REGINA V. THE GREAT WESTERN RAILWAY COMPANY

(1862), 21 U.C.Q.B. 555

Upper Canada Queen's Bench, Robinson C.J. and Burns J., 1862

***Highways--Indictment for obstructing--22 Vic.,* ch. 116, *sec.* 15; *Consol. Stats. U. C., ch.* 54, *secs.* 313, 333; 16 *Vic., ch.* 99, *sec.* 4; 16 *Vic., ch.*101; *4 W. IV., ch. 29, sec.* 9; 12 *Vic., ch.* 35, *sec.* 41.**

In September, 1852, a tract of land upon the river St. Clair, adjoining the town plot of Sarnia to the south, was ceded by the Indians to the Crown, to be disposed of for their benefit. In the same year this tract was surveyed under instructions from the government, and three streets laid out upon the plan, one called Front street, running north and south, parallel with the river, and the others Wellington and Nelson streets, running westerly through the tract, crossing Front street at right angles, and continuing to the river bank, which was distant only 1 chain 50 links from Front street along Nelson, and 50 links along Wellington street. This plan was reported to the government, with the surveyor's field notes, but Nelson and Wellington streets were not laid out upon the ground west of Front street, and that portion of them had never been opened or used so as to give access to the water---the river bank there being abrupt. A sale was held in 1853, at which some lots were sold with reference to this plan, one on Nelson street, but none west of Front street.

In 1854 the Great Western Railway company purchased from the government the tract west of Front street along the river between Wellington and Nelson streets, and beyond them to the north and south, including the water lots in front, for which they paid the sum awarded by arbitration. Afterwards a public sale of lots in the tract ceded by the Indians was held by government, at which a plan was referred to, made for the company by the same surveyor who first laid out the tract, shewing the ground which the railway and its terminus would occupy, but exhibiting no streets leading through it to the river; and this was the plan used before the arbitrators, and upon which their award was made.

The company, without objection on the part of the municipality, entered upon the land bought by them, made new ground in front by filling up the river, and completed their buildings and other works, which obstructed Wellington and Nelson streets running through the land purchased to the river, according to the first plan mentioned. After this the municipality by letters applied to them for compensation for the injury caused to the town in consequence of the access to the water by these streets being cut off, claiming that they should be paid a fair value for the streets thus taken, and remunerated for a purchase of land which it was proved they had made higher up at a cost of $3200, in order to obtain access to the river. They made no complaint, however, that the defendants had acted illegally.

Defendants being afterwards indicted for obstructing these streets, it was left to the jury to say, with reference to the 15th clause of 22 Vict., ch. 116, whether the municipality or the government had permitted defendants to occupy the streets before that act, and if so, to find for defendants. The jury gave a general verdict of guilty, and being asked how they found as to the permission, said only that they thought the municipality ought to be compensated for the land.

By 22 Vict., ch. 116, sec. 15, it is enacted, in substance, that all highways occupied by this railway with the written assent of the municipality within which they are situated, shall be declared vested in them to the extent of the user permitted or enforced by the municipality; and all proposed or contemplated streets occupied by the company, or which they have been permitted to occupy by the license of the owner in fee, and which shall not lead to any place beyond the said railway, shall be deemed closed, and the occupation by the said railway shall be lawful. *Held,* that defendants were clearly entitled to an acquittal under this clause, for 1st, as to the first part of the clause, a written assent given afterwards by the municipality would suffice, and might be inferred from their letters, in which they asked only for pecuniary compensation; and 2ndly, these were proposed or contemplated streets occupied by the company, and not leading to any place beyond the railway, in which case no assent was required.

***Held*, also, that the Consol. Stat. U. C., ch. 54, sec. 333, had no application, for it could not be said that these streets had not been opened by reason of any other road being used in lieu thereof.**

That under 16 Vic., ch. 99, sec. 4, and 16 Vic., ch. 101, defendants had clearly a right to take possession of this land for their railway, with any easement thereto.

***Quære*, whether the 4 W. IV., ch. 29, sec. 9, which requires this railway company on intersecting any highway to restore it to its former state, or in a sufficient manner not to impair its usefulness, could have been applied to this case; the streets in question never having been opened or used, being covered by the works of defendants, so that they could not be restored without dispossessing them, and leading to no place beyond. *Semble*, that at all events a mandamus would not, under the circumstances, have been granted at the instance of the municipality.**

Under Consol. Stat. U. C., ch. 54, sec. 313, these streets, being laid out on the original plan made by the Crown surveyor, would be public highways, though not staked out upon the ground, and never opened or used.

***Semble*, that under 12 Vic., ch. 35, sec, 41, the Indians, or the government acting for them, had power to alter and amend the survey by striking out these streets where they ran through the land sold to defendants.**

THIS was a prosecution for nuisance, in obstructing two common and public highways. The indictment was preferred at the assizes for the County of Lambton, and was removed into the Court of Queen's Bench by *certiorari*, at the instance of the defendants, and was tried before *Robinson*, C.J., at Sarnia, in October last.

The indictment charged that on the 1st of January, 1857, and thereafter continually until the committing of the grievance complained of, there were certain common and public highways, to-wit, Wellington street, and Nelson street, in the town of Sarnia, in the county of Lambton, terminating on the river St. Clair, in front of the said town of Sarnia, which were used by her Majesty's subjects residing in the said town, and by others, to pass and re-pass over, for the purpose of procuring from the waters of the said river a supply of water for their use and that of their families, and to water their cattle, horses and stock; and that the waters of the said river were at the terminations of the said streets open and accessible for the purposes aforesaid, for all the said subjects, and others, and the same had for many years then past been constantly used by the said subjects and others for such purposes. And that the defendants, on, &c., unlawfully and injuriously cut down and carried away the earth and soil of the said streets, and made divers erections and buildings thereon, and at the termination thereof, and constructed portions of their depot, grounds, platforms, and wharves thereon, and in front thereof, and piled large portions of earth and soil upon Nelson street, and thereby then obstructed the said streets, and prevented their continual use by the said subjects as aforesaid, and also obstructed the said access by the said subjects to the said waters of the river, and prevented their obtaining and using the said waters, as they had been accustomed to do as aforesaid, to the common nuisance of her Majesty's subjects and others using the said streets and waters.

The defendants pleaded not guilty, referring in the margin of their plea to the statutes 4 Wm. IV., ch. 29, sec. 26; 16 Vict., ch. 99, sec. 10; 18 Vict., ch. 176, sec. 26, and 22 Vict., ch. 116, sec. 5.

The first witness for the Crown was *Henry Glass,* Esquire, the registrar of the county of Lambton. He produced a copy of a plan, certified by the Commissioner of Crown lands on the 29th of September 1854, of an addition to the plot of Sarnia, consisting of certain land ceded by the Indians to her Majesty in September 1852, and adjoining the former town plot of Sarnia on the south. The river St. Clair formed the front of that tract (the addition) running in direction nearly north and south. A little way back (that is, easterly) from the river a street was exhibited on this plan called Front street, parallel nearly with the river.

On the south side of this lately ceded tract, as laid down on this plan, and near but not exactly at the southern limit, there was exhibited a street or allowance for a street called Nelson Street, which touched the southerly limit of the tract some chains back from the river, and ran westerly towards the river, diverging in its course from the southerly limit of the ceded tract a little to the north, so as to leave a small gore between that limit and Nelson street. On this plan Nelson street was represented as crossing Front street at right angles, and continuing from the west side of Front street to the river.

Then on the northern side of the ceded tract, as laid down on this plan, and near the northern limit, but separated from it by a small gore, there was laid down a street called Wellington street, running from the east through several blocks of village lots as laid out on this plan to Front street near the river, crossing Front street at right angles, and continuing westerly from Front street to the river. Front street on this plan was laid out of the width of 70 feet, and Nelson street and Wellington street of the width of one chain.

The whole width of this tract ceded by the Indians to the Crown in 1852 was about 900 feet, and the space along the bank of the river between the two streets was about 750 feet. The distance from the west side of Front street to the river, along Nelson street, as laid down in the plan, was one chain, and fifty links, and the distance from Front Street to the river along Wellington street was only fifty-seven links.

This plan, the registrar stated, was received by him from the Commissioner of Crown lands in the autumn of 1854, but was not filed by him as it would have been if it had been a plan deposited by a private proprietor according to the statute.

A copy of this plan, recently certified by the assistant Commissioner of Crown lands, was also produced on the trial.

Mr. Glass further stated that before the Indians made the surrender spoken of to the Crown this tract formed no part of the town, but it was afterwards laid out into town lots, as this plan shewed: that since the session and survey all the land between Nelson and Wellington street and lying between Front street and the river, having been purchased and occupied by the defendants, the Great Western Railway Company, they had made a considerable quantity of land by filling up from the bank of the river as it was formerly, out towards the deep channel, so that at this time there was a wide space of firm land in a continued tract along the whole space between the two streets, and in front of the two streets themselves. This was land made by the company at their own expense, and entirely occupied by them for purposes connected with their railway, and interposing between the termination of the streets respectively, as laid down in the plan spoken of, and the waters of the river as seen at present.

The natural bank of the river at the terminus of Wellington street was about twenty feet above the water, being an abrupt bank, at the time of the survey. At the end of Nelson street the bank of the river was not so high, and not so inaccessible. But they had neither of them, as Mr. Glass (the

registrar) stated, been used as streets, nor so shapened as to give access by them from Front street to the water of the river, before the defendants took possession of the ground.

There had, however, been a ditch made from that part of Wellington street which was east from Front street to the river, for the purpose of draining Front street and the streets back of it. This was done after the cession of the tract by the Indians. Front street was at that time a travelled highway.

Mr. Alexander Vidal, the provincial land surveyor who laid out the ceded tract by order of the government, was next examined. He stated that the town of Sarnia was incorporated in 1856, and that it then included these two streets: that under instructions by letter from the superintendent of the Indian Department, dated 15th September, 1852, which he produced, he made the survey and plan referred to by the first witness; and he produced his field notes, shewing that he had laid out the two streets in question as extending from Front Street westerly to the river, and reported such survey with his plan to the government, Mr. Young being at that time reeve of Sarnia: that there was no street laid out between Wellington and Nelson streets leading from Front Street to the river, but that twelve or fourteen chains up the river, that is north of Wellington street, there was now a street leading down to the river. South of Nelson street the land yet belonging to the Indians came up to the southern limit of the ceded tract. Both these streets in question, Mr. Vidal stated, were now closed west of Front street, the whole tract in front, including the two short streets, being fenced off and occupied by a freight house and the railway track, and by a dock which extended along the whole front on the river between the two streets, and beyond them north and south.

Mr. Vidal on cross-examination stated that he had made out a map for the defendants of the defendants' land along the river and up to Front street, in which no such streets as Wellington and Nelson streets were laid down from Front street to the river. He did this, he said, at the desire of the company; that is, he made the plan at their request. He was asked to produce the letter of their secretary, Mr. Hatt, but it was not produced. He supposed, he said, that when he made out that plan the streets never entered into his mind, adding that he had recommended to the government not to sell any lots between Front Street and the river, and that his intention in continuing these two streets to the river in his survey was to give access to the water.

Dr. Thomas W. Johnson, the Mayor of Sarnia, swore that the public were cut off from access to the river by the defendants' fences, freight-houses, and other works. In 1853 or 4, he said, and as he thought after the tract was laid out, it was talked of generally that the defendants would require to have their western station and terminus upon the ceded tract in question: that on the first day of the public sale no lots were sold between Front street and the river: that the company had cut away the bank, and built out wharves in front, which obstructed the two streets and filled up the space between and in front of them: that the corporation of Sarnia had since bought from a private proprietor for $3,200, a piece of land about six hundred feet north of Wellington street: that is, above the lately ceded tract, over which they had made a street leading from Front street to the river, and they had called it North Wellington street: that the land south of Nelson street was private property.

On cross-examination, he said that the Great Western Railway was finished and opened to Sarnia about four years ago, and that he did not know that any objection was made to the works going on while they were in progress.

A letter was shewn to him, and admitted, which was written on the 31st of July 1858, by the town clerk to the company, calling to their attention that a portion of Front street and of Wellington and Nelson streets " had been obstructed by the engineer and contractors," and stating that the damage to the inhabitants from their being cut off from access to the river, on which they depended for water for their daily use, was serious. This was not, however, complained of in the letter as an illegal act on the part of the company, and the letter concluded thus, "I am now therefore directed, on the part of the corporation, to demand an adequate compensation for the damage thus suffered by the town, and I am to request that you will be pleased to inform the town council what amount the company will be willing to pay for this damage."

William McIlwhain was next called, and he stated that at the first government sale of town lots laid out on the new tract, held in 1853, he bought a lot on Nelson street east of Front street, supposing that he would have access by Nelson street to the river: that he built on his lot: that he and others had used Nelson street, passing along it to the water's edge: that he did not know of any statute labour having been done on it (west of Front street:) that part of the Company's engine-house for their elevators now covered Nelson street, and there were fences across it, and a dock built out in front of it, covering part of the river, so that there was no access to the water for the public at that part of the river.

This was the testimony on the part of the Crown.

*Becher, Q.*C., counsel for the defendants, referred to sec. 333 of the present Municipal Council Act, as bearing on this case. He contended, also, that a by-law of the municipality was necessary, if it was intended to open these streets for public use: that the only proper proceeding open to the corporation of Sarnia to adopt, if they had any ground of complaint, was by applying for a

mandamus to the company "to restore the alleged streets to their former state of usefulness" as provided by statute; if this should appear to be a case in which that provision should, in the nature of things, be carried out. And he referred to 22 Vict., ch. 116, sec, 15, which was passed on the 16th of August 1858, and to 16 Vict., ch. 101, secs. 8, 9, and 21; and then he proceeded to call the following witnesses:----

Peter T Poussett, who stated that he was clerk of the town council of Sarnia in 1858, and wrote the letter dated 31st of July of that year, and also one dated 16th November 1858, to the defendants' solicitor, both by direction of the council. Both were written after the railway had been opened and in use, which it was in January 1858. The latter merely pressed for an answer to their former letters. He proved also other letters from the mayor of Sarnia to the company, of the 15th of March 1859, and 14th of July, 1859, the former enclosing a resolution from the town council, and the latter another resolution pressing for a definite answer from the company (these defendants).

It appeared from these documents that the council were pressing upon the company the reason ableness of their making compensation to the town for closing up the two streets, as the town council had in consequence to make the purchase of land higher up the river, at a cost of $3200, in order to give the inhabitants access to the water. They intimated that they were not disposed to insist upon the company removing the obstruction from the streets, but that they trusted "they will not hesitate to allow fair value for the continuation of the streets referred to, which have been used by them," (that is, the continuation of them from Front street to the river).

John O. Hatt, Esquire, stated that he was solicitor for the railway company (defendants) in 1851-2 and 3: that under instructions from them he applied to the Indian Department for a right of way over the Indian lands, and for lands for their station and depot, &c., at their intended terminus on the river; that he saw Colonel Clench, the Indian agent, and made an agreement with him for the price of all the land that they would require between Front street and the river. This he thought was sometime in 1854. He learned from Colonel Clench the upset price that had been fixed by the government for the land, and told him that the company were willing to pay that, but that it would be proper to have a reference to arbitration and an award fixing the amount.

A reference was accordingly made to three arbitrators under the statute, and it was stated to the arbitrators that the company and the Indian Department had agreed upon the sum of £1500 to be paid for the 900 feet along the river, being the front of the ceded tract (which government were to dispose of for the benefit of the Indians.) The arbitrators being Mr. Burritt, the judge of the county court, Mr. Vidal, the witness in this case, and Mr George Durand, accordingly made a formal award under their hands and seals on the 10tb,of May, 1854, as upon a submission between the railway company and the Indian Department, for the purpose of settling the compensation to be paid to the Indian Department by the company for the location or right of way of the Sarnia branch of the Great Western Railway Company through the Indian reserve in the township of Sarnia, including station-ground and water lots, as laid down in a certain plan thereof made by the company marked A.; and they awarded for the right of way and station-grounds, comprising twenty-four and one-half acres, £900; and for the water lots aforesaid, comprising a frontage on the river St. Clair of 900 feet, more or less, the further sum of £1500.

On the same day (10th of May, 1854,) the principal chiefs of the Chippewa Indians, occupying and claiming to be sole proprietors of the upper reserve on the river St. Clair, executed a deed of surrender, to her Majesty of all the claim and right in and to the several pieces of land described on the map annexed, containing 24½ acres, "including the ten water lots fronting the river St. Clair," the same being a portion of the said Chippewa reserve, and required for railway purposes, "to the end and purpose that her Majesty may be graciously pleased to order and direct that the said land and water lots be sold to the Great Western Railway of Canada, their heirs and assigns for ever."

Mr. Hatt proved that he had furnished Colonel Clench with a plan of the land which the company would require, which plan the arbitrators had before them. It did not lay down any streets leading from Front street to the river. He was at the public sale of town lots made afterwards. That plan was exhibited and put up in the room in which the sale took place, that all might see what ground the railway terminus would occupy; and the witness swore that there was no doubt the lots sold higher from its being thus shewn to all present where the railway and works were to be---that is, on the same ground which they now occupy. He heard nothing said about any streets through the front tract till long after, when he was told that the town council were making some difficulty about these alleged streets. At that time all the price of the land had been paid to the Indian Department.

It was stated at the public sale that the land sold by Colonel Clench on behalf of the Indians was 900 feet along the river, as shewn upon the map hung up in the room, (and of which a copy was produced at the trial,) on which no streets were shewn leading through that tract to the river. This plan was made by Mr. Vidal. It was in 1856 or 7 that the witness first heard any thing said of the two streets. He produced receipts for the £2400 paid to the Indian Department according to the

award, and he swore that what he agreed to buy from the Indian department was all the land west of Front street, which included the two streets in question.

Judge Burritt, one of the arbitrators, was also called, and proved that he was judge of the county court and living at Sarnia in 1854, when this land was sold to the railway company: that he was at the sale of town lots spoken of by the other witness, when Colonel Clench and Mr. Hatt were also present. He heard nothing said then about streets. He heard afterwards some regret expressed that the town had not secured a passage to the river; and that the town council were endeavouring to acquire some land from one Wood, in order by that means to continue Cromwell street down to the river some distance north of Wellington street. At the arbitration Colonel Clench and Mr. Hatt stated to the arbitrators that they had agreed upon a certain sum to be paid for the land taken, and the award was then made adopting the sum agreed upon. The witness understood that all the land west of Front Street, (that is, between it and the river,) was sold.

Mr. T.S. Bell, an assistant engineer of the defendants, proved that he measured the whole front possessed by the company along the river, and found it to be 914 feet: that it was all absolutely necessary for the purposes of the company at their station on the river, and was in fact too little. The company had made much land west of what used to be the margin of the river. Wellington street, he stated, was obstructed by fences of the company, and partly by their freight house. He put in a plan of the ground, shewing the works, etc.

Mr. Vidal, being recalled for the Crown, stated that the distance along the river mentioned in the award was taken by him from the plan: that when he made his survey he did not plant any stakes at the water's edge: that be knew that the government claimed the right to sell water lots extending into the river to the deep channel, but that such land covered with water had never been owned by the Indians.

The evidence of R. T. Pennefather, Esq., Superintendent General of Indian affairs, being taken in Lower Canada under a commission, was read at the trial.

He swore that the management of Indian affairs was under the control of the Governor-General: that he had held his office since February, 1856: that the tract of which what were called Nelson street and Wellington street formed parts had never till lately been surrendered by the Indians to the Crown, and was in the occupation of the Indians of Sarnia: that it was surrendered in July 1852, to her Majesty and her successors, by an instrument of which he produced a copy: that it was ceded on condition that it should be laid out in town lots, and sold to the best advantage for the benefit of the Indians, that the department acted in the case of the sale to the railway company as it would for the Indians in any other case of sale of lands surrendered by them: that the company on the 22nd of November, 1852, first applied for a right of way by a letter produced. That there were public sales of parts of the tract surrendered in 1852 on the 2nd of May, 1853, and on the 8th of May, 1854: that the original award spoken of by the other witnesses had never been in his possession, and he knew nothing of the map referred to in it as annexed: that it appeared from documents in his office that the Indian department laid out a portion of the Indian reserve in 1852 into town lots for sale and settlement; that Colonel Clench was instructed to cause a survey to be made, and that Mr. Vidal was proposed as the surveyor.

In the letter of the 22nd of November, 1852, produced by this witness, the Great Western Railway Company wrote to Colonel Bruce, the witness' predecessor in office, that they had completed the survey of the lands on the St. Clair river that would be required for their track, depot, and station: that they were anxious to procure the right of way through and in front of the Indian Reserve, and requested to know on what terms the Indian Department would grant it, and also the frontage on the river.

The copy of the deed of cession from the Indian chiefs, dated the 28th of July 1852, shewed that what was then surrendered to the Crown was about eighty acres, described as follows: bounded on the west by the river St. Clair, on the north by the present (that is, the first or old) town plot of Sarnia, on the east by a line produced by a continuation of the rear or easterly boundary of the (old) town plot of Sarnia, and on the south by the possessions of an Indian chief named in the deed; and it was expressed that the land was surrendered for the purpose of being laid out into town lots and sold to the best advantage for the benefit of the said Chippewa Indians and their posterity.

There was produced upon the trial a plan of the location of the Sarnia branch of the Great Western Railway through the Indian Reserve and town of Sarnia, certified on the 12th of October, 1860, under the statute, chapter 80, Consol. Stats. C., under the seal of the company, to be a true copy of the original map. This exhibited Nelson street and Wellington street as carried no further west than the east side of Front street, and the whole 900 feet frontage upon the river, forming the whole front of the tract surrendered by the Indians in July, 1852, as taken by the company for their railway.

At the conclusion of the case, the learned Chief Justice desired the jury to consider whether they were satisfied by the evidence that either the corporation of the town of Sarnia or the government, or the Indian Department, licensed,---or, in other words, permitted---the defendants to construct their road and put up their buildings and works where they then were, and to occupy the

ground in front on Front street on the river, including the two small pieces claimed as streets; and whether this license or permission had been given before the passing of the statute 22 Vic., ch. 116. He left that to the jury to find in reference to the 15th clause of that statute, telling them that if they found such permission he thought their verdict should be given for the defendant.

But if they did not find that there was any such permission, and that what had been called Nelson street and Wellington street had been obstructed, of which there could be no doubt, then he recommended them to find the defendants guilty, which should be subject to the opinion of the court on the points, whether these ever were in law public highways, or either of them a public highway; and if they were, then whether the defendants had and have a right to occupy the ground on which they were by virtue of authority given by the legislature, and by reason of the facts proved.

He observed upon the fact that Mr. Vidal, the surveyor, had stated that he never posted the lines of these streets beyond Front street; that he had returned a map to the government with such streets marked upon it, while in his plan made for the defendants he had laid down no streets through the tract west of Front street, which he explained only by saying that he supposed they never entered into his mind when he was making out that plan.

He remarked also, that if the town council really meant to object to the company occupying the small pieces of the land in question, which he could hardly suppose possible, if they acquiesced in the station and track being there at all, that they should not have suffered the company without objection or remonstrance to take and retain exclusive possession of the lands as they had done, and to construct the railway and erect their buildings and dock upon and in front of them; and then after that to institute this criminal prosecution, with a view to compel the Company to give up the land and submit to have their works abated as a nuisance, after the railway, which had probably cost some hundreds of thousands of pounds, had been completed and had been for a long time in daily use.

The jury brought in a general verdict of "guilty," which was understood to be subject, as mentioned, to the opinion of the court.

The learned Chief Justice asked them whether he was to understand from the verdict that neither the corporation of Sarnia, nor the government, nor the Indian Department, had in their opinion consented that the defendants should occupy these streets spoken of. The foreman answered that they all thought that the corporation should be compensated for the land; that is, for the small pieces exhibited on the plan as streets between Front street and the bank; and the learned Chief Justice did not press for any further explanation.

Becher, Q.C., for the defendants, obtained a rule last term on the Attorney-General to shew cause why the verdict should not be set aside and a verdict of not guilty entered, on the grounds, that until a bye-law had been passed to open the alleged highways the defendants were entitled to occupy the ground: that upon the evidence the only course open was, not to prosecute by indictment for nuisance, but to apply for a mandamus to restore the alleged streets to their former state, or so as not to impair their usefulness: that what were called streets were not shewn in the evidence to be actual legal highways: that if they were such, they were and are no longer of use as highways; and that the defendants were by statute entitled to take the grounds for their railway; or why a new trial should not be granted on the law and evidence.

Robert A. Harrison shewed cause, and cited Aspindall v. Brown, 3 T.R. 265; Rouse v. Bardin, 1 H. Bl. 351; Rex v. Hamond, Str. 44; Rex. v. Allan et al. 1 O.S. 90.

Becher, Q.C. and *Irving,* contra, cited Brewster v. The Canada Company, 4 Grant Chy. Rep. 443; Regina v. Brewster, 8 C.P. 208.

Consol. Stats. U.C., ch. 54, secs. 313, 333, 424, sub-sec. 6; 4 W. IV., ch. 29; 16 Vict., ch. 99, sec. 4; 16 Vict., ch. 101, secs. 8, 9, 12, 14; 22 Vict., ch. 116, sec. 15, were referred to on the argument.

ROBINSON, C.J., delivered the judgment of the court.

The defendants in this case, among other grounds of defence, relied upon the 333rd section of the Municipal Council Act, Consol. Stats. U.C., ch. 54, which provides that, "In case a person be in possession of any part of a government allowance for road laid out adjoining his lot, and enclosed by a lawful fence, and which has not been opened for public use by reason of another road being used in lieu thereof, or in case a person be in possession of any government allowance for road parallel or near to which a road has been established by law in lieu thereof, such person shall be deemed legally possessed thereof as against any private person, until a bylaw has been passed for opening such allowance for road by the council having jurisdiction over the same," and sec. 334, that, "No such by-law shall be passed until notice in writing has been given to the person in possession eight days before the meeting of the council, that an application will be made for opening such allowance."

This clause, however, it is clear, does not apply to the case before us, for it cannot be said that these two small pieces of land marked on a plan as streets leading from Front street to the river

had not been opened "*by reason of another road being used in lieu thereof."* They were not opened, so far as we can see, only because the company had occupied them with their railway track and other works, claiming a right to do so under certain statutes, and also under their purchase from the government or from the Indian department; and because the municipality had, as the company contends, suffered them to occupy these pieces of land for their railway and station without opposition or remonstrance, making no complaint that by occupying the land the company were unlawfully creating a public nuisance, until they had at an immense expense erected works upon and in front of these alleged streets, which works they could not now abandon without ruinous expense and inconvenience.

The defendants also relied upon the several statutes of this province which gave authority to them to occupy the ground which they have occupied for their railway and station, on such conditions as to compensation, where compensation can be claimed, as the legislature have thought proper to impose. Among these provisions is the 5th section of 22 Vict, ch. 116, which enacts that the words "railway," "roadway," and "railroad," used in any statute, shall, as far as regards the Great Western Railway Company, include and be construed to cover all viaducts, bridges, stations, freight and station houses, depots, and other works, machinery, and the land covered by the same, &c., which may be necessary or convenient to the making or using of any railway, from whence it may be argued, though that clause was passed probably with another object in view, that the powers given by these acts to occupy land for the railway allow of the occupation equally for any purpose immediately connected with the construction or use of the railway.

We have no doubt that such is the law, either under that clause or without the aid of it, under the general powers given by the act.

The 4th section of 16 Vict., ch. 99, was also relied upon by Mr. Becher on the part of the defendants, as being material to be considered, and that enactment does appear to me to be most material, for it authorises this company "to take, hold, use and occupy all such land or ground, with the privileges which appertain thereto, and which may be found necessary for the same, *in, along, upon, and across any navigable stream, lake, river, or waters whatsoever,* and for the uses of such railway *to use, occupy and take possession of the shores or banks thereof, and any easement thereto, being of a public or private nature or character:* provided always, that the free and uninterrupted navigation of the said streams, lakes, rivers, or other waters so used, for all boats, ships, and vessels passing and repassing the same, shall not be interfered with by the said railway, and also that the owner or owners, occupier or occupiers of any lands, grounds, or *private* privileges so taken, shall be compensated therefor as is provided by this act and the several acts incorporating said company and amendments thereto."

This statute was passed in 1853, in the same year that by another statute, 16 Vict., ch. 101, these defendants, the Great Western Railway Company, were authorised to construct a railway from the foot of Lake Huron at *or near Port Sarnia* to intersect the Great Western Railway at or near the town of London, by which act all the powers were given to them to occupy any lands of the Crown, or of any corporation or individual, which were given to them by the statutes that had already been passed respecting the Great Western Railway Company.

It seems to us to be quite clear, therefore, that the defendants had a right, under this 4th section of 16 Vict., ch. 99, to occupy as they have done the 900 feet along the river St. Clair, *with the privileges which appertain thereto,* and to take possession *for the use of the railway* of the shore or banks thereof, and any easement thereto being of a *public* or private nature or character.

If there had been no enlargement of this authority given to them by any statute of a later date, it still could not, we think, be denied that they had power under the above act if not under the earlier statutes, to occupy the bank of the St. Clair with their railway and works to whatever extent might be required for providing all the accommodations and conveniences necessary for conducting their proper business at this termination of the road, on the bank of the river St. Clair.

It must be assumed, we think, that if on the shore or bank of the river there were at the time of their taking possession the two short allowances for road in question legally established, which if they should be afterwards actually made into streets would lead from Front street through the defendants' station and over the railway to the water's edge, it would be quite incompatible with the public safety and convenience that such allowances should be actually opened and used as highways, at the same time that the defendants were on the same spot carrying on the business of the railway.

Either the use of the lands for one purpose must be abandoned, or its use for the other, and there can be no question which ought to give way; for these short pieces of streets, proposed but never formed, one of them 57 links in length only, the other a chain and a half, led to no place beyond the bank of the river as it flowed in its natural state, and could not, in order to reach the water, be carried through the artificial works which the defendants were authorised to construct along and over the waters of the river. They could not, therefore, be made of right to serve the purpose of giving to the people of Sarnia access to the river for obtaining water for household purposes, or for watering their cattle. It is, however, the loss of this convenience which is

principally complained of in the indictment. As to any other use that could be made of them as highways, it is evident, when all the circumstances are looked at, that they could serve no purpose but to lead people into the way of danger.

If these intended streets had been part of highways that had been travelled and were in use at the time the defendants took possession, and if there had been no legislative provision to meet the peculiar case of their leading through and over the works of the company, but to no place beyond them, then the 9th section of the act of incorporation, 4 W. IV., ch. 29, which was referred to in the argument, would have required to be considered. It is that clause which provides that when it shall be necessary to intersect or cross any road or highway "the company shall restore the road or highway thus intersected to its former state, *or in a sufficient manner not to impair its usefulness*."

Whether that clause could in reason have been applied to these pieces of land, which had never been actually opened and in use as highways, would then have been the question; and another question would have been, whether that provision could be held to apply not only to an actual highway intersected by the railway, but to land that had been merely marked out as an intended road over a piece of ground wholly covered by the station and works of the company, and through which the public could have no right to go to any place beyond; and which could not in the nature of things be restored to its former state, otherwise than by dispossessing the defendants of that which the law allowed them to occupy.

To any one looking at the plans on which the situation of the streets in question is represented with reference to the works by which they are surrounded, it need hardly be said that if an application were made to a court to compel the defendants by writ of mandamus to restore, these allowances for streets to their former state, or in a sufficient manner not to *impair their usefulness* as highways, the court could not fail to look upon the application as most unreasonable, and one which they could with no propriety grant, especially at the instance of any party who had without remonstrance or objection seen the defendants constructing the railway, and erecting their buildings, and forming their quays along the river as they have done, and who had only complained of the occupation as illegal after the railway had been completed and in use. The judgment of the Court of Chancery in this province, in the case cited on the argument of Brewster v. The Canada Company, (4 Grant. Chy. Rep. 452), and the language of English judges in the cases there referred to, would have applied strongly against such an application.

But it is not left to us to deal with this case upon the clause to which we have last referred, or with a view only to the statutes which we have cited, for there is besides them the statute 22 Vict., ch. 116, sec. 15, on which the defendants mainly rely, and by which, after all, it seems to us the case must be governed. That act was passed in August, 1857, and the 15th clause is as follows:

"And whereas the Great Western Railway Co. have, in the construction of their railway, encroached upon certain proposed streets for allowances for streets, or highways or roads, and not only such as known as original allowances, but which encroachments have been licensed by the respective parties in whom the title to the said streets was vested, and by the municipality within whose boundaries the said original allowances are situated. Therefore, all highways, roads, or streets which have been occupied by the Great Western Railway Company with the written consent of the municipality within which the same are situated shall be hereby declared vested in them to the extent of the user permitted or enforced by the said municipality; *and all proposed and contemplated streets occupied by the said company*, or which they have been permitted to occupy by the license of owner in fee, *and which shall not lead to any place beyond the said railway, shall be deemed closed,* and the occupation by the said railway shall be and is hereby declared to be lawful: saving, nevertheless, the civil rights and remedies of all parties who may have sustained or shall sustain any damage or injury by reason of obstruction or injury to any such highway; and nothing herein contained shall be construed to bar or prejudice any party or parties, in or from any remedy at law or in equity in the nature of a civil action or proceeding against said company or other parties for obstructing or injuring any such highway, but such civil action and proceedings may be had, taken, and prosecuted in the same manner and to the same extent as if this act had not been passed, but not hereby giving any right which does not now exist."

With a view to this clause, to which my attention was called upon the trial, I requested the jury to find upon the evidence whether the pieces of land called in the indictment Nelson street and Wellington street had or had not been occupied by the, defendants with the written assent of the municipality, or by the license, written or otherwise, of the provincial government or of the Indian Department, representing the interests of the Indians. But the jury bringing in no other verdict than the general verdict of guilty, I asked them whether they had or had not made up their minds upon the questions of fact regarding the permission to occupy, to which the answer was the company ought to compensate the municipality for the land.

That was a point on which opinions might differ. It may be thought by the municipality that the company ought to pay the whole or some part of the price which the municipality has paid to Mr. Wood for the ground for the new street spoken of, which now affords the inhabitants access to the

river, while the defendants may think that the municipality had no just claim upon them for any contribution of the kind, as they have paid for all the land taken the price which was awarded.

But in truth that question of right to compensation is something altogether distinct from the question whether the defendants should be found guilty of nuisance in obstructing a highway; for if the defendants gave and the municipality of Sarnia had accepted the fullest compensation for the ground in question, that would not have settled the legal question, whether her Majesty's subjects, and not only the inhabitants of Sarnia, could or could not rightly complain of the occupation by the defendants of the land in question as constituting a public nuisance.

The first question is, were these streets, as they are called, ever in law public highways.

And the second is, have they been and are they *unlawfully* obstructed by the defendants.

On the first point, we see that in July, 1852, the Indians ceded to the Crown the tract which includes these streets, to be disposed of by the government to the best advantage for the benefit of the Indians. Very soon after, at the suggestion of the Indian Superintendent, Colonel Clench, Mr. Vidal was employed by the government to lay out the tract so ceded, or at least that part of it east of Front street, into blocks and lots, with a view to sale for the benefit of the Indians, for whom the government held the tract, as it were, in trust, and Mr. Vidal in making the survey marked upon the plan, which he sent to the government with his report, two short streets intended to lead from Front street to the water; but he did not actually lay them out upon the ground; that is, he planted no stakes west of Front street to mark such streets.

About the time he was making the survey, if not before, the Great Western Railway Company were making their arrangements for laying out their tract and fixing upon the station at the river, and they were communicating with Colonel Clench and the government upon the subject of the ground which they wished to acquire. Before their negociation was closed a sale was publicly made of some village lots in the new plot that Mr. Vidal had surveyed, and some were sold, in view, as we infer, and with reference to the plan made by Mr. Vidal. Soon after that the bargain between the railway company and the government was concluded, so far that it was settled that the company would purchase a tract of 900 feet along the river and between it and Front street, which embraced these two short streets. Mr. Vidal, at the request of the company, made out a plan of the tract, and the plan which he so made out exhibited no such streets. Mr. Vidal did not assert that he omitted them in consequence of any instructions to do so. Then another sale took place of town lots, which brought high prices in consequence of its being known that the railway station and depots would occupy the position which they now do, and Mr. Vidal's plan last mentioned was publicly exhibited for the information of the public, shewing the whole 900 feet between the river and Front street as one tract, not broken by any streets leading down to the river.

Soon after that the company paid for the land the price awarded by three arbitrators, being the sum which had been agreed upon between them and the agent for the Indians, and they took possession as soon as they had occasion to do so, and constructed their railway upon it, and erected large buildings and works, and made a dock along the river occupying the front, and extending some distance into the river upon land which they have made at a great expense by filling up the water.

What are called Wellington street and Nelson street had not been opened--- that is, not shaped or graded---and no statute labour had been done or money expended on them. They had not been used as highways, for they led to no accessible place beyond, the bank of the river being high and steep, though less so at the end of one street than of the other.

It is plain from these facts that the claim to have these two pieces of land between Front street and the bank of the river regarded as public highways, as things stood in 1852 and 1853, or at any time afterwards, stands on the most slender grounds possible. It has only the single fact to rest upon, that the surveyor, Mr. Vidal, marked them out as streets upon the plan returned to the government, and that those who bought town lots at the first sale (in 1853) bought with the knowledge that he had done so.

But under the 313th clause of the present Municipal Council Act (Consol. Stats. U.C., ch. 54), the fact of a government surveyor laying out certain allowances for roads or streets in the plan of the original survey of Crown lands would be sufficient, we think, to give to such roads or streets the legal character of highways, though there may have been no stakes planted on the ground to mark them out, and they would be deemed in law highways before they were actually opened and used, and before statute labour or public money had been expended upon them.

If there be any room for doubt whether these small streets marked on the surveyor's plan in 1853 were to be regarded as being still common and public highways at the time these defendants took possession of land along the river for their railway, it could only be, we think, in consequence of the statute 12 Vic., ch. 35, sec. 41, and under the railway acts which we have referred to.

The statute 12 Vic., ch. 35, sec. 41, makes this provision respecting allowances for streets laid down by private proprietors, namely, that they "shall have lawful right to amend or alter the first survey and plan made by them of any such town or village, or any original particular division

thereof, provided no lots of land have been sold fronting on or adjoining any street or streets, common or commons, where such alteration is required to be made."

The Indians, though they had ceded this land to the goverment, did so upon the trust or condition expressed in their deed, that it was to be disposed of for their benefit; and the Indian agent, we see, was allowed to negotiate and settle with the company for the sale and the price to be paid; and it must have been quite well understood by all parties that the tract which the company acquired along the river was required for purposes altogether incompatible with the opening and use of the two streets by the public, and inconsistent with the only object which could have led to their being originally laid out, for when the docks and other works of the company should come to occupy the ground in front of the streets they could no longer afford access to the water.

And as there had been no lots sold fronting on or adjoining these streets, it would have been within the spirit of this provision in 12 Vic., ch. 35, that the Indians, as the beneficial owners, or the government acting for them, should have had the right to alter and amend the survey so as to prevent these allowances for streets interfering with the location of the railway terminus upon the river at that point.

In point of fact, it does not appear from any thing proved at the trial that the obliteration of those streets, only existing upon paper, which it was clear must follow the occupation of the bank of the river by the railway company, met with any opposition at the time, nor during the construction of the railway, nor until after it had been for some time in operation, and then in no other sense and with no other object than to ground upon the fact of their occupation a claim to some pecuniary compensation.

But supposing it to be as free from doubt as in this criminal prosecution for a nuisance it ought to be, that up to the time when the defendants took possession of the ground, Nelson street and Wellington street were in law common and public highways, the next question is whether they continued after that occupation to be public highways, and are still public highways, so that sentence of a criminal court can properly be passed for abating as a public nuisance the railway and all belonging to it which interferes with the free use of those streets by the public.

Upon that point we do not think it necessary to go into any further consideration than we have done of those provisions of the Great Western Railway Acts which authorised the company to take possession of lands, public or private, but shall only refer again to the 15th section of 22 Vict., ch. 116, which in our opinion is conclusive on this question. The first part of that clause cannot apply unless there be proof of the written assent of the municipality to the occupation of these streets by the defendants.

There was no written assent shown to have been given beforehand by the municipality, but a written assent given afterwards would suffice, in our opinion; and in the correspondence produced on the trial there was, we think, such evidence as should have satisfied the jury that the municipality was not at any time desiring anything so unreasonable as that the defendants should throw open these streets to the public, but were endeavouring (whether fairly or not it is not for us to judge) to found upon what had been done a claim to pecuinary compensation; and the jury shewed at the trial that this was in fact the.view which they took of the matter.

But in the latter part of the same section there is this distinct provision carrying the enactment further in favour of the company, and as regards streets situated on this river. We refer to the words, "*And all proposed or contemplated streets occupied by the said company,* or which they have been permitted to occupy by the license of the owner in fee, *and which shall not lead to any place beyond the said railway,* shall be deemed closed, and the occupation by the said railway shall be and is hereby declared to be lawful."

We may read as in a parenthesis the words " or which they have been permitted to occupy by the license of the owner in fee," because that is one of the two classes of cases which are separated from each other by the disjunctive "or," and then the enactment reads thus: "And all proposed or contemplated streets occupied by the said company, and which shall not lead to any place beyond the said railway," which precisely describes the present case; and the words which follow, "shall be deemed closed, and the occupation by the said railway shall be and is hereby declared to be lawful," in our opinion clearly put an end to all doubt that could otherwise be entertained in this case, and entitle the defendants clearly to an acquittal.

The enactment is in itself reasonable, and seems intended to meet just such a case as this has been shewn to be.