1905
*Nov. 14, 15.
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*Feb. 21.

THE GRAND TRUNK RAILWAY COMPANY OF CANADA (DEFENDANTS) ..... APPELLANTS;

AND

THE CITY OF TORONTO (PLAINTIFFS) ..... RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Highway—Dedication—Acceptance by public—User.

An action was brought by the City of Toronto against the G. T. Ry. Co., to determine whether or not a street crossed by the railway was a public highway prior to 1857, when the company obtained its right of way. It appeared on the hearing that, in 1850, the Trustees of the General Hospital conveyed land adjoining the street describing it in the deed as the western boundary of allowance for road, and in another conveyance, made in 1853, they mention in the description a street running south along said lot. Subsequent conveyances of the said land prior to 1857 also recognized the allowance for a road.

Held, Idington J. dissenting, that the said conveyances were acts of dedication of the street as a public highway.

The first deed executed by the Hospital Trustees, and a plan produced at the hearing, shewed that the street extended across the railway track and down to the River Don, but at the time the portion between the track and the river was a marsh. Evidence was given of use by the public of the street down to the edge of the marsh.

Held, Idington J. dissenting, that the use of such portion was applicable to the whole dedicated road down to the river, and the evidence of user was sufficient to shew an acceptance by the public of the highway.

APPEAL from a decision of the Court of Appeal for Ontario reversing the judgment at the trial in favour of the defendants.

*PRESENT:—Sir Elzéar Taschereau C.J. and Girouard, Davies, and Idington JJ.

This action was brought by the respondents pursuant to a direction or suggestion of the Railway Committee of the Privy Council. The respondents had applied to them for protection at the existing crossing of Cherry Street by the appellant company, and the question of priority became of importance in connection therewith. The action asked to have it declared that Cherry Street:

(1) Exists across and beyond the right of way of the appellants.

(2) Was dedicated as and for, and became, a public highway prior to the acquisition and use by the appellants of the said right of way.

The first proposition is no longer contested, having been conceded in the Court of Appeal. The second called for the determination of two points, namely: Was the highway dedicated, and if so was it accepted by the public before the right of way was acquired?

In giving judgment in the Court of Appeal Mr. Justice Maclennan deals with the question of dedication as follows:—

"The acts or evidence of dedication relied upon by the city are two conveyances made by the hospital trustees, the one made on the 19th, and registered on the 31st of October, 1850, of three lots lying to the west of the street in question, to one Jones, and the other made on the 14th October, and registered on the 2nd November, 1853, of the lots on the east side of the same street to one Jackson; and it is alleged that from and after the making of these deeds, if not before, that part of the street was used as a street by the public, and became in law by dedication a public street or highway.

"The description of the land conveyed to Jones is as follows: 'All and singular that certain parcel or tract

1905

GRAND TRUNK RY. CO. v. CITY OF TORONTO.

of land situate in the City of Toronto in the Home District, being part of the late Government Park Reserve, and described on the plan of lots laid out by the trustees of the Toronto Hospital Endowment, as lots Nos. 10, 11 and 12 on the south side of Front Street, and which may be otherwise known and described as follows, that is to say: Commencing on the south side of Front Street at the northwest corner of said lot No. 10 on the limit between lots Nos. 9 and 10 on the south side of Front Street; thence south 16 degrees west, six chains eighty links, more or less, to the southern limit of said lot No. 10; thence about south 75 degrees east to the water's edge of the river known as the Little Don; thence along the water's edge of said River Don in an easterly direction to the eastern limit of said lot No. 12, being the western boundary of allowance for road, as described on the plan aforesaid; thence along said boundary north 16 degrees west seven chains 30 links, more or less, to the southern boundary of Front Street; thence along Front Street south 74 degrees west four chains 50 links, more or less, to the place of beginning.'

"This is an unequivocal declaration by the hospital trustees, the owners in fee of the land, that there was then on the east boundary of lot 12 and adjacent thereto, extending from the River Don to the south side of Front Street, a distance of 7.30 chains, or 495 feet, an allowance for road, as described in the plan of lots laid out by them. No particular plan or copy of plan is specified. The declaration is that upon the plan of lots laid out by them there is a description of an allowance for road lying along the east side of lot 12. Now, at that time, apparently, the original plan was not in existence; it was worn out; but there was one plan, the McDonald plan,

which did not unequivocally shew such allowance, while there were two others, the Chewett and the Howard plans, which did so. They were all copies, and I think the proper conclusion from the language of the deed is that the original plan exhibited the allowance as described therein. This is made, as I think, irresistibly probable by the fact that even the McDonald plan shews a sufficient width for a street and a lot, both of the regulation width, at the east side of lot 12. It is also to be noted that the allowance is declared to extend to the River Don, and not merely to the marsh.

"The description in the deed to Jackson is as follows:—

'All that certain parcel or tract of land situate in the City of Toronto, being composed of part of the late Government Park Reserve and described on the plan of lots laid out by the trustees of the Toronto General Hospital endowment as lots Nos. 13, 14, 15, 16, 17, 18 and 19 on the south side of Front Street, and which may be otherwise known and described as follows, that is to say: Commencing on Front Street at the north-west angle of said lot No. 13, being at the junction of the southern boundary of Front Street and a street running south of said lot; thence south sixteen east to the water's edge of the River Don; thence along the edge of said River Don in an easterly and northerly direction to a line which would be formed by the continuation of the western boundary of East Street; thence along said line north 16 degrees west to the southern boundary of Front Street; thence along Front Street south 74 degrees west, 10 chains, 50 links, more or less, to the place of beginning.'

"By this deed the trustees convey seven lots de-

1905

GRAND TRUNK RY. CO. v. CITY OF TORONTO.

scribed on the plan of lots laid out by them on the south side of Front Street, and the description commences at the north-west angle of lot 13, being at the junction of the southern boundary of Front Street and a street running south of said lot. There could be no street running south of said lot, for that would be at the Don, but the description refers to a street forming the southern boundary of Front Street and running south, and there is no difficulty in construing it as meaning a street running south, not of, but along said lot. The width of the seven lots, 10.50 chains, would make each lot 1.50 chains, and would leave an allowance for a street west of 13 of the same width as the declared and admitted width of Cherry Street, on the north side of Front Street.

"I think this deed, like the deed to Jones, is a declaration that according to the plan there was an allowance for a road on the south side of Front Street, extending to the River Don, over the site in question. I think that even if the McDonald plan was shewn to be a true copy of the original plan, reading the plan with the deeds, the latter must be regarded as declaring that a sufficient part of the lot marked on the plan lying east of lot 12 was allowed, that is declared to be, for a road, and that such is the meaning of the plan. I think these two deeds were solemn declarations by the trustees of an intention that the land in question was then an allowance for a road and, dedication being always a matter of intention, were acts of dedication.

"The trustees have never since that time done any act to revoke or qualify the declarations contained in those deeds, and it is admitted that the land in question is now, and has been for many years, an undoubted highway, and it is clear it can only have be-

come so by dedication. The sole question is whether the dedication had become irrevocable before the railway company laid their track across it.

"It is in evidence that about the date of Jones' deed he was in occupation and built upon lot 12, and that between that date and the 29th December, 1855, the land was conveyed by and to successive owners six different times, besides as many mortgagees, in all of which deeds the allowance for road is referred to in the same terms as in the deed to Jones, and on the last mentioned date the then owner conveyed to the defendants a strip across 10, 11 and 12, thirty feet wide, lying 441 feet south of Front Street along the west side of Cherry Street. There was a plan attached to this deed and referred to in the description, which, however, has not been produced; and on the same day, by another deed referring to the west side of Cherry Street as its eastern boundary, Hutchinson conveyed to the defendants the remainder of the said lots.

"By another deed made the 22nd October, 1856, Dennis and Julia Riordan conveyed to the defendants a part of lot 9, fifty links in width, according to a plan annexed thereto, for their track, and this plan shews Cherry Street extending across the railway to the River Don.

"In like manner by a deed dated the 12th of February, 1858, made by Thomas Galt to the defendants, the seven lots conveyed by the trustees to Jackson were conveyed to the company by the same description as that contained in Jackson's deed.

"It thus appears that all parties interested in the adjacent lands, from and after the 19th of October, 1850, including the defendants, in their dealing therewith expressly recognized the existence of the allow-

1906

GRAND TRUNK RY. CO. v. CITY OF TORONTO.

ance for a road or street extending to the Don, and across what is now the right of way of the defendants."

His Lordship then dealt with the question of acceptance and decided that the evidence shewed user by the public sufficient to establish it.

W. Cassels K.C. for the appellants, referred to *London & Canadian Loan & Agency Co.* v. *Warin*(1).

Fullerton K.C. and *Johnston* for the respondents, cited *Gooderham* v. *City of Toronto*(2); *Mytton* v. *Duck*(3); *Rowe* v. *Sinclair*(4).

THE CHIEF JUSTICE.—I am of opinion that this appeal should be dismissed.

GIROUARD J.—This case involves no principle of law, but merely a question of fact. The City of Toronto asked to have it declared:

(*a*) That Cherry Street extends across and beyond the right of way acquired by the defendants;

(*b*) That Cherry Street was dedicated and used as and for and became a public highway prior to the acquisition and use by defendants of the said right of way.

The trial judge, MacMahon J., decided in favour of the railway company, but on appeal this judgment was reversed with costs (Osler, Maclennan and Maclaren JJ.).

I have gone over the reasons for judgment pro and con, and the numerous plans, maps and papers form-

(1) 14 Can. S.C.R. 232.
(2) 21 O.R. 120; 19 Ont. App. R. 641; 25 Can. S.C.R. 246.
(3) 26 U.C.Q.B. 61.
(4) 26 U.C.C.P. 233.

1906

GRAND TRUNK RY. CO. v. CITY OF TORONTO.

ing the case, and I do not see why the judgment of the Court of Appeal should be disturbed. The appeal should, therefore, be dismissed with costs, for the reasons given by Mr. Justice Maclennan.

Girouard J.

DAVIES J.—For the reasons given by Mr. Justice Maclennan in delivering the judgment of the Court of Appeal for Ontario I am of the opinion that this appeal should be dismissed and the judgment of the Court of Appeal confirmed.

I would add a few words only because I understand there is a difference of opinion in this court.

I think the evidence sufficient to shew that there was a dedication of Cherry Street as a public highway from Front Street south to the edge of the River Don in the grants given by the hospital trustees, the then owners in fee, to their several grantees of the lots on the east and west sides of this dedicated highway and in the plans referred to in the deeds.

I was in doubt during the argument whether there was sufficient evidence given of an acceptance by the public of this dedication.

A careful perusal of the evidence and of the several plans produced and a consideration of the arguments pro and con have convinced me that the evidence of acceptance by the public was ample. This evidence would, of course, have been ludicrously insufficient from which to presume a dedication of the highway. It was ample to prove acceptance of a highway dedicated by the owner to the public. It was, no doubt, the misunderstanding on the part of the trial judge as to the description in the deeds and plans shewing the dedication which led him to the conclusion that there was no highway there and on the assumption on which he proceeded of the absence of an

1906

GRAND TRUNK RY. CO. v. CITY OF TORONTO.

Davies J.

express dedication I think his conclusion was right. While the evidence was insufficient to shew an acceptance by the municipality as such it was ample as shewing an acceptance by the public.

It would, in my judgment, be absurd to hold that all the evidence given by Barnes and others of a user by the public of the dedicated road from Front Street down to the edge of the marsh prior and up to the construction of the Grand Trunk Railway should be limited to an acceptance of that part of the dedicated road only and should not extend to that small piece of the highway dedicated which crossed the marsh.

I think the evidence of the user applicable to the entire road dedicated, and that it could not be successfully contended that the public by their user intended to accept a kind of *cul de sac* excluding them from access to the river. I think, also, however, that there was evidence of such user of the road across the few feet of marsh as the nature of the conditions admitted.

When the Grand Trunk Railway purchased their right of way across this marsh bordering the Don, they knew well that the highway dedicated ran to the edge of the river.

The plan on Riordan's deed to them and the description in the deed from Galt to them in 1857 shews this beyond any doubt. They did not get nor attempt to get any deed of the land where the highway is contended to be from the hospital trustees or any one else, nor did the trustees attempt to obtain any compensation from the Grand Trunk Railway Co. for the taking of the lands, all of which is consistent with the understanding of all the parties as to the dedication and inconsistent with any other idea.

Some doubt existed at the argument arising out of a discrepancy between the copies of the two plans produced (13 and 16) as to whether the plan in the possession of the hospital trustees and by which they sold the property to purchasers shewed the prolongation of Cherry Street by dotted lines to the edge of the Don. That doubt has been removed by a statement since submitted to us as arranged at the argument, and I have dealt with the case on the assumption that the plan referred to does shew these dotted lines.

IDINGTON J. (dissenting).—Was that part of Cherry Street in Toronto, running from the northerly line of the appellants' right of way, to the south thereof, in 1857, a public highway?

Such is the issue we have to decide. It is of the utmost importance, in order that we may properly answer this question, that all happenings since 1857 be discarded.

In some cases the conduct of the litigants in relation to the issues raised has great weight.

One peculiarity of this case, and the issue it raises, is that the conduct of either party to the suit is unimportant.

The question is reduced to one, resting on the common law, in relation to dedication and acceptance thereof by the public.

We have to find a dedication by the hospital trustees who were owners of the fee and an acceptance by the public prior to the railway crossing in 1857, or not at all.

The respondents' council did nothing that can be held to have constituted, by or through their authority, an acceptance by the public.

1906

GRAND TRUNK RY. CO. v. CITY OF TORONTO.

Idington J.

The evidence of dedication by the trustees, who were the owners, rests entirely upon the grants by them of the parcels of land, of which one was granted to one Jones on the 19th October, 1850, the other granted to one Jackson on the 14th October, 1853. Each of the deeds evidencing these grants describes the parcels thereby respectively conveyed, first by numbers of lots

according to a plan of lots laid out by the trustees of the Toronto hospital endowment,

on the south side of Front Street, and then proceeds to further describe the same by metes and bounds. In the first of such descriptions by metes and bounds reference is made to an "allowance for road," and in the other and later one to "a street" which in either case can only refer to the land now in question.

I put aside for the present possible inferences from descriptions by metes and bounds, instead of resting on the numbers of the lots on an alleged plan, and the observations to which this dual description is here open, and also the difficulties in the description in one deed, and in the meaning to attach to the words "allowance for road" in the other.

Such grants, with such descriptions, are not necessarily to be taken as an unequivocal dedication. If there were nothing more two such grants, together, might be cogent evidence of and capable of shewing an intention to dedicate. Under the circumstances I am about to advert to, I am unable to find them in in that regard quite unambiguous.

The land conveyed to Jones in 1850 had, within the time from that to 1858, a building erected upon it and business carried on therein. But there is no evidence of the parties occupying the same or those doing

business with them entering the premises from the alleged Cherry Street side. Obviously there would be no necessity for using this alleged Cherry Street as the front of the lot faced on Front Street, which led to the business part of the city.

No fence was shewn to have been erected on the east side of this Jones property until the railway had crossed.

There seems to have been an erroneous impression in this regard in the Court of Appeal.

So far from a fence being on that side, the witnesses refer to this land as an open field. Of course in later times there was a fence on both sides of the land now claimed to have been a street.

This conveyance of land on the west side of the supposed street was, in itself, certainly no dedication. And nothing having been done by those claiming under this grant (save reconveying by the same words of description), to shew a claim to the street as such, we must take it that, at all events until the trustees made on the 14th October, 1853, the grant to Jackson of land on the east side of the land now in question, there could hardly be said to be the vestige of evidence of a dedication.

This grantee, Jackson, by deed of 13th March, 1857, conveyed with other lands

> lots Thirteen (13), Fourteen (14), Fifteen (15) Sixteen (16), Seventeen (17), Eighteen (18), Nineteen (19) on the south side of Front Street in the said City of Toronto

to Mr. Galt. There is no reference in this to the alleged street, no description by metes and bounds, and in short nothing to indicate a desire of preserving any right of way there.

That conveyance, without more, terminated all right of user of such a way as incidental to the

1906

GRAND TRUNK RY. CO. v. CITY OF TORONTO.

Idington J.

ownership of lot thirteen. It is not pretended that Mr. Galt or his clients, the appellants, were concerned in the use of, or used this way till after the construction of the railroad.

That, and what I have related, reduces the question of dedication and acceptance to the happenings between 14th October, 1853, and 13th March, 1857, a period of three years and seven months.

But within this period what do we find the alleged dedicators doing in relation to this land?

In June of the year 1846 the Registration Act, 9 Vict. ch. 34, sec. 33, was passed and enacted as follows:

> That any person, corporation or company of persons, who have heretofore, or shall hereafter survey and subdivide any land into town or village lots, differing from the manner in which, such lands were described as granted by the Crown, it shall and may be lawful for such person, corporation or company to lodge with the register of the county a plan or map of such town or village lots, shewing the numbers and ranges of such *lots, and the names, sites and boundaries of the streets or lanes by which such lots may be in whole or in part bounded, together with a declaration to be signed by such person, or by the lawful officer, agent or attorney of such corporation or company, that the said plan contains a true description of the lots and streets* laid out and appropriated by such person, corporation or company, and thenceforth it shall be lawful for the register to keep an index of the land described on such map or plan as a town or village, or part of a town or village, by the name by which such person, corporation or company shall designate the same.

We find that the trustees had a plan prepared for them, in the next year, 1847, by Donald McDonald. It is not explained why they delayed to register it. The later Act of 12 Vict. ch. 35, sec. 42, for the wider and more pressing purposes of surveyors and surveyings and assessment was enacted with a penalty for each year's default in registration of plans, shewing subdivisions. Probably this in time wakened up the

trustees. They from whatever cause acted, and registered in January, 1855, the plan prepared in 1847, which does not shew any extension of Cherry Street south of Front Street.

The presumption of law is that this was regularly done, and that the registrar did not, improperly, register it without the required declaration, but required that, and saw that it was properly registered.

Unfortunately, as this requirement of the statute escaped the attention of solicitors and counsel in this case, we are left to proceed upon the legal presumption only.

It is to be observed, that the plan shews, upon the face of it, a certificate of its correctness, signed by the chairman and secretary-treasurer of the trustees.

What weight should we give solemn acts, such as this declaration, this certifying, and this registration; which, if improperly done, and without a declaration, could not be said to have constituted a compliance with either Act, and would have left the trustees open to prosecution for penalties, and possibly worse if they had made a false declaration?

These solemn acts were done within about a year and three months from the execution of the deed which completed that upon which dedication is relied upon in the court below.

Should we infer these acts were done with criminal recklessness? Or should we not rather infer, that the deeds never were intended by the grantors to have the effect now given them?

Or in face of all this, and the peculiarity of the dual description, should we not rather infer, that there was an error on the part of the clerks preparing the deeds, or that something tentative or possibly conditional, binding only between the parties to the deed,

1906

GRAND TRUNK RY. CO. v. CITY OF TORONTO.

Idington J.

was what led to their containing those perplexing descriptions above referred to?

The least result of any possible answers to these questions must be to reduce this assumed unequivocal dedication to a something rather ambiguous, when we have to find and pass upon it, at this distance of time, in relation to the intention of gentlemen of education and respectability.

Need I go further? It seems to be clear law that before the public can take a man's property it must be clearly made out that his intention was to give it. Or at all events, the public acts claiming it must be of that open and well-known character that it is fair to infer he in truth and in fact assents to the taking.

In considering this question or purpose it has been well said, in the passage quoted by Mr. Justice Maclennan in his judgment herein,

> that a single act of interruption by the owner is of much more weight

than user by the public.

It seems these acts I advert to, as done by the trustees, ought to be held to have more than outweighed all, if anything, they have done before; and also the evidence of public user.

What is the evidence of public user that can be relied upon here either to support a dedication or an acceptance by the public of one?

Could the respondents have asked successfully, in 1857, for an injunction to restrain the trustees from withdrawing anything they had done, and enclosing the ground now in question; or could a trespasser have been indicted had he at any time up to the end of 1857 dug a hole in this alleged highway where the waters of the lake or river flowed over it?

Could any court have been got to listen and en-

join or convict on the evidence of such acceptance by the public as we have here?

These would seem to be not only fair tests, but the true tests open to any one then complaining of such supposed improper conduct.

The person digging could, perhaps, if this supposed dedication was incomplete by reason of non-acceptance, have been sued by the trustees for trespass.

Imagine such an application for injunction then, or such a prosecution by way of indictment then, and it seems to me, that the evidence of Cadieux, with his garrulous tales of hauling marsh hay and ice from the bay, and of Ward as to his going to school with his little boat, and his infirm and confused memory in regard to incidental details thereof as the only evidence of user of this part of the street, would not have supported either case.

It strikes me that such a case could hardly be listened to.

I have read, out of respect to the court that relied upon this evidence, these witnesses' testimony several times. I quit it each time wondering whether the memory of the old man or the younger one had furnished the most evidence of unreliability.

Both witnesses confuse, in several places, the happenings of before and after the making of the railroad crossing, and when one discards that which is not clearly referable to the times before the appellants' track was built there is little left, and that unimportant indeed. What signifies people hauling hay in ancient times before this street could have had any formation or appearance thereof? Who believes that this Cherry Street was, when an open field or com-

1906

GRAND TRUNK RY. CO. v. CITY OF TORONTO

Idington J.

mon along with all the land there, sacredly followed by people hauling hay, or ice either?

They doubtless went and came by the line of least resistance.

I refuse to believe that, without fences, marks, or stakes defining it, there was any divinity hedging about this swampy piece of land as that to be chosen for driving over. I could believe it if a man told me he found the creek frozen over and better sleighing on the ice than over the thicket formed by rushes and probably bushes that grow in a marsh. And if the plan is reliable such driving as is alleged would be along the very edges of the frozen marsh and creek, probably the most treacherous (by reason of rising and falling of stream breaking the ice) and dangerous part of the whole place.

Not until Barnes came there was there any fence on either side. The reference to the docks and other features of later times destroys much of these witnesses' evidence. It shews that their memories had not clearly retained what they saw before, but confused it with what happened after, the railway crossing.

I do not wish to cast any reflections upon either witness. Ward repeated time and again from beginning to end his want of confidence in his memory as to the exact time. And the old man Cadieux also says much the same, in places, of his own memory. When some witnesses are led by counsel, even if the process be checked, it weakens the confidence we might otherwise place in frail memories of long past events, in their relation to time and exact place in which they had no interest.

But what of the further evidence of James Barnes whose father is said to have owned and had a brickyard on this lot thirteen? I confess this is a puzzle.

1906

GRAND TRUNK RY. CO. v. CITY OF TORONTO

Idington J.

I have shewn that Jackson's title passed to Mr. Galt. Where did Barnes' title come in? I can find no deed to him or from him. No evidence is given of his ever having had any title but that which his son gives of his father's occupation.

There is also written across the plan Exhibit 16 the name Michael Barnes, but there is nothing to indicate what it means.

In most of the other cases, when the names are written on this plan across a lot or lots, the date of the deed is given.

It might be inferred from that sort of marking that the parties so named had become owners. But here that is not a safe inference and in this case it is precluded by the facts, already given, of the title having passed from the trustees to Jackson and from Jackson to Galt.

Can it be that Barnes was a lessee of the trustees or had enjoyed under them some temporary title such as a proposed purchaser?

Whatever it may mean I take it that on these facts his dealings with the lot all go for nothing as of any consequence in deciding truly the issue presented to us.

In all probability he was one of the hospital trust's lessees, who had the right to dig for clay and form brick there or thereabout.

And in the course of his business he possibly used a piece of this alleged Cherry Street extension, for ingress and egress, as part of his rights as lessee.

If that surmise be correct of course all that appears in his evidence to support a public user of this road, and that is attributable to such a purpose, is worthless. And it seems to me without any surmise, but without explanation, the same result must follow.

1906

GRAND TRUNK RY. CO. v. CITY OF TORONTO

Idington J.

I need not, therefore, deal with the son's evidence. Even if his father had been in Jackson's place in relation to the title it would be of little value.

Have we, in the surmise I make, an explanation of the allusion to a road allowance in one of the deeds and a street in the other?

I return to the main question of dedication to point out that the registered plan makes Cherry Street end at Front Street, whilst in the case of other streets such as East Street on one side and Mill Street on the other running parallel with the northern part of Cherry Street they run by this plan to the water.

As Mr. Justice MacMahon points out in his judgment the nature of the plan, by reason of the windings of the Don encroaching upon what would have been the further extension of Cherry Street, forbade the use of it as a street. It would seem also as if the creek or marsh, at least of the east side, was such as to forbid hope of making or preserving the extension of a street to serve usefully the rear end of the lots, in the condition of things at that early day.

And, as the judge I refer to has also pointed out, the width of the stream was such as to take up as much land as a street and then leave only enough of good land for one lot. I may add it was marked on the plan No. 13 by a marking No. 13 in the centre of the entire whole width of what is now presented as thirteen and a street.

Why should there be a street there? It was by reason of the Crown owning the land at the extreme south end, and that covered by water not deep enough to be navigable, a sort of *cul de sac.*

The authorities point out that in the case of a *cul de sac* the inference from acts of travel is not so clear as when over a thoroughfare.

Indeed the inference of such a dedication, by user, was held not legally possible, according to very high authority.

The later rule is to limit it to cases of clearer intention than requisite in relation to a thoroughfare.

In the view that there may have been user, by those owning the lots on either side, coupled with the form of deeds and description therein such as to create a dedication in itself, I would point out that to infer such a user is not open, and if it be open, that it clearly was a right exerciseable only by virtue of the easement that the deeds may have created in favour of those grantees and their assigns who chose to assert it.

That was something the public had nothing to do with. It did not rest necessarily upon a dedication to or for the public. It was not necessarily, standing alone, any evidence of dedication.

Such right as flowed or might flow from such a state of things could have been extinguished at any moment.

Street plans are daily set aside and the statute permitting and regulating that is but what existed before the statute.

Until the public has acquired a right by clear acceptance of a proferred dedication it can be withdrawn.

All that could have, by any possibility, supervened here in favour of the public to prevent such a withdrawal, must have taken place between the 14th of October, 1853, and such time in 1857 as the appellants' railway crossing was built.

When one takes into consideration the swampy nature of the ground, the encroachment of the creek, the absence of any need of such a street extension,

1906

GRAND TRUNK RY. CO. v. CITY OF TORONTO

Idington J.

the enormous expense that, with such a creek covering in parts most of the alleged allowance, it would have cost to make a road of it, we are (unless we attribute it to the owner's folly or mockery), I think I am bound to say, with the greatest respect, however, forbidden to believe that they must be held by doing and submitting to all that appears in evidence, to have had the intention of dedicating a street here.

It is to be observed that what I just expressed as to the nature of the ground may not have been applicable to the small part at the north end. If there had been any room for finding, otherwise than as I view the case, a dedication from evidence of the user *alone* it would have, even if possible, only extended to the part so used as to give such a right.

Then as to the plan on the back of the deed the appellants and their omission to expropriate this street in the course of getting right of way, why should we attribute to that any weight?

We must test it, if worth anything, by the excellent test of its admissibility as a piece of evidence in the event of a suit or prosecution (with which appellants had nothing to do) such as I have supposed to have been possible to have taken place in 1857.

It could not, I think, have been admitted in such a case, and being inadmissible there, for such a purpose, is of no avail now.

I repeat we are trying not these litigants, but the possible rights of possible litigants in 1857 when the public right as it existed then must be the test. The exact date of the crossing is doubtful and counsel left it to be taken as in 1857.

On the whole I am unable to find that evidence here existed up to 1857, that would, within the cases, constitute such dedication and acceptance of the intended

dedication, if such there were, as would in law constitute all or any part of the land in question, from the northerly line of the appellants' road allowance to the water, a public highway. The inexpediency of having highways for whose repair no one can be held responsible, should in this country prevent any further recognition of the creation of highways by way of dedication than can be avoided, where the municipal councils have not recognized them. See Angell on Highways, pp. 178 to 183.

The cases of *Wimbledon & Putney Commons Conservators* v. *Dixon*(1); *Cowling* v. *Higginson*(2); and *Selby* v. *Crystal Palace District Gas Co.*(3), illustrate the principles that must be kept in view in weighing acts of user; especially such as may have resulted from occupations like those of Barnes and others, and what user, resting on covenants or provisions in deeds, may be implied as standing for.

In my opinion this appeal should be allowed, and the judgment of the trial judge be restored, with costs here and in all the courts below.

Appeal dismissed with costs.

Solicitor for the appellants: *W. H. Biggar.*

Solicitor for the respondents: *Thomas Caswell.*

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(1) 1 Ch. D. 362.
(2) 4 M. & W. 245.
(3) 30 Beav. 606.