1914
*Oct. 29.
1915
*Feb. 2.

ALEXANDER ROWLAND (PLAINTIFF) ..... APPELLANT;

AND

THE CITY OF EDMONTON AND OTHERS (DEFENDANTS) ..... RESPONDENTS.

ON APPEAL FROM THE APPELLATE DIVISION OF THE SUPREME COURT OF ALBERTA.

Highway—Old trails of Rupert's Land—Survey—Width of highway—Construction of statute—60 & 61 V. c. 28, s. 19—"North-West Territories Act," s. 108—Transfer of highway—Plans—Registration—Dedication—Estoppel—Expenditure of public funds.

The plaintiff's lands, held under Crown grant of 1887, were bounded on the south by the middle line of Rat Creek (now in the City of Edmonton) and were traversed by one of the "old trails" of Rupert's Land, known as the "Edmonton and Fort Saskatchewan Trail." Upon instructions, under section 108 of the "North-West Territories Act," as enacted by 60 & 61 Vict. ch. 28, sec. 19, that portion of the trail was surveyed and laid out on the ground by a Dominion land surveyor shewing its southern boundary approximately as Rat Creek and thus giving it a width upon the plaintiff's lands in excess of the sixty-six feet limited by this section. The plan of this survey was not shewn to have been approved by the Surveyor-General nor was it filed in the land titles office as required by the statutes in force at the time.

Held, reversing the judgment appealed from (28 West L.R. 920), that the statute gave the surveyor no power to increase the width of the highway authorized to be laid out by him; that the approval of the Surveyor-General and the filing of the plan in the land titles office were necessary conditions to the transfer of the trail as a public highway and, consequently, the land comprised in the augmentation of the highway remained vested in the plaintiff.

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*PRESENT:—Sir Charles Fitzpatrick C.J. and Idington, Duff, Anglin and Brodeur JJ.

Plaintiff sold part of his lands, described as bounded by the northerly limit of the surveyed trail, and, subsequently, the purchasers, and persons holding lands south of Rat Creek, filed plans of subdivision shewing the surveyed trail as of the full width given by the surveyor. The city also claimed to have expended moneys in improving the roadway at the locality in question.

Held, that the registration of the plans of subdivision, made without privity on the part of the plaintiff, was not binding upon him, and that there was not such evidence of expenditure of public moneys or of conduct by the plaintiff — by recognizing the plans as filed — as could preclude him from claiming the lands encroached upon or compensation therefor.

APPEAL from the judgment of the Appellate Division of the Supreme Court of Alberta(1), reversing the judgment of Harvey C.J., at the trial, and dismissing the plaintiff's action with costs.

In the circumstances stated in the head-note, the plaintiff brought the action for an injunction restraining the City of Edmonton from trespassing or interfering with that portion of the lands comprised in the augmentation of the trail in question, as laid out by the surveyor, south of a line parallel to and sixty-six feet distant from the northern limit thereof, and order vesting such portion in him as the legal owner thereof, an order rectifying the plan of survey, damages and such other and further relief as the nature of the case might require. The other defendants were added for the purpose of enabling them to be heard so far as their rights might be affected.

The plaintiff's action was maintained by His Lordship Chief Justice Harvey, at the trial, and his decision was reversed by the judgment now appealed from.

(1) 28 West L.R. 920.

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Ewart K.C. and *G. B. O'Connor* for the appellant.

Bown K.C. and *O. M. Biggar K.C.* for the respondents.

The Chief Justice.

THE CHIEF JUSTICE.—I can find no evidence of dedication by the plaintiff, appellant, and there certainly is no justification for reversing the trial judge on this finding of fact. As was said by Fournier J., speaking for this court, in *Chamberland* v. *Fortier* (1), at page 380:—

> Les formalités prescrites par nos status pour l'ouverture des chemins et l'expropriation des particuliers pour la construction des chemins, doivent être rigoureusement observées, sous peine de nullité, comme l'ont décidé nos cours.

As pointed out by Mr. Justice Idington, the requirements of the local statute were not complied with and the mere grant or spending of a sum of money by the Government and the municipality on the plaintiff's land to build a highway does not create a presumption *juris et de jure* in favour of dedication even if acquiesced in by the owner. The mere user by the public does not create a presumption of grant or dedication. In order to constitute a valid dedication to the public of a highway by the owner of the soil it is clearly settled that there must be an intention to dedicate, there must be an *animus dedicandi* of which the user by the public is evidence, and no more. *Mann* v. *Brodie* (2), at page 386. See also *Folkestone Corporation* v. *Brockman* (3).

The appeal should, therefore, be allowed with costs here and in the courts below and the judgment of the trial judge restored.

(1) 23 Can. S.C.R. 371. (2) 10 App. Cas. 378.
(3) [1914] A.C. 338.

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IDINGTON J.—The appellant seeks to enjoin respondent from trespassing on certain lands which were granted by the Crown to him in 1887, when part of the North-West Territories, but which are now in Alberta. By virtue thereof he became registered owner on the 15th of June of said year. Over part of these lands there was a trail known as the "Edmonton and Fort Saskatchewan Trail." Prior to said grant there had been enacted the "North-West Territories Act." It had then become chapter 50 of the Revised Statutes of Canada, 1886. By section 108 thereof the Governor-in-Council, upon notice from the Lieutenant-Governor that it was considered desirable that any particular thoroughfare or public travelled road or trail, in the territories, which existed as such prior to any regular surveys should be continued as such, might direct such to be surveyed by a Dominion land surveyor and thereafter might transfer the control of each thoroughfare, public travelled road or trail, according to the plan and description thereof, to the Lieutenant-Governor in Council for the public uses of the territories.

The grant of said lands to appellant probably was subject to the exercise of said power.

Said section 108, however, was repealed by 60 & 61 Vict. ch. 28, sec. 19, which was substituted therefor.

This later enactment was much longer and more specific in regard to what might be done under it, and provided a number of steps to be taken in respect to the results of such a survey before its becoming effective. Amongst other things to be done with the return of such a survey was the filing of it in the land titles office for the district. It seems clear that it was not until that and other things were done that the road or

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trail so surveyed could be transferred to the Lieutenant-Governor for the use of the territories, and even then it was subject to any right which might have been acquired under letters patent issued previously to such transfer.

Sub-section 2, of said section 19, is as follows:—

> 2. The width of such road or trail shall be one chain or sixty-six feet; and in making the survey, the surveyor shall make such changes in the location of the road or trail as he finds necessary for improving it, without, however, altering its main direction.

It is exceedingly doubtful in face of the certificate of title, which in absence of the letters patent is our only guide to contents thereof, if there ever could have been a survey made under this section interfering with the apparently absolute grant to the appellant. But it is shewn that in fact a Dominion land surveyor, in 1901, did make a survey of this trail, but how he came to do it or by what authority he presumed to do it is not explained. He was called as a witness and tells, amongst other things, that when done the plan thereof was sent to Regina.

The said section 19 required any such return when approved by the Surveyor-General to be filed in the Department of the Interior. Nothing of that kind seems to have been done or attempted. It never was filed in the district registry office and it seems quite clear that it was null as regards any legal effect herein or elsewhere as governing the right of any one.

It is simply because it seems to have been one of the many curious things put forward in answer to appellant's claim herein, as helping to establish an alleged dedication by him or something that might estop him from claiming the part of his land so granted, now in question, that I notice this proceeding alleged to have been taken under said statute.

He sold ten acres of his lands to a Mrs. Sinclair, and in his deed thereof, as appears by the certificate of title to her in 1902, described same as bounded in part by the northern boundary of a surveyed road along the north side of Rat Creek. A plan of this part was drawn by same surveyor and is said to have been annexed to the deed.

It appears that in the plan of survey of the said trail the said surveyor had taken it upon him to make the proposed road allowance nearly two chains wide at this part instead of only one chain as the statute required, and this illegal and improper dealing with another man's property, without calling his attention to it or asking his consent, it is claimed so appears on the plan as to constitute an act of dedication by him.

The deed was sent to him at Battleford, where he lived, for execution and then executed and returned. The marking of road allowance or boulevard thereon can be under such circumstances no evidence of dedication of this part of the land in question or foundation for any estoppel.

Then in 1903 the appellant agreed to sell to McDougall & Secord the remainder of said lands at so much an acre and, in course of that transaction, came to discover, by reason of the amount of acreage, that would have to be paid for by the purchasers that he was short of the price he expected. That led to correspondence with the Department of the Interior demanding compensation, answered by referring him to provincial authorities, who failed to recognize that way of looking at matters. He was forced, by these circumstances, to conclude his bargain by deducting from the price the acreage cut off by this illegal survey. And in his deed, as I infer from the certificate of

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title issued to McDougall & Secord, the land sold them was described by describing his original grant of lands and excepting therefrom that ten acres sold to Mrs. Sinclair

and also saving and excepting thereout a surveyed road crossing the said land hereby described.

It is again said this was a dedication, I fail to find anything therein of dedication. Some people might be tempted to call it something else if anything but blundering of some one.

The appellant lived at Battleford still and so executed the deed there, but never abandoned in any way his right to the property.

No one acting on behalf of the respondent ever had occasion to consider these deeds or registrations or is able to say he acted upon them, and thus as an estoppel enuring to respondent it is out of the question for it to claim thereby.

The legal presumption that every one is supposed to know the law might well, coupled with the fact of a trail having existed there, be supposed to have probably induced appellant to be reconciled to losing sixty-six feet in width for a road such as the statute above quoted seemed to make a possible provision for.

Even if in strict law it could not have been at one time forced from him, there were other considerations such as his sale to these people, needing a road, which may well be looked at as tending to constitute a dedication or laying a foundation for inferring that much.

But beyond that I fail to see how it is possible to find in this appellant's conduct anything which could be fairly construed into an actual dedication by him of anything more than the common width of road al-

lowance so generally and extensively in use in the west.

The defendant's streets did not then extend out there, and no inference can be drawn in law from what has transpired since in way of offer to dedicate or accept such dedication beyond the said sixty-six feet in width.

Defendant has since, on the north part of this land, but in no way extending further south from the said northerly limit of the surveyed land than sixty-six feet, expended some money thereon to render it a highway.

It has been travelled upon that much but the remainder now claimed herein is a founderous piece of land unfit for use as a road.

The expenditure of public money may, under the statute, constitute so much of the land as so improved thereby, a public highway, but not beyond.

The appeal should be allowed with costs here and in the courts below and the judgment of the learned trial judge be restored.

DUFF J.—I concur in the result.

ANGLIN J.—The plaintiff, whose title under a Crown grant of 1887 to the land in question, lying along the north side of Rat Creek and extending to the middle of the bed of the stream, is admitted, unless that land has subsequently become part of a public highway, charges trespass by the defendants the Corporation of the City of Edmonton. The other defendants are owners of lots lying to the south of Rat Creek. The defendants all assert that the land in dispute became part of a public highway by virtue of a survey

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made, in 1900, by one Driscoll under section 108 of the "North-West Territories Act," as enacted by 60 & 61 Vict. ch. 28, sec. 19; that by two conveyances made by him the plaintiff dedicated this land as a highway; that as a result of these conveyances and certain registered plans which shew the land in question as part of a highway he is precluded from asserting title thereto: and that by the expenditure of public moneys thereon by the defendant municipal corporation its character as part of a highway has been confirmed.

In making his survey Driscoll ignored the provision of section 108 limiting the width of the highway, thereby authorized to be laid out, to 66 feet. He laid out a road at some points three chains wide. I cannot accept the view that he had some discretion as to the width to be given to the highway. So far as I can find there is no evidence that Driscoll's plan ever received the approval of the Surveyor-General, although Mr. Justice Beck states that it was "approved by the department at Ottawa on the 11th October, 1904." The learned appellate judge apparently based this statement on some initials and figures — "P.W.C.; 11, 10, '04" — which appear on one corner of Driscoll's plan produced from the department; at least I have found nothing else in the record to sustain it. There is no evidence to shew what these letters and figures signify — certainly nothing to warrant the conclusion that they indicate approval by the Surveyor-General. Nor was a copy of Driscoll's plan ever filed in the land titles office of the district as the statute prescribes. It is only upon these things being done that section 108 authorizes the transfer of the road or trail so surveyed "by the Governor in Council for the use of the Territories." This transfer, it is asserted, and not denied,

was not made. The old "Fort Trail" had been transferred to the territories by order-in-council of the 16th May, 1895. But it did not include the land now in question.

The evidence shews that the northern boundary of the projected highway as laid out by Driscoll across the plaintiff's land followed approximately the northern boundary of the old "Fort Trail" and, notwithstanding the omissions above stated, the plaintiff recognizes the public right to a highway, across what was formerly his land, of the statutory width, having as its northern boundary the northern boundary of the projected highway as laid out by Driscoll. It is the land to the south of this highway 66 feet wide, and between it and Rat Creek, that he claims.

The judgment of the learned Chief Justice of Alberta, who tried the action, upholding the plaintiff's title to the land in question, accordingly limited his recovery, as appears in the following paragraphs:—

> This court doth order and adjudge and declare that the plaintiff is entitled to the lands described in the pleadings, that is to say: All that part of the Edmonton and Fort Saskatchewan trail as shewn upon a map or plan of the said trail prepared by Alfred Driscoll, D.L.S., and of record in the Department of Public Works in the Province of Alberta, in the westerly 25 chains of section nine (9), in Township fifty-three (53), range twenty-four (24), west of the fourth meridian, in the Province of Alberta, lying to the south of an imaginary line parallel to and 66 feet south of the northern limit of the said trail.
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> 3. And this court doth further order that the said plan of the said trail be rectified by substituting for the southern boundary of the said trail in the said section nine (9) as shewn on the said plan, a line drawn parallel to and 66 feet south of the northern boundary of the said trail as shewn on the said plan.

In order to deprive the plaintiff of the land lying between the highway thus defined and Rat Creek,

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which was admittedly included in his grant from the Crown, much clearer authority than is afforded by the statutory provision invoked would be required and a much more precise compliance with its provisions than has been shewn would have to be established.

None of the persons entitled under the plaintiff's grants to Sinclair and McDougall & Secord are parties to this action. Whatever right by way of estoppel or otherwise they may have (if any) cannot be asserted by the present defendants.

The plaintiff appears to have made some demand early in 1904 for compensation in respect of the appropriation of three acres of his land; but his claim was rejected and there is nothing to shew that he ever intended to dedicate the strip now in question gratis to the public. On the contrary, on the 21st June, 1904, he wrote to the department to know if it intended to cancel the survey of the "Fort Trail," and in reply he received a letter, dated 2nd July, 1904, stating that this trail had been transferred to the territories by order-in-council of the 16th May, 1895. Of course that transfer did not cover the land now in dispute.

The registration of plans to which he was not a party shewing lands of other persons lying to the south of Rat Creek as bounded by a highway lying to the north of the creek and extending to its centre line did not bind the plaintiff. There is nothing to shew that Driscoll's highway or esplanade extended south of the north bank of the creek. It, therefore, does not appear that any of the defendants or any other person who has bought lands upon the plans referred to has a frontage upon, or a direct right of access to, the highway in question. Nor does the evidence at all satisfactorily establish that any purchaser of such

lands bought in the belief that he had a frontage on that highway.

The plans filed by Mrs. Sinclair and McDougall & Secord subdividing parts of the lands purchased by them from Rowland, shew the esplanade as laid out by Driscoll. But, I am, with respect, unable to accept the reasons advanced by Mr. Justice Beck as warranting the view that the plaintiff was bound by the registration of these plans in respect of land owned by him and improperly included in them, although they were not signed by him as an owner as is required by sub-section 1 of section 124 of the Alberta "Land Titles Act" (chapter 24 of 1906). Although the certificates of title of Sinclair and McDougall & Secord, which have been produced, shew sales to have been made by them of parts of the lands purchased from Rowland, they do not establish sales or mortgages according to the registered plans of subdivision relied upon, if, indeed, that would suffice, under sub-section 2 of section 124 of the "Land Titles Act," to make the plans binding on the plaintiff without his signature in respect of land belonging to him and improperly included in them. In view of the requirements of sub-section 1 of section 124, I think it would not.

Expenditure of public moneys on the land in question is not established. The evidence is quite too vague and indefinite (*Township of St. Vincent* v. *Greenfield*(1)), except as to a sewer; and, for aught that appears to the contrary, no part of the sewer is north of the middle line of the bed of Rat Creek. The admission relied upon by the defendants rather indi-

(1) 12 O.R. 297, at pp. 306-7; 15 Ont. App. R. 567.

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cates that it lies wholly under the south half of the bed of the creek and land adjoining to the south.

For these reasons and those assigned by Mr. Justice Stuart in his dissenting opinion I think the conclusion reached by the learned trial judge was right and that his judgment should be restored. The plaintiff should have his costs in this court and in the Appellate Division of the Supreme Court of Alberta.

BRODEUR J.—A land surveyor, who was supposed to be acting under the provisions of the law, surveyed a trail and, at the place in question, the roadway so surveyed exceeded the 66 feet provided by the law. The owner of the property subsequently sold his property to different persons and never claimed then any right in the part of the roadway which exceeded the 66 feet.

This roadway is now one of the streets of the City of Edmonton and has necessarily acquired a great value. The plaintiff, appellant, claims the ownership of the piece of land which is left, those 66 feet being deducted.

The evidence is not very satisfactory as to whether this piece of land had been dedicated for the roadway or not. It is true that the land surveyor had mentioned it on his plan and that in selling his property the appellant had referred to that plan. But it cannot be said and maintained that this man formally dedicated this piece of property and nobody can be deprived of his rights without his consent, or without the provisions of the law.

There is no consent proved and the law cannot be

construed as depriving him of his right in connection therewith.

For these reasons, I would allow this appeal with costs.

Appeal allowed with costs.

Solicitors for the appellant: *Griesbach, O'Connor & Co.*

Solicitor for respondent, the City of Edmonton: *John C. Bown.*

Solicitors for respondent, W. D. McPhail: *Macdonald & Grant.*

Solicitors for the other respondents: *Parlee, Freeman & Abbott.*