Supreme Court of Canada
Heiminck *v.* The Municipality of the Town of Edmonton (1898) 28 SCR 501
Date: 1898-06-14

Philip Heiminck (Plaintiff)

Appellant

And

The Municipality of the town of Edmonton (Defendant)

Respondent

1897: Nov. 4, 5, 6; 1898: June 14.

Present:—Sir Henry Strong C.J. and Taschereau, Gwynne, Sedgewick, King and Girouard JJ.

ON APPEAL FROM THE SUPREME COURT OF THE NORTH-WEST TERRITORIES.

Municipal Corporation—Highways—Old trails in Rupert's Land—Substituted roadway—Necessary way—R. S. C. c. 50, s. 108—Reservation in Crown Grant—Dedication — User—Estoppel—Assessment of lands claimed as highway—Evidence.

The user of old travelled roads or trails over the waste lands of the Crown in the North-west Territories of Canada, prior to the Dominion Government Survey thereof does not give rise to a presumption that the lands over which they passed were dedicated as public highways.

The land over which an old travelled trail had formerly passed, leading to the Hudson Bay Trading Post at Edmonton, N.W.T., had been enclosed by the owner, divided into town lots and assessed and taxed as private property by the municipality, and a new street substituted therefor as shewn upon registered plans of subdivision and laid out upon the ground had been adopted as a boundary in the descriptions of lands abutting thereon in the grants thereof by Letters Patent from the Crown.

Held, reversing the decision of the Supreme Court of the Northwest Territories, that under the circumstances there could be no presumption of dedication of the lands over which the old trail passed as a public highway, either by the Crown or by the private owner, notwithstanding long user of the same by settlers in that district prior to the Dominion Government Survey of the Edmonton Settlement.

APPEAL from the judgment of the Supreme Court of the North-west Territories, sitting *en banc*, which affirmed the judgment of the trial court dismissing the plaintiff's action with costs.

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The plaintiff's action was for trespass by the municipality and breaking down his fences enclosing lands in the Town of Edmonton. The municipality claimed part of these lands as a public highway by reservation and dedication in the patent from the Crown and by long user. The case was tried in the Supreme Court for the North-west Territories, District of Northern Alberta, before Scott J., who dismissed the plaintiff's action with costs and this decision was affirmed by the full court, sitting *en banc*, Rouleau J. dissenting.

The circumstances under which the controversy arose and the matters in issue in the case are stated in the judgment reported.

McCaul Q.C. for the appellant. The appellant's title is unquestioned, unless the *locus in quo* is a public highway by express reservation in the Crown grant or by dedication, as the claim by prescription has been abandoned by the respondent, and claim by estoppel does not appear on the face of the pleadings.

All the judges of the court below are agreed that the respondent could not succeed upon the ground of reservation. Their lordships have found it impossible to say that the reservation in the patent—"the public road or trail crossing the said lot"—has reference to the particular trail to which the respondent endeavours to assign the words. As to the question of dedication, the trial judge, (Scott J.), held that the evidence was not sufficient to establish a dedication. Upon appeal, Richardson J., feeling bound by *Turner* v. *Walsh*[1] decided that from user alone there was sufficient evidence of dedication; Wetmore J., was of opinion that there was no sufficient evidence of dedication by reason merely of user alone, but that such user coupled with the reservation in the patent and some

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supposed admissions of the appellant in connection with certain expropriation proceedings, showed a sufficient intention on the part of the appellant (and his vendor, David McDougall, the patentee), to dedicate; while Rouleau J. held that there was no evidence of dedication. The trial judge dismissed the action on the ground of estoppel by representations; upon appeal Richardson J. and Wetmore J. gave no decided opinion, while Rouleau J. thought that the doctrine of estoppel had no application whatsoever. Therefore, although the judgments are largely in favour of the appellant, yet because of alleged admissions of the appellant at the expropriation proceedings, the judgment in appeal went against him.

The respondent contended that, in addition to Jasper Avenue, there exists a highway, part of an old irregular and straggling trail (which had been used as a public road prior to the Dominion Government survey in 1882) still surviving, though only as to a small portion, the rest having been obliterated by lots, streets and buildings. Now the grantee from the Crown did not and could not claim through the squatters who had occupied the land prior to the survey; *Farmer* v. *Livingstone*[2]; *The Trustees, Executors and Agency Company* v. *Short*[3]; and the trial judge expressly held that prior to patent, (in 1887,) he had "no right or title to occupation," and "was not in a position, to prevent" any user of the property as a trail.

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[1] 6 App. Cas. 636.
[2] 5 Can. S. C. R. 221.
[3] 13 App. Cas. 793.

The "reservation" in the patent is in these words: "Reserving thereout the public road or trail one chain in width crossing the said lot." There were, at the date of the patent, "crossing the said lot," not only the roadway which the respondent claims to have been the trail or road reserved but also, towards the north,

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a well-travelled road which answered the description in the patent and also Jasper Avenue, the main street of the village or town, which had been cleared and was the principal travelled road in 1887. It is altogether probable that it was to Jasper Avenue that the patent referred, but if not, the next most probable road was the northerly one. It is certain, therefore, that the roadway in question is not that referred to in the patent as the "public road or trail." In this all the judges agree.

The whole question of dedication is a question of fact; *Belford* v. *Haynes*[4]; *Beveridge* v. *Creelman et al.*[5] at page 37; depending on the assent or intention of the owner, which "must be clearly proved before the court will take away a man's land from him," *Rae* v. *Trim*[6] per Blake, V.C., at p. 379. It was a question for the trial judge, (Scott J.) who distinctly held that there was no evidence of any intention to dedicate on the part of the patentee. While the fee was in the Crown, user cannot be relied upon as evidence of dedication because that user was without the knowledge of the Crown, and *Nullum tempus occurrit regi. Harper* v. *Charlesworth*[7]; *Reg.* v. *Plunkett*[8]; *Dunlop* v. *The Township of York*[9]; *The Queen* v. *Moss*[10]. Although there was a certain amount of travel over the lands in question the route was not of any considerable importance and in no sense a main-road or trail. It was merely one of innumerable local trails which arise in every waste territory, according to the convenience of straggling squatters. The western prairie, far from being a "trackless" plain, as so often described, was, and is, crossed and re-crossed by tracks and trails, in every conceivable

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direction. The main trail—the principal artery of travel—crossed the north end of the lot in question. One of the witnesses speaks of the roadway now in dispute as a mere footpath in 1882 and in fact it was a mere trespass road or short-cut, used until the main thoroughfare, (Jasper Avenue), was cleared and opened, and it has been completely obliterated both upon the east and west of the *locus in quo*, blocked, closed up, and built upon. The patentee in making his plan, three months after obtaining his patent, showed a distinct refusal to dedicate the property, and instead thereof dedicated, or rather, as he believes, conformed to the patent, in showing, upon his plan, Jasper Avenue, as the road reserved across his property and the respondent, since incorporation in 1892, assessed the owner of the property in question and collected taxes thereon for the years 1892, 1893, 1894, 1895 and 1896, up to the time of the trespass complained of. See Dillon "Municipal Corporations," (4 ed.) par. 564,

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[4] 7 U. C. Q. B. 464.
[5] 42 U. C. Q. B. 29.
[6] 27 Gr. 374.
[7] 4 B. & C. 574.
[8] 21 U. C. Q. B. 536.
[9] 16 Gr. 216.
[10] 26 Can. S. C. R. 322.

note p. 659. There never was any *animus dedicandi; Poole* v. *Huskinson*[11]; Elliott on Roads and Streets, p. 120.

Beck Q.C. for the respondent. The respondent submits that the southerly trail is that intended to be reserved in the Crown patent. The Government plan shows the southerly trail to be a continuous one through the Village settlement, and a necessary highway affording the settlers access to the surveyed road allowances running north and south on each side of the village, while the northerly trail, so far as the map shows, stops short, no doubt because it was not clearly defined on the ground. The patents for lands in the vicinity, except that for lot 10, contain reservations of a trail, and describe the adjoining lands by express reference to the Government map which shows no

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continuous trail over them except the southerly trail. The omission of the reservation in the patent for lot 10 is clearly explained by the fact that prior to the issue of that patent the plan of subdivision had been registered giving a public highway over it, approximately corresponding with the southerly trail there. The plan of subdivision of the Hudson Bay Company's Reserve completed before the Dominion Government survey clearly shows which trail the company—one of the public interested in both trails—considered to be the more important, showing as it does the southerly, but not the northerly trail. User by the public has been shown since 1852, and evidence of intention to dedicate on the part of McDougall, the patentee, is clear in view of his legal rights as an occupant, and of his assumed rights recognized by the Crown. His conduct is clearly sufficient to establish a dedication as against both himself and the Crown. *Reg.* v. *East Mark*[12]; *Reg.* v. *Petrie*[13]; Elliott on Roads and Streets, pp. 100, 124, 125; *Turner* v. *Walsh*[14]. The reservation in the patent, and the conduct of McDougall in connection with the arbitration on recent expropriation proceedings, even if not amounting to estoppel, are both strong additional circumstances in support of the dedication.

As to estoppel, (even assuming there was waiver by not pleading it), the trial judge in dealing with the facts was at liberty to find either according to the facts or according to the estoppel if they led to different conclusions. *Vooght* v. *Winch*[15]; *Trevivian* v. *Lawrence*[16]. The plaintiff is estopped. David McDougall was a party to the arbitration proceedings, and the plaintiff was his agent and at the same time the nominal owner

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of the land in question, in trust for McDougall, subject to his own beneficial interest. McDougall raised the issue of the trail in question being a legally existing one or not, and the plaintiff gave evidence to show that there was a trail and that, therefore, a proposed extension of another street would be not only valueless to him but an injury. The appellant took the benefit of the arbitrators' finding on this point. In a question of estoppel, an award is equivalent to a judgment. Bigelow on Estoppel (5 ed.) p. 58; Russell on Arbitration (7 ed.) pp.

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[11] 11 M. & W. 827.
[12] 11 Q. B. 877.
[13] 4 E. & B. 737.
[14] 6 App. Cas. 636; 50 L. J. P. C. 55.
[15] 2 B. & Ald. 662.
[16] 1 Salk. 276; 3 Salk. 151; Ld. Raym. 1036, 1048; 6 Mod. 256.

514, 555; *Whitehead* v. *Tattersall*[17]; *Gueret* v. *Audouy*[18]. The familiar cases of "standing by" are instances of this kind of estoppel. *Ramsden* v. *Dyson*[19] at pages 142 and 160; *Gregg* v. *Wells*[20]; *Coles* v. *Bank of England*[21]. Also under quasi-estoppel, Bigelow, pp. 673, 683-4-5-7; *Birmingham* v. *Kirwan*[22] at page 449.

There is no estoppel against the defendants. They were quite right in assessing the property. The right of way over it does not change its ownership, though it no doubt lessened its value, and a large part of the parcel assessed is unaffected by the right of way. The assessment and collection of taxes would in no case amount to an estoppel, except in proceedings relating directly thereto. At all events, there could be no estoppel in the circumstances under which this land was assessed. There has been no abandonment so far as this portion of the trail is concerned, for nothing more is shown than that the two buildings have been allowed to be built so as to encroach on the trail, but not so as in any degree to restrict the travel. Jasper avenue and Main street was not dedicated by registration of a plan of

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subdivision until after the issue of the patent. It was bush until 1885, when only the timber on it was cut. It was not brushed or cleared up till 1890 or 1891, and not graded until 1892. In order to establish an abandonment, it is necessary not only to show the opening of a new way which will answer the purpose of the old one, but also to show an entire and absolute disuse of the old road. Elliott. p. 658 et seq.

The judgment of the court was delivered by:

GWYNNE J.—This is an action instituted in February, 1895, by the plaintiff against the Town of Edmonton, incorporated as a municipality by an ordinance of the North-west Territories in the month of January, 1892, for breaking and entering a close of the plaintiff, situate at the north-east angle of that part of river lot no. 8, in the Edmonton Settlement, which lies south of Jasper avenue, as it crosses the said lot, and for breaking down and destroying a fence of the plaintiff there being. The close in question consists of two small town lots fronting on the south side of said Jasper avenue for which the plaintiff's predecessors in title were assessed and taxed by the municipality defendants every year until the year 1895, when the plaintiff, being in possession, was assessed and taxed therefor. The defendant, notwithstanding the assessment of the said town lots, now pleads as a defence to the present action that at the time of committing the grievances complained of by the plaintiff the *locus in quo* was and for a

[17] 1 A. & E. 491.
[18] 62 L. J. Q. B. 633.
[19] L. R 1 H. L. 129.
[20] 10 A. & E. 90; 8 L. J. (N. S.) Q. B. 193.
[21] 10 A. & E. 437; 9 L. J. (N. S.) Q. B. 36.
[22] 2 Sch. & Lef. 444.

long time had been a public highway within the limits of the municipality, and in support of such contention, it is alleged and pleaded; 1st. That the *locus in quo* forms part of river lot no. 8, in the Edmonton Settlement, and that the patent from the Crown for the said lot expressly reserves the said highway for the public use; and, 2ndly. That the highway was dedicated

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by the Crown and by the patentee as is evidenced by long user.

Prior to the year 1882, when first these lands called river lots in the Edmonton District were surveyed and given boundaries by the Crown there was a trail across what is now river lot 10, and other lands east of it, in a devious, irregular route and without any defined limits, and westerly across what is now river lot no. 8, in a diagonal direction from the place where it entered upon the river lot 8, to where the western limit of the said lot, which is the eastern limit of the river lot 6, reaches a steep bank overhanging the Saskatchewan River, and thence along the top of such steep bank, across river lot 6, to the Hudson Bay Company's Reserve, which lies immediately west of the river lot 6, and so to a Trading Post of the Hudson Bay Company in such Reserve. This trail the settlers on the Edmonton Settlement, close to the river, had been in the habit of using for convenience of access to the Hudson Bay Company's said Trading Post.

In the year 1892 the present defendant brought an action against two persons named Brown and Curry, in which the contention of the present defendant was that Jasper avenue as laid across river lot 10 by the person who afterwards became patentee from the Crown of the greater part of that lot was adopted and dedicated by the Crown and confirmed by the letters patent for the several parts of the said river lot and was substituted for the old trail as it crossed said river lot 10, which upon the opening of Jasper avenue, which was eighty feet in width, became absolutely obliterated and extinguished in so far as lot 10 is concerned. In that contention the present defendant finally succeeded by the judgment of this court delivered upon the 1st May, 1894, and in that judgment will appear how the Dominion Government acted in

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so adopting Jasper avenue as a substitute for the old trail on river lot 10. The judgment was

unfortunately mislaid and therefore not reported, but has recently been discovered and can now be reported[23].

In the present action the defendant as part of its case proved, by admission of the opposite party but still as part of the defendant's case, that letters patent from the Crown were issued upon the 30th September, 1887, a month after the issue of the letters patent for lot 10, which has been in like manner proved in the present case, granting said river lot 8 to one David Macdougall the purchaser thereof, in fee "reserving thereout the "public road or trail, one chain in width, crossing the

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said lot." The defendant has thus established the issues entered on the record in favour of the plaintiff unless the *locus in quo* should be established to be, as pleaded, a public highway.

David McDougall, the patentee of this river lot 8, upon acquiring his title under the said letters patent immediately extended Jasper Avenue across his lot to a greater width than it has across lot 10, as appears by the registered plan produced, and upon either side of it he laid out building lots, those upon the south side numbering from the western to the eastern limit of the lot where are situated the lots constituting the *locus in quo.* The old trail ran diagonally across land

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now comprised within the limits of four of these lots, all of which have been continuously assessed and taxed by the municipality ever since its incorporation to the patentee or persons claiming title under him. Thus in so far as in him lay the patentee declared his clear intention to close forever and he in point of fact so closed up the old trail at its very entry into the lot 8, and he substituted therefor Jasper Avenue which he dedicated as a public highway across his lot. It also appeared that the patentee of river lot 6 in like manner extended Jasper Avenue across his lot to the Hudson Bay Company's Reserve.

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The whole question then at the trial was: 1st. Whether the public road or trail reserved in and

[23] 1 *N. W. T. Rep. Part* 4, *p.* 39. (1898) 28 SCR 510

by the said letters patent to David McDougall was the trail which formerly crossed where is now the *locus in quo* in the present action; and 2nd. Whether a dedication by the Grown or the patentee could be presumed from the user which appeared in evidence. These questions underwent a thorough investigation during a trial which extended over seven days and at its close the learned trial judge upon the 17th December, 1895, reserved his judgment which was delivered by him on the 24th June, 1896, and thereby he found

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and adjudged as to the above issues joined, upon the record; 1st. That the highway or public road reserved by the said letters patent was not the trail which had crossed river lot 8, at the place where the *locus in quo* in the present action is, but that a public road or trail which crossed the northerly part of the said river lot 8, and which was the great thoroughfare from a very early period between the east and west for all the traffic of the Hudson Bay Company who had the monopoly of the trade of the country, and by which road the great majority of persons passing backwards and forwards into and through the Settlement travelled,

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was the public road reserved by the letters patent. He also found and adjudged, 2ndly. That the evidence was insufficient to justify the finding of a dedication by the Crown, and that there was nothing in the act or conduct of the patentee McDougall *prior to the arbitration* (next mentioned), from which a dedication could be implied. He thus found that from the time of the issue of the letters patent to McDougall up to the time of the arbitration taking place, at any rate the patentee and those claiming under him were absolutely seized in fee of the land over which the old trail had passed free from any claim whatever of the public to such

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land as being dedicated to the use of the public as a highway and for this reason he justified the assessment of the *locus in quo* up to and including the year 1894 as the property of the patentee and his assigns, and so liable to be assessed, but as to the assessment to the plaintiff in the year 1895, he could not see, he said, how that assessment could effect the matter in question. But the assessment of that year, equally as the assessments of the preceding years was, as was the plaintiff's contention, quite proper, and all for the same reason, namely, that the lots so assessed were the absolute property of the patentee and

those claiming

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under him and did not nor did any part of them constitute land dedicated to the public use as a highway, as now claimed by the defendants. The weight of this evidence as relied upon by the plaintiff, was that it was clearly in rebuttal of any dedication to be presumed from user.

Now as to this arbitration so referred to by the learned judge it appears that copies of the award made thereat, and of a paper purporting to be the evidence given by the plaintiff thereat, and of the by-law for the expropriation of the piece of land therein mentioned, under which the arbitration took place, none

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of which in any manner bear upon or relate to the matters in issue on the record, became to be filed as exhibits in the cause in some way or other not explained in the record before us; at what stage of the trial or for what purpose they were so filed nowhere appears. The plaintiff's counsel appears to have regarded the documents as wholly irrelevant; the defendant's counsel does not appear upon the record before us to have alluded to them during the trial nor at any time except at the close of his argument, after the trial he alludes to them thus:

> The answer is an estoppel because plaintiff shews that he then had an interest in the property in question and upon the arbitration he claimed that the trail existed.

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It is singular, to say the least, that having, as is said here, an interest in the property in question he should be insisting upon the existence of a state of things which would utterly destroy his interest. However, in the argument before us this construction of the plaintiff's evidence is utterly repudiated and denied to be sound, what he actually did being said to be, that he gave evidence for the information of the arbitrators as to what could be done with the lot remaining not yet laid out if the trail was a public highway and what if it were not; and it is utterly repudiated that he said anything which could be reasonably construed into insisting that the trail is a public highway, or with intention to get the arbitrators to regard it as such. To have done so would certainly have been utterly inconsistent with his duty to the owner of the land and could not be binding on him. The learned judge read all these papers and formed

the opinion that the evidence thereby appearing to have been given by the plaintiff *leads to the conclusion that he was contending* that the trail in question

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was a public highway and he thought that if the arbitrators had not found it to be a public highway they would not have awarded so much as they did. As to this observation it may be said that the suggestion is merely a surmise of the learned judge for, from the award, the arbitrators would seem to have attached little weight to the evidence of the plaintiff which certainly would seem to have been rather extravagant, for the value attached by him to the piece expropriated was $2,583.75, while the arbitrators allowed only $325. Again the learned judge says that he thinks that the representations of the plaintiff which the learned judge had spoken of as *leading to the conclusion* that the plaintiff was contending that the trail was a public highway were made with intent that the arbitrators should act upon such representations, but what these representations were is nowhere stated, although the conclusion which they are construed as leading to, is stated, and such being the assumed intent of the plaintiff in making the representations whatever they were, the learned judge was of opinion that upon the ground of good faith alone the patentee McDougall and the plaintiff should be estopped from denying that the trail in question is a public highway.

I do not propose to inquire whether the opinions of the learned judge are well founded or not, for although he expressed the opinion, he concluded (as there were no pleadings on the record to raise the question involved) *by merely directing that the defendant municipality might, if so advised, amend its defence in such manner as to raise a question as to estoppel*, but nevertheless, while so directing and notwithstanding the material' issue joined or the record which he had found in the plaintiff's favour he ordered judgment in the action to be entered for the defentants and in accordance with such order a rule has issued out of the court dismissing

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the plaintiffs action with costs. From this rule the plaintiff appealed to the full court, and from the judgment of that court therein the appeal to this court has been taken.

The full court consisted of three judges, namely: Justices Richardson, Rouleau and Wetmore.

All concurred with the learned trial judge that the trail in question was not that which was reserved as a public road by the letters patent. As to the residue, Mr. Justice Richardson was of opinion that dedication by user was established, resting his judgment upon the authority of *Turner* v. *Walsh*[24], and for that reason he was of opinion that the appeal should be dismissed. Mr. Justice Wetmore entertained such great doubts as to the applicability of the doctrine of estoppel that he declined to pass judgment upon that point and leaving all question upon that point out of consideration he was of opinion that from the plaintiffs conduct at the arbitration *coupled with* the previous user a *dedication* of the trail as a public road might and ought to be presumed upon the authority of *Turner* v. *Walsh* (1). He regarded as he said the conduct of the plaintiff at the arbitration as being equivalent to McDougall himself appearing and saying: "I am owner of this land and I concede that this is a way; I concede that it must be presumed that there has been a grant of this trail as a way," and so he held that there was established a dedication of the way by user and consent of parties.

So to construe what took place at the arbitration involves an *assumption* first, that the plaintiff had any authority to bind McDougall by any concession relating to his lands; and secondly, that such authority extended to making in his name a concession which, assuming it to have been made, would be in direct

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contradiction and reversal of McDougall's manifest intention and conduct in closing up the trail, in dedicating Jasper Avenue in its stead and laying out town lots on the trail itself where closed, disposing of them to others, some of whom built upon them and who, as well as he himself, have ever since the incorporation of the defendant as a municipality, paid to the defendant the taxes which the defendant assessed upon those town lots.

Mr. Justice Rouleau was of opinion that the learned trial judge was quite right in all his findings upon the issues upon the record, but that his opinion as to applicability of the doctrine of estoppel to the case was erroneous; and while doubting the applicability of the doctrine of *Turner* v. *Walsh*[25] to the case of user of a way over the waste lands of the Crown in the Territories before ever a survey was made of them by the Crown he showed very clearly, as

[24] 6 App. Cas. 636.
[25] 6 App. Cas. 636.

we think, that even upon the authority of *Turner* v. *Walsh* (1) any presumption arising from user, if any did arise upon the evidence in the present case, was completely rebutted; and he was of opinion that judgment should be entered in the action for the plaintiff with ($40) forty dollars damages and his costs of the action and of his appeal. In this judgment we entirely concur and all that we wish to add to it is that while we cannot concur with the learned trial judge in the opinion he formed as to the construction of the plaintiff's conduct and evidence upon the arbitration, still no conduct of his or evidence given by him could, from anything appearing in the case, have the effect of divesting McDougall or his assigns of any estate or interest in their or any of their real estate, or could constitute a dedication by McDougall of any part of his real estate as a public highway to the

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public use. We are of opinion therefore that the learned trial judge should have rendered judgment for the plaintiff upon the issues found in his favour after a protracted trial of seven days.

This appeal must therefore be allowed with costs and judgment be ordered to be entered for the plaintiff in the action for $40 damages as stated in Mr. Justice Rouleau's judgment with all costs.

Appeal allowed with costs.

Solicitors for the appellant: McCaul & Short.

Solicitors for the respondent: Beck & Emery.