

*Judgment of the Lords of the Judicial Committee
of the Privy Council on the Appeal of The
Honourable Thomas Chase Casgrain v. The
Atlantic and North-West Railway Company,
and the City of Montreal (a party intervening),
from the Court of Queen's Bench for Lower
Canada, Province of Quebec ; delivered 9th
February 1895.*

Present :

THE LORD CHANCELLOR.

LORD WATSON.

LORD MACNAGHTEN.

LORD SHAND.

LORD DAVEY.

[*Delivered by Lord Watson.*]

In this case, their Lordships heard a very full argument upon a great variety of questions. They have not found it necessary to decide all of these questions; but they have thought it right to express their opinion upon some points, the decision of which is not, in the view which they take, necessary to the disposal of the appeal.

It is impossible to appreciate the various questions presented for decision, without referring, in detail, to the circumstances in which these have arisen, and also to the peculiar course of the present litigation in the Courts below. Before advertng to these proceedings, their Lordships will notice certain facts which are either not in dispute, or have, in their opinion, been established by evidence.

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The Respondent Company were incorporated by an Act of the Dominion Legislature, which empowered them to carry their line of railway through the city of Montreal. For effecting that purpose, they proposed to take and use a rectangular piece of ground (herein-after referred to as "the area"), lying between Mountain Street and Bisson Street, two of the public streets of the city, which run parallel to each other. There was a lane wholly situated within the area, known as Blache Lane, which opened off Mountain Street and terminated in a *cul de sac*. The lands abutting on the lane belonged to private individuals, by whom it was used as an access to their properties. The Company duly expropriated such parts of these properties as lay within the area, and had a frontage to the lane; and thus acquired the right to exclude all access to Blache Lane, except from Mountain Street.

The Company submitted to the City Council, for approval, a plan of their contemplated works which showed, *inter alia*, that the line of railway was to be carried over Mountain Street by means of a bridge, one of the abutments of which completely closed the entrance to Blache Lane from Mountain Street. It also showed that the whole area, including the *solum* of Blache Lane, was to be occupied and used for railway purposes. The Company also applied to the Council for leave, instead of carrying their railway by a bridge over Bisson Street, to close and occupy that part of the street which adjoins the area, offering, at the same time, to protect the city from all claims of damage resulting from the closing of the street.

The plan in question, and the application for leave to close Bisson Street were remitted to the Road Committee of the Council, who recommended that the Company should be permitted

to make bridges over Mountain Street and other streets as shewn on the plan; and that they should be allowed to close Bisson Street, upon certain conditions, which need not be specified. On the 20th February 1888, the plan and application, together with the report of the Road Committee, were considered at a special meeting of the City Council, called for that purpose, when the report was unanimously adopted, with the exception of the recommendation with regard to Bisson Street, which was sent back to the Committee for further consideration. It is unnecessary to notice what followed upon the remit. It is sufficient to say that the crossing of Bisson Street was subsequently arranged.

After receiving the assent of the Council, the Company proceeded with the construction of their line; and, before the end of the year 1888, the railway was formed across Mountain Street, upon the area in question, and across Bisson Street. In the course of these operations, the whole of the area, including the old site of Blache Lane, was covered by an embankment of considerable height, in order to bring it up to the proper level of the railway road.

In the month of February 1889, after the railway had been for some time in actual operation, the Company were served with a Writ of Information, bearing to be in terms of Article 997 of the Civil Procedure Code for Lower Canada, at the instance of the Honourable Arthur Turcotte, who was at that time Attorney-General for the Province, which prayed that the Company should be condemned to open Blache Lane, and leave it free for public use, and that, in default of their so doing, the same should be opened to the public at their expense. It was set forth in the Writ, that the proceedings had been instituted by the Attorney-General at the request of William Walker, one of the proprietors whose land fronting

Blache Lane had been expropriated by the Company, who had found security to indemnify the Government against costs, in accordance with the provisions of Article 997. It appears that the Attorney-General had, upon the 4th January 1889, given Mr. Walker's solicitors a written mandate authorising them to prosecute the Company in his name.

In view of the objections which are urged by the Company against the competency of the proceeding, it becomes necessary to notice the averments which are made on behalf of the Attorney-General, in support of the conclusions of his writ.

The first and cardinal averment is, that Blache Lane was a public street, and had been so from time immemorial. That is followed by an allegation that the Company, after they had acquired by expropriation the land abutting on the lane, "under pretext that thereby all rights of servitude " in favour of proprietors abutting on said street " had become vested in the said Company " alone," had closed the lane at its intersection with Mountain Street, and had made all ingress and egress impossible to the public in general. That statement imports that the Company justified their operations, not upon the ground that the lane was the property of the public, and that they were possessed of some power, franchise, or privilege which enabled them to close it at their own hand, but on the ground that it was private, and that they had acquired all the servitudes of way by which it was affected.

The next averment is to the effect that the closing of the street was particularly damaging to Mr. Walker, and the other proprietors whose lands had been in part expropriated; that the expropriation was made "on the distinct understanding that the said properties would not, " by reason of the said expropriation lose their

“ frontage on a street ;” whereas, by reason of the closing of Blache Lane, these properties had “ no outlet whatever in rear.” The street contemplated in the “ distinct understanding ” was obviously not Blache Lane ; and the evidence supplies the information that it was a new street which Mr. Walker alleges the Company undertook to make for his and others’ convenience, as part of the compensation for the lands which had been taken by compulsion. It is difficult to conceive of what relevancy these averments can be, in an action brought by the Attorney-General for the public interest. They relate exclusively to the rights of Mr. Walker and others to be compensated for lands which had been expropriated by the Company ; and their introduction is calculated to beget a suspicion, that the prosecution on behalf of the general public was expected to promote the enforcement of these private claims. It is manifest that the interest of the public in the opening of Blache Lane was infinitesimal. Even if the lane were opened to Mountain Street, they could derive little or no advantage from it ; and, if the consent given by the City Council to the construction of an abutment which closed the entrance from Mountain Street were valid, their privilege of using Blache Lane would consist in the right to perambulate the bottom of a pit, which they could only reach by means of a balloon, or some similar contrivance.

The next and last averment is simply a plea in law, which sets forth that the closing of Blache Lane constituted, in the circumstances previously detailed, “ the exercise by the said Company of “ a power, franchise, and privilege, which does “ not belong to it, or is not conferred upon it by “ law, and is a case governed by Article 997 of “ the Code of Civil Procedure for Lower Canada.”

In their defence, the Company denied the allegations of the petitioner, and averred

that Blache Lane was private property; and that Mr. Walker, and all other persons, whose lands fronting the lane had been expropriated, had been fully compensated, on the footing that the lane was to be closed and occupied for railway purposes. They also pleaded by way of demurrer, that the allegations made in the writ were insufficient in law to support its conclusions. After hearing parties upon that plea, Mr. Justice Mathieu, on the 29th March 1889, reserved it for consideration along with the merits of the cause.

On the 10th September 1889, the City Council of Montreal presented a petition for leave to intervene in the suit. The Company opposed the petition, upon the ground, mainly, that the suit was one brought under Article 997 of the Code, and that the terms of the Article do not warrant the admission of any party other than the Attorney-General to take part in its prosecution. Their objections were over-ruled, and the City Council were allowed to intervene in the cause, "for the purpose of watching the proceedings, taking such conclusions or making such declarations therein as they may be advised."

On being thus admitted, the Council filed grounds of intervention. These consist of a detailed statement of facts tending to show that Blache Lane was one of the public streets of the City; and they conclude by preferring a claim against the Company, which they were allowed to support by proof, for the sum of \$20,000, as damages already sustained by the City through the closing of the lane. The statement is certainly not characterized by an excess of candour. It carefully avoids all reference to the fact that the Council themselves had sanctioned the exclusion of the public from the lane, by authorising the only public access to it to be closed. From the date of their intervention, until the present appeal was brought, the Council

appear to have taken a very active part in the litigation, and a large proportion of the proof led was adduced by them.

On the 31st July 1890, the Hon. Arthur Turcotte, as Attorney-General, lodged in Court a notice, signed by himself, in these terms:—
 “ Arthur Turcotte, the said Petitioner hereby
 “ discontinues the present action without costs,
 “ and prays acte of this, his said discontinuance.”
 On the same day, he gave notice of his intention to discontinue to Mr. Walker’s solicitors, who had till then conducted the case on his behalf, by a letter in which he explains his reasons for taking that step, as follows:—“ Careful enquiry
 “ has satisfied me that aside from the interest of
 “ these gentlemen ” (*i.e.*, Mr. Walker and others in his position) “ there is no public general
 “ interest which requires the re-opening of this
 “ lane. The private relator, at whose request I
 “ instituted the prosecution above-mentioned,
 “ having chosen, along with the parties interested
 “ with him, to resolve his remedy to have the
 “ lane re-opened into an action to recover the
 “ damages caused him by its being closed, I
 “ must refuse to allow my name to be further
 “ used in this prosecution which is now being
 “ evidently pushed solely with the object of
 “ forcing the payment of the damages sought to
 “ be recovered in the private suits.”

At this time, the proofs for the Attorney-General, the interveners, and the Company, had been practically completed. Nearly the whole of the evidence led for the Attorney-General consisted of productions and oral testimony bearing upon the averments, made in the information, with respect to the private interests of Mr. Walker and others, the obligation said to have been undertaken by the Company to give them a new road as an access to their properties, and the amount of the damages which they had suffered by reason of their not

getting that access. Amongst his witnesses, there were three gentlemen who had acted, two of them as arbitrators and the other as umpire, in assessing the compensation due to Mr. Walker: and their Lordships observe, with regret, that these gentlemen were subjected to an irregular and improper examination, by Counsel representing the Attorney-General, as to the reasons and motives by which they were influenced in making their award. His evidence also disclosed the fact that Mr. Walker had, on the 3rd February 1889, raised, and was still pursuing, an action, concluding to have it declared that the award was made on the condition and understanding that his property, after expropriation, was to be bounded by a new street fifty feet wide, and also to have the Company condemned to pay him damages in respect of their failure to fulfil that condition.

Mr. Walker, the relator, after the discontinuance was filed, presented an incidental petition to the Court praying that a Writ of Mandamus should issue "in this cause," commanding Mr. Turcotte, in his capacity of Attorney-General, to withdraw his discontinuance, and to allow the petitioner to obtain a final judgment upon the merits of the Writ of Information. The grounds upon which the application was made were substantially these:—that the discontinuance of the action was the result of a corrupt agreement between the Attorney-General and the Company; that, in the circumstances of the case, the Attorney-General was bound by law to prosecute, at the relation of any citizen of the city of Montreal; and that, if the Attorney-General had any discretion as to discontinuing the suit, which was denied, such discretion had not been properly exercised, and could be controlled by the Court.

Notwithstanding the opposition of the Attorney-General, a Writ of Mandamus was issued in the terms craved on the 22nd August 1890;

but the final determination of the matter was delayed until the hearing of the cause upon its merits. On the 28th August, Mr. Turcotte ceased to hold the office of Attorney-General, and was succeeded by the Hon. Joseph E. Robidoux, who, on the 1st September, became officially a party to the action, and submitted himself to the decision of the Court.

The cause, including the incidental proceedings for Mandamus, was heard before Mr. Justice Mathieu, who gave judgment on the 16th May 1891. The learned Judge held that the permission, originally given to Mr. Walker, by the Attorney-General, to use his name in the prosecution of the Writ, could not be withdrawn without the authority of the Court; and that the discontinuance was not justified and must be rejected. He therefore discharged the Writ of Mandamus as being unnecessary. The learned Judge also held that Blache Lane was shown by the evidence to have been one of the public streets of the city, at the time when it was closed by the Company; and that the case came within the provisions of Article 997, inasmuch as the Company, in closing the lane, had assumed a power which the law did not accord to them. He accordingly condemned the Company to re-open the lane within six months from the date of his judgment, and, in the event of their failing to do so, authorised the Interveners and Mr. Walker to re-open it, at the expense and risk of the Company. The learned Judge dismissed the Interveners' pecuniary claim, on the ground that they had not proved any damage.

The Company appealed to the Court of Queen's Bench, who, on the 23rd December 1892, reversed the decision of Mr. Justice Mathieu. Before the appeal was heard, Mr. Robidoux had ceased

to be Attorney-General, and was succeeded in office by the Hon. T. C. Casgrain, the present Appellant, who appears to have entertained a more sanguine view of the merits of his cause, and a more modest estimate of his official privileges, than his predecessor. He was made a party to the Record, upon a petition which sets forth that he was "desirous to take up the instance in this" "in his official capacity, and support the judgment in this cause rendered by the Court below, dismissing the discontinuation of the Honorable Arthur Turcotte, and maintaining the original conclusions taken by him to the effect that Blache Lane be ordered to be, and be opened with costs."

The Court before whom the appeal was heard consisted of Baby, Bossé, Blanchet, Hall, and Wurtele J.J., who were unanimously of opinion that whether he ought or ought not to permit the action to be continued in his name was a matter entirely within the discretion of the Attorney-General; that the Court had no right to interfere with the exercise of his discretion, and no jurisdiction, in any event, to issue a mandamus against an officer of the Crown in his position. They accordingly held that the discontinuance of the action on the 31st July 1890 was valid and effectual. Upon the merits, the learned Judges were of opinion that it had not been established, by satisfactory evidence, that Blache Lane was a public street; and they appear, so far as the interveners were concerned, to have attached considerable weight to the fact that they had not only been parties to the closing of the lane, but had been guilty of laches in not objecting until the railway was completed and in operation. They held, in these circumstances, that the case did not fall within Article 997 of the Code, and they dismissed the original action,

the intervention of the City Council, and Mr. Walker's Writ of Mandamus.

The City Council have submitted to the judgment of the Court of Queen's Bench, and were therefore not represented in the argument addressed to this Board. In the course of that argument, the legality and propriety of their admission to the suit as interveners were fully discussed. Their Lordships entertain doubts whether, in an action brought by the Attorney-General under Article 997, any other party can be entitled to appear and prosecute, as an intervener, in terms of Article 154 of the Code. Even more doubtful is their right to prosecute a claim of damages which was not within the conclusions of the original Writ. But in the absence of the City Council, who are out of the case, and seeing that, now, neither the Appellant nor the Respondent Company have any real interest in its determination, their Lordships abstain from deciding the point. They will proceed to deal with such questions raised in the argument as appear to them to require notice, in the order in which they were presented by Counsel.

The first of these questions is, whether the information, as laid, discloses any cause of action under Article 997, which enacts, as follows:—
 “ In the following cases:—1. Whenever any
 “ association or number of persons acts as a
 “ corporation without being legally incorporated
 “ or recognised ; 2. Whenever any corporation,
 “ public body or board, violates any of the
 “ provisions of the Acts by which it is governed,
 “ or becomes liable to a forfeiture of its rights,
 “ or does or omits to do acts the doing or omission
 “ of which amounts to a surrender of its corporate
 “ rights, privileges and franchises, or exercises
 “ any power, franchise or privilege which does
 “ not belong to it or is not conferred upon it by

“ law, it is the duty of Her Majesty’s Attorney-General for Lower Canada to prosecute, in Her Majesty’s name, such violations of the law whenever he has good reason to believe that such facts can be established by proof, in every case of public general interest, but he is not bound to do so in any other case unless sufficient security is given to indemnify the Government against all costs to be incurred upon such proceeding, and in such case the special information must mention the names of the person who has solicited the Attorney-General to take such legal proceedings, and of the person who has become security for costs.”

The Respondent Company are not alleged to have incurred a forfeiture of their corporate rights, or to have been guilty of any act or omission which implies a surrender of these rights. The charge which the Attorney-General prefers against them is, that, in closing Blache Lane, they exercised a power, franchise, or privilege which did not belong to them and was not conferred upon them by law. It therefore becomes necessary to consider what kind of acts are indicated by the statutory expression “exercises any power, franchise, or privilege.” Their Lordships are of opinion that the words were meant to include, not every act done by the Company which can be shown to be contrary to law, but such acts only as are either professedly, or from their very nature manifestly done in the assertion of some special power, franchise, or privilege. The Company might illegally occupy and use a public road, and exclude the public, in such circumstances as to bring them within the provisions of Article 997. On the other hand, if one of their goods trains ran off the line and blocked a highway, and they failed to remove the obstruction within due time, they would be liable to an indictment for nuisance, but could not, in

their Lordships' opinion, be reasonably said to have committed the nuisance, in the exercise of a power, franchise, or privilege which did not belong to them.

The Attorney-General does not, in his Information, allege that the Company closed Blache Lane in the assertion of any power possessed by them to close a public street. On the contrary, he avers that they did so under the pretext that they had acquired private interests in the lane which entitled them to shut it up. Neither does he state any fact or circumstance from which it could reasonably be inferred that the Company must have seen and known that they were not dealing with private property, but with a public street. The reason for so limiting his averments may very well be explained by the fact that, after a voluminous proof, one Judge has come to the conclusion that the lane was a public street, whilst five learned Judges are of opinion that the evidence is insufficient to support that conclusion. Their Lordships are of opinion that the averments in the Writ, although sufficient to sustain an indictment for nuisance at the instance of the Attorney-General, do not amount to a relevant allegation that the lane was closed by the Company, in the exercise of any power, franchise, or privilege, within the meaning of Article 997.

Upon the next question, that which relates to the discontinuance of the action, their Lordships entertain no doubt that the decision appealed from is right. The Attorney-General was the sole *dominus litis*, and had the same right to control the conduct and settlement of the suit as if there had been no relator.

Counsel for the Appellant, although they referred to, did not very seriously press, two points which appear to have been relied on in the Courts below. One of these was that a new Attorney-General might so far disturb judicial

arrangements made by his predecessor, as to retract a discontinuance by the latter ; and the other that the Attorney-General for Lower Canada, as an officer of the Crown, stands in this exceptional position, that a Mandamus will lie at the instance of his relator, to compel him to perform what the Court may conceive to be his official duty, in a prosecution under Article 997 of the Code. There is no authority for either of these propositions, which are so plainly erroneous, that it is unnecessary to take any further notice of them.

But it was strenuously urged, on behalf of the Appellant, that in a prosecution under Article 997, the Attorney-General does not possess the usual powers of a plaintiff and *dominus litis*. In so far as concerns the right to discontinue, it was maintained by the Attorney-General, that he is the mere servant of the Court, and cannot refuse to insist until final judgment, unless he has leave from the Court. In support of that strange assertion, his Counsel relied upon Article 998 of the Code, which enacts that, without the authorization of the Court or Judge, no writ of summons can issue under Article 997. Whatever may be its practical effect, that enactment is plainly intended to be for the protection of the persons or companies against whom the writ is directed. It enables the Court or Judge, in their discretion, to prohibit the issue of a writ ; but it cannot imply any unusual right, on their part, to interfere with the discretion of the prosecutor to withdraw or insist, after their authority has been given to the institution of his action.

Their Lordships can hardly conceive anything less calculated to advance the interests of justice than to make the Bench prosecutors as well as Judges, by devolving upon the Court before whom the cause depends, the duty of determining whether the Attorney-General shall, or

shall not continue to insist. Apart from plain considerations of policy, it is clear that he must always be in a better position than the Court to decide whether he ought or ought not to discontinue the action. Their Lordships have come without difficulty, and certainly without regret, to the conclusion, that the learned Appellant has underrated his official powers and privileges. With one exception, the authorities cited appeared to them either to have no bearing on the point, or to be inconclusive. Section 703 of the revised Statutes of Quebec 1888, which was not referred to by the Appellant's Counsel in their opening, and was not noticed in their reply, although cited by the Respondents, is, in their Lordships' opinion conclusive. It enacts that the Attorney-General "has the functions "and powers which belong to the office of "Attorney-General and Solicitor-General of "England respectively, by law or usage, in so "far as the same are applicable to this Province." It is scarcely necessary to observe that the power to discontinue an action, independently of the Court, is possessed by the law officers of England; and that no reason exists for holding that an enactment, which confers the same power upon the law officer of the Crown for Lower Canada, is inapplicable to that Province.

Upon the assumption that his predecessor had the power to discontinue, to be exercised according to his own discretion, it was argued for the Appellant, that the discontinuance could not be given effect to, in the first place because it did not comply with the requirements of Article 450 of the Civil Procedure Code, and, in the second place, because it was not accepted by the Respondent Company. It is difficult to say which of the reasons thus alleged was most destitute of plausibility.

Article 450 enables a plaintiff to discontinue

his action, and, if he thinks fit, to bring a new one, without the consent, and against the will of the defendant. It is made an indispensable condition that, in such a case, the plaintiff shall pay the costs incurred by the defendant in the suit which he seeks to discontinue. The Article has no application whatever to any case where the parties are agreed as to the terms upon which the suit is to be withdrawn.

But then it was argued that, as matter of fact, the Company never accepted or intimated their willingness to accept the discontinuance. The argument is somewhat audacious, seeing that the discontinuance has been all along impeached upon the ground that it was the result of a corrupt agreement between Attorney-General Turcotte and the Company to put an end to the action. That they were agreed as to the discontinuance, on the terms which it specifies, has never been disputed; but corruption was denied, and, although proof was allowed and led upon the point, there is not a tittle of evidence to prove it. And, in both Courts below, unsuccessfully in the first, but successfully in the Court of Queen's Bench, the Company have pleaded that the discontinuance was valid, and terminated the suit.

The greater part of the argument was directed to the merits of the cause, and, in particular, to the question whether Blache Lane was a public or a private street. Their Lordships do not think it necessary to determine whether the decision of Mr. Justice Mathieu or the decision of the Court of Queen's Bench, upon that point, ought to be followed. If the lane was private property, there is admittedly an end of the Attorney-General's case. On the other hand, if the lane was a public street, their Lordships are of opinion that his case equally fails, because the City Council had power to

authorise, and did authorise, the Company to close it.

The plan which has already been referred to was submitted by the Company to the City Council, for the purpose of informing that body of the extent to which, and the manner in which the construction of their railway would affect the streets of Montreal, and of obtaining their consent to the works indicated on the plan. And it is not disputed that the Council, in whom the public streets of the City are vested by Statute, was the only authority competent to deal with the application. The evidence clearly proves, and the plan, which speaks for itself, also shows, that the Council were distinctly apprized that the design of the Company was, not only to close the entrance to Blache Lane from Mountain Street, but to occupy and use the lane for the purpose of constructing their railway track. The Council gave their express assent to the carrying out of that design, so that the only question left is, whether they had a legal right to do so. The answer to be given to that question depends upon the construction of Section 12 of the General Railway Act, Cap. 109 of the Revised Statutes of Canada, 1888.

The clause, in so far as bearing on this point, enacts that "the railway shall not be carried
" along an existing highway, but shall merely
" cross the same in the line of the railway, unless
" leave has been obtained from the proper
" municipal or local authority therefor; and no
" obstruction of such highway with the works
" shall be made without turning the highway so
" as to leave an open and good passage for
" carriages, and, on completion of the works,
" replacing the highway."

The enactment just quoted appears to their Lordships to deal with two separate matters, the first being, the carrying of the permanent track

along a public highway, and the second, the temporary occupation and obstruction of a highway, for the purpose of constructing the permanent works. In the first case, the Company are empowered to carry their line along a highway, upon condition of their obtaining the consent of the proper authority. In the second case, it is imperatively enacted that they shall remove the obstruction, and restore the highway to the site which it occupied before their operations commenced, as soon as their operations are completed.

If the first branch of these enactments be taken *per se*, their Lordships see no reason to doubt that it must be interpreted as giving the local authority an absolute discretion to sanction the construction of the permanent line of railway along a public road, unqualified by any condition to the effect that the public must not be thereby excluded from the use of the road. The Appellant's Counsel argued that the discretion conferred upon municipal and local authorities by the first enactment is qualified by the provisions of the second. The result of sustaining that contention would be, that the Company, as soon as they had, with the leave of the proper authority, completed the construction of their permanent track upon a public highway, would incur a statutory obligation to remove it, and to restore the highway to its original condition.

The clause under consideration, enacted in 1888, was not new legislation. It merely re-enacted, without verbal alteration, Section 12 of the Canadian Statute, 14 & 15 Vict. Cap. 51, and extended to the Dominion the same statutory provisions which had previously been in force within the Provinces of Ontario and Quebec, before and after their separation.

In the year 1857, two cases, involving the construction of Section 12 of the Canadian

Statute, were decided in the Supreme Court for Upper Canada. The first of these,—*Regina v. Grand Trunk Railway Co. of Canada* (15 Q. B. Toronto 121.),—was an indictment for nuisance against the Company, who had, in constructing their line, occupied for a considerable distance, the whole of a public street, to the exclusion of the public, with the leave of the municipality. The prosecutor maintained that the municipality had no power to grant such leave. The Judge of First Instance, and the learned Judges of the Court of Queen's Bench, held that under Section 12 the municipality had power to sanction the closing of a public street; and that, their leave having been duly given, no indictment would lie. In the second case,—*Re Day and The Town Council of Guelph* (15 Q. B. Toronto 126.),—the same question was raised in different circumstances, and was decided in the same way.

Their Lordships cannot assume that the Dominion Legislature, when they adopted the clause *verbatim* in the year 1888, were in ignorance of the judicial interpretation which it had received. It must, on the contrary, be assumed that they understood that Section 12 of the Canadian Act must have been acted upon in the light of that interpretation. In these circumstances their Lordships, even if they had entertained doubts as to the meaning of Section 12 of the Act of 1888, would have declined to disturb the construction of its language which had been judicially affirmed.

The practical result of these views is, that effect ought to have been given to the discontinuance filed by the Attorney-General in July 1890; and that the Court of Queen's Bench were right in dismissing the action upon that ground. But the discontinuance was without costs, and it follows that the Court ought not to have given the Company the costs incurred by

them prior to its date. Their Lordships will therefore humbly advise Her Majesty to affirm the judgment appealed from, with the variation as to costs which they have indicated. The Appellant must pay to the Respondent Company their costs of this Appeal.
