1916
*Nov. 13, 14.
1917
*Feb. 6.

H. HARVEY (DEFENDANT) ..... APPELLANT;

AND

THE DOMINION TEXTILE CO. (PLAINTIFF) ..... RESPONDENT.

ON APPEAL FROM THE COURT OF KING'S BENCH, APPEAL SIDE, PROVINCE OF QUEBEC.

Highways — Dedication — User — Prescription — "Chemin de tolérance" —Municipal road—Constitutional law—"Municipal and Road Act of Lower Canada," (C.) 1855, 18 Vict., c. 100, s. 41, ss. 8 and 9—Arts. 749 and 750, Municipal Code.

Per Davies, Idington and Anglin JJ.—The sub-sections 8 and 9 of 18 Vict. c. 100, s. 41, are still in force; but

Per Davies, Anglin and Brodeur JJ.—These sub-sections are applicable only to roads which had been in existence and in public use for ten years before the first of July, 1855. Fitzpatrick C.J. *dubitante.*

Per Fitzpatrick C.J. and Brodeur J.—The road in question in this case, being opened at its extremities and having a fence on one side and a sidewalk on the other, meets all the requirements enumerated in article 749 of the Municipal Code in order to be declared a public road. Davies and Anglin JJ. *contra.*

Per Fitzpatrick C.J. and *Semble, per* Anglin J.—A public right of way may be constituted in the Province of Quebec by direct or indirect dedication. Brodeur J. *dubitante.*

Semble, per Brodeur J., that dedication, presuming a donation of the soil, would be illegal in the absence of a deed. (Art. 776 C.C.). Anglin J. *dubitante.*

Semble, per Anglin J.—Even if the road in this case was a municipal road within articles 749 and 750 of the Municipal Code, the owner, having retained the property of the soil, may exercise the right to close it or to forbid its use as a "chemin de tolérance." Brodeur J. *contra.*

Per Brodeur J.—A road may become the property of the municipal corporation when used by the public and the municipal corporation during thirty years (art. 2242 C.C.); and not only the right of way, but the fee itself in the soil becomes the property of the public (art. 752 C.M.).

Judgment of the Court of King's Bench affirmed on equal division of the court.

APPEAL from a judgment of the Court of King's Bench, appeal side, Province of Quebec, reversing the

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

judgment of the Superior Court sitting in review, at Quebec, restoring the judgment of the trial judge, Malouin J. and maintaining the respondent's action.

The material facts of the case are fully stated in the judgments now reported and more specially at the beginning of the reasons of Mr. Justice Anglin.

Alex Taschereau K.C. for the appellant.
A. Rivard K.C. for the respondent.

THE CHIEF JUSTICE.—The action is really for trespass although referred to throughout as an *action négatoire*. No question of servitude arises, the plaintiffs, now respondents, complain that the defendant entered on their land and pulled down some fences. The appellant, defendant below, pleads that there is a road across the plaintiffs' property which he is entitled to use as one of the general public. It is admitted that the road exists and has been for some years used as a thoroughfare by the public on sufferance, as alleged by the plaintiffs and as of right as the defendant contends, and that is the sole issue.

The road was admittedly laid out and built by the plaintiffs, and to succeed the defendant must shew that it became a public highway, either by dedication or by prescriptive user during the statutable time;—assuming the statute of Canada 18 Vict. ch. 100, sec. 41, sub-secs. 8 and 9 to be in force and applicable.

My brother Brodeur discusses so ably and fully the legal effect of articles 749 and 750 M.C. that it will be unnecessary for me to do more than refer to what he says on that aspect of the case.

Were it not for the judgment of the Court of Queen's Bench in *Mignerand dit Myrand* v. *Légaré*(1), I

(1) 6 Q.L.R. 120.

1917
HARVEY
v.
DOMINION TEXTILE CO.
The Chief Justice.

would be disposed to doubt that the principle of dedication as applied in English law is known to the civil law, and to hold that, in the absence of statute, the right of road in Quebec must be based upon the fact of user by the public, as a matter of right, for the full period of the long prescription, thirty years. Contrary to the rule of the English law when a road became a public highway in Quebec the soil of the road was, before the Municipal Code, vested in the Crown; arts. 400 C.C. and 743 M.C. *De la Chevrotière* v. *La Cité de Montréal*(1); and a deed of gift must under pain of nullity be executed in notarial form (art. 776 C.C.). But the rule in *Mignerand dit Myrand* v. *Légaré*(2) has been adopted and followed in the Quebec Courts so universally and for such a length of time that it must now be accepted as definitely fixing the law and I feel bound to hold that a public right of way may be constituted in Quebec by direct or indirect dedication.

As Dorion C.J. said in *Mignerand dit Myrand* v. *Légaré*(2):

> C'est aux tribunaux à juger si, d'aprés les circonstances, le public a joui d'un chemin assez longtemps pour *faire présumer* que le propriétaire en a fait l'abandon.

There has been considerable diversity of opinion amongst the judges of the courts below. I have perused those opinions with much advantage and have with great care considered the opinions of those from whom I differ. In the result I have come to the conclusion that the judgment of the Court of Review is right and should be restored.

The learned trial judge seems to have assumed that in the absence of evidence of direct dedication made by deed or declaration of the owner the public could

(1) 12 App. Cas. 149, at p. 159. (2) 6 Q.L.R. 120.

acquire no right in the highway. He does not appear to have considered the possibility of an implied dedication presumed from an acquiescence by the owners in the use made by the public of the highway which they themselves laid out. The uniformly accepted doctrine is thus expressed in Smith's Leading Cases (1915), volume 2, page 166:—

> Except where it is expressly created by statute, a highway derives its existence from a dedication to the public by the owner of land of a right of passage over it. This dedication, though it be not made in express terms, as it seldom is, may and generally will be presumed from an uninterrupted use by the public of the right of way claimed.

In *Rex* v. *Lloyd*(1), it was held:—

> If the owner of the soil throws open a passage, and neither marks by visible distinction, that he means to preserve his rights over it, nor excludes persons from passing through it by positive prohibition he shall be presumed to have dedicated it to the public.

In *Mann* v. *Brodie*(2), Lord Blackburn quotes the passage in *Poole* v. *Huskinson*(3), where Baron Parke states the principle of the law and then says:—

> But it has always been held that where there has been evidence of a user by the public so long and in such a manner that the owner of the fee, whoever he was, must have been aware that the public were acting under the belief that the way had been dedicated, and has taken no steps to disabuse them of that belief, it is not conclusive evidence, but evidence on which those who have to find the fact may find that there was a dedication by the owner whoever he was.

And in *Folkestone Corporation* v. *Brockman* (4), Lord Atkinson, at page 368, referring to Taylor on Evidence, 9th edition, par. 131, adds:—

> The statement of the law in that paragraph is perfectly accurate, and is supported by the six authorities mentioned in the notes. It is to this effect that the uninterrupted user of a road justifies a presumption in favour of the original *animus dedicandi* even against the Crown.

The doctrine of dedication, as had been recently said, is based in all the decided cases, upon the proposition that a person cannot lead the general public

(1) 1 Camp. 260 at p. 262.
(2) 10 App. Cas. 378, at p. 386.
(3) 11 M. & W. 827, at p. 830.
(4) [1914] A.C. 338.

1917
HARVEY
v.
DOMINION TEXTILE CO.
The Chief Justice.

or a local public, to base their action, and build up their fabric of life upon the theory of permission of a certain kind, on his part, in respect of his land, and when they have thus accommodated their affairs to this expectation, violate the confidence thus invited. I admit, of course, with my brother Anglin, that theoretically there must be intention on the part of the private owner, but such intention may be and in almost every instance is, shewn exclusively by his physical acts; and the requirements of intent on his part is hardly more than theory. Indeed, the private owner's action is ordinarily such that he would be estopped to deny the existence of an intention on his part.

In that view of the law, are we, in presence of the conflicting findings of fact in the courts below, in a position to say, that the defendant, upon whom lay the burden of proving dedication, has satisfied his obligation? As Sir Montague Smith said in *Turner* v. *Walsh*(1):—

> The proper way * * * is to look at the whole of the evidence together, to see whether there has been such a continuous and connected user as is sufficient to raise the presumption of dedication; and the presumption, if it can be made, is of a complete dedication, coëval with the early user. You refer the whole of the user to a lawful origin rather than to a series of trespasses.

Considering the whole evidence in the light of that doctrine and with great deference for the opinions of those who differ from me, I am driven irresistibly to the conclusion that the defendant has made out his defence.

The facts proved and as to which there is practically no dispute are: that the plaintiff company, owners of large cotton mills, for their own benefit and incidentally for the convenience of their employees, built upon the lot of land known in these proceedings under the

(1) 6 App. Cas. 636, at p. 642.

No. 59 (a), and across which the road in question runs, two rows of houses facing the river and separated by a road. To enable the employees, occupants of the houses, to reach the mills situate below, on the shore of the river in the village of Montmorency Falls, a road or way was necessary. But it was equally important that those employees should have a means of access to the public road above known as "Côte à Courville" which winding down the hillside led from the village known as St. Louis de Courville to Montmorency village. Otherwise they would be cut off from communication with the centres upon which they were dependent for the daily needs of themselves and their families. All their purveyors, such as the baker, butcher, etc. lived in those villages. To provide those necessary conveniences, a macadamized road 36 feet wide was built. This road started from the "Côte à Courville" to the north and continued down below the houses built for the employees where it was connected with a plank boardwalk which in turn opened into a stairway leading down the steep hillside to the public road below. So that the company built a continuous way leading from one public road to another and which is proved to have been travelled for 14 or 15 years openly, freely and without objection during all seasons and at all hours of the day and night, not only by those who had business with the company's employees but also as a way of access to the villages of Montmorency Falls and St. Louis de Courville.

The plaintiffs, respondents, in their factum say that as originally built the road did not extend to the brink of the hill and that up to June, 1905, it terminated at

1917
HARVEY
v.
DOMINION
TEXTILE
CO.
The Chief
Justice.

a grassy ground where the children of the employees could play and amuse themselves at ease and that that construction of the stairs is posterior to 14th June, 1905.

Admitting this to be the fact, there may be a highway through a place which is no thoroughfare, as Campbell C.J. said in *Bateman* v. *Bluck*(1). Take the case of a large square with only one entrance, the owner of which has, for many years, permitted all persons to go into and round it; it would be strange if he could afterwards treat all persons entering it, except the inhabitants, as trespassers. That case seems to be on all fours with the case which the plaintiff company present in their factum. But in fact it appears by the plans filed and from the description of the locality given by the witnesses that without the stairs the road would not give the employees the convenience of access to the mills; which was the chief object of the company. And one rather expects to hear such witnesses as Mailloux, the superintendent of the mill, Coté who actually built the stairs for the company, and Curé Ruelle who sold them the land, frankly say, when examined as witnesses, that the stairs were built at the same time as the houses, that is to say, 14 or 15 years before the suit was brought.

We have therefore a road built by the plaintiffs admittedly to connect the "Côte à Courville" with another public road at Montmorency village having all the outward physical characteristics of a public highway, without a gate, barrier, sign-post or anything to indicate an intention on the part of the proprietor to limit its use. It is also in evidence that the road was used from the very beginning not only by the local public for their convenience but also by those who travelled by the electric railway to and from

(1) 18 Q.B. 870, at p. 876.

the City of Quebec. Leclerc, the instigator of this suit says, in answer to a question:

Il vient des voitures de tout bord et de côté.

Curé Ruelle says in effect, when examined for the plaintiffs, that this road is used by the public in preference to the "Côte à Courville," because it is a short cut, and without objection until these proceedings were started. It is also worthy of notice, as evidence of the intention of the owners of the land to dedicate to the public the highway they had opened, that they did not reserve the use of all the lodgings in the buildings for their employees. One of the tenements was rented to a grocer named Vachon, who did business with all those from the outside that he could reach, and it is proved that scores of people, who had no connection whatever with the company or its employees, used the road to come to his store. To the east of the highway in question, an hospital and a laundry had been built with access to the road, and those who had business with either used the road at will. The appellant Harvey had a blacksmith shop on the land he still occupies and he tells us that the public used this road without let or hindrance to reach that shop which was afterwards rented to Vachon, the company's tenant, and he, Vachon, used it as a storehouse to which his customers from the outside had access. It would be difficult to find a case in which a highway had been used more universally and for more varied purposes by the people of the neighbourhood. If, as the evidence establishes, the company built a road of the regulation width, of the material usually employed in the construction of public thoroughfares to connect two public municipal roads and permitted the general public to use it as of right for over 12 years,

1917
HARVEY
v.
DOMINION TEXTILE CO.
The Chief Justice.

the presumption of dedication is in my opinion irresistible. In *Dovaston* v. *Payne*(1), eight years' user was held to shew sufficient acceptance and in the much litigated case to which I have already referred of *Bateman* v. *Bluck*(2), six years sufficed. The creation of a public lane in private land by informal dealings of the land owner with the public over as short a period as eighteen months, was held sufficient. In *North London Rly. Co.* v. *Vestry of St. Mary*(3), and in *Reg.* v. *Petrie* (4), the Court permitted a jury to find an instantaneous dedication. Mere occasional use had been held to support a title in the public, *Mildred* v. *Weaver*(5).

There is no evidence here that the company ever seriously objected to the use of the road by the public as of right. It is on the contrary established that this whole difficulty has arisen out of a conflict between one of the tenants of the company, not an employee, who complained of the business competition the defendant gave him.

I am of opinion that there has been such evidence of user by the public of the right of way with the acquiescence of the owner as to justify the defendant's plea and that this appeal should be allowed with costs.

DAVIES J.—The substantial question between the parties to this appeal is whether a certain roadway running through plaintiffs' land was a public road or not.

There was much difference of judicial opinion in the courts below, the trial judge holding the roadway not to be a public way, the Court of Review reversing that judgment and holding it to be a public

(1) 2 Sm. L.C. 154.
(2) 18 Q.B. 870.
(3) 27 L.T. 672.
(4) 4 El. & Bl. 737.
(5) 3 F. & F. 30.

way and the Court of King's Bench (Pelletier J. dissenting) in turn reversing the latter judgment and restoring that of the trial judge.

The appellant relied largely upon the statute of Canada 18 Vict., ch. 100, sec. 41, sub-sec. 9, which he held applicable to the road in question and contained the law on the subject.

That section and the preceding one, which must be read with it, are as follows:—

8. Every road declared a Public Highway by any *Procès-Verbal*, By-law or Order of any Grand Voyer, Warden, Commissioner or Municipal Council, legally made, and in force when this Act shall commence, shall be held to be a Road within the meaning of this Act, until it be otherwise ordered by competent authority.

9. And any road left open to and used as such by the public, without contestation of their right, during a period of ten years or upwards, shall be held to have been legally declared a Public Highway by some competent authority as aforesaid, and to be a Road within the meaning of this Act.

The question which immediately arises is not whether those sub-sections are in force for the purposes and objects for which they were passed but whether they were intended as a general law and operative as such until repealed expressly or impliedly.

As a fact they have not been expressly repealed but they do not appear in the later statute of 1860 which was an Act to consolidate the Act 18 Vict. ch. 100 and its amendments, or in any later Act as one would suppose they would if they were not merely temporary provisions but general ones.

They are both sub-sections of section 41 of the "Municipal Road Act" of 1855, and are connected together by the conjunction "and." They deal with the same subject matter, *roads*, and, it seems to me, must be read and construed together.

Sub-section 8 enacted that every road declared a public highway by any procès-verbal, by-law, etc.,

1917
HARVEY
v.
DOMINION TEXTILE CO.
Davies J.

legally made, *and in force when this Act shall commence,* shall be held to be a road, etc.

Sub-section 9 enacts that any road left open to and used as such by the public without contestation of their rights during a period of ten years shall be held to *have been legally declared* a public highway by some competent authority *as aforesaid.* These last words "as aforesaid" clearly refer to the authorities expressly mentioned in sub-section 8. Under the one subsection the declaration of the *procès-verbal in force when the Act began* to run declaring a road to be a public highway was sufficient. Under the other sub-section (9) after ten years uncontested user by the public of any road it

> shall be held to have been legally declared a public highway by some competent authority *as* aforesaid.

Sub-section 8 was clearly a temporary provision having reference only to roads in existence at the date of the coming into force of the Act and, as I have said, I think subsection 9 should be read with it and construed as limited to roads which had on the 1st July, 1855, been left open and used as such by the public without contestation of their right for ten years and upwards. That view of the scope of their provisions would account for their non-appearance in subsequent revisions of the statute as also for their not having been expressly repealed. This was the view expressed by Mr. Justice Burbidge in the case of *Bourget* v. *The Queen*(1).

Several Quebec authorities were cited as shewing that a contrary view was held as to the scope of sub-section 9 of several judges. But I do not think that in any of the cases cited the express question I am

(1) 2 Ex. C.R. 1, at pp. 7, 8.

now dealing with had been raised. The general character of the sub-section was assumed. Of course, if there had been decisions establishing a jurisprudence on the point in the province, I would not venture to challenge it. Mr. Taschereau, however, also relied upon arts. 749 and 750 of the Municipal Code of Quebec as a second string to his bow. He contended that these articles did not abrogate the 8th and 9th sub-sections of section 41 of the "Municipal Act" of 18 Vict., although they contain no limit as to time.

He was obliged however to concede that for the greater part of its length this road in question was not "fenced on each side or otherwise divided from the adjoining land," as required by the statute to make it a statutory road. As I understood him, however, he contended that for the comparatively short distance it was so divided, the road would be held to be a public road. I cannot agree with such an interpretation and can see that it might if adopted lead to great injustice. It was suggested, but I do not think pressed, that the sidewalk would be such a division as the statute contemplates. I cannot accept the suggestion. The "otherwise divided" in the article means by fences, as expressed, or something equivalent to fences and having the same effect, such as buildings, etc.

I will not labour this branch of the case further than to say that upon it I fully concur with the reasons stated by Mr. Justice Cross in his judgment in the Court of King's Bench.

For the foregoing reasons, I would dismiss the appeal with costs.

IDINGTON J.—I am of opinion that 18 Vict., ch. 100, sec. 41, sub-sec. 9, was not intended to be merely retrospective and is still in force and operative as each

1917
HARVEY
v.
DOMINION
TEXTILE
CO.
Idington J.

occasion or situation created by the development of facts fitting its terms arises; of which those bearing upon the existence of the road in question for the prescribed term of ten years seem to be such as to establish at least the greater part of the road now in question as a public road.

The law relative to dedication has always been somewhat difficult of application by reason of its requiring evidence of the intention in the mind of the owner to dedicate, and again of an acceptance thereof by some authority representing the public to establish dedication.

The said section seems designed to simplify the means of proof and by such an enactment to establish by way of prescription a road when it has been used by the public for ten years without contestation by the owner.

Is it possible that the simplicity of the enactment so perplexed those judicially or legislatively concerned in its application as to render its efficacy a matter of doubt?

However that may be, I think the enactment is not in conflict with articles 749 and 750 of the Municipal Code, and both standing together render the road in question a public highway.

The difficulty about it not being throughout a road over which teams can pass seems imaginary, for a public road may be a cul-de-sac, or its width capacity or utility be measured by that kind of traffic for which it has been used by the public without contestation for ten years and upwards.

I think the appeal should be allowed with costs and the judgment of the Court of Review be restored.

DUFF J.—This appeal should be dismissed with costs.

ANGLIN J.—The question to be determined in this action is whether a road opened in 1900 by the Montmorency Cotton Company, the predecessors in title of the plaintiff company, on cadastral lot 59a, owned by them, is now of such a public character that the plaintiff company cannot control its use or exclude the public therefrom.

The Montmorency Cotton Company acquired lot 59a from Joseph Cauchon on the 23rd December, 1899, for the purpose of constructing dwellings thereon for the employees of its mills. It proceeded immediately to carry out that purpose and erected two blocks of apartments each facing on a cross road laid out by it. Each of these cross-roads debouches at its eastern end into the road in question. This latter road is 36 feet wide and runs southerly some 283 feet, along the eastern side of lot 59a, from the "Côte à Courville," a public highway, out of which it opens at its northern end. To the south it terminates in a field, part of lot 59a, about 125 feet north of the edge of a precipitous cliff. Beneath this cliff are situated the mills of the company, the church of the Parish of St. Grégoire, the electric railway station and the "Côte à Courville," which descends from the point at which the road in question leads from it, sweeping in a semi-circle first easterly, then southerly and finally westerly. At some later date not distinctly shewn, but apparently shortly after its purchase from Cauchon, the Montmorency Cotton Company, in order to establish more direct communication for its employees between their dwellings on lot 59a and the company's mills, acquired from the Catholic Episcopal Corporation a right of way, together with the right of constructing a stairway down the face of the cliff. In June, 1905, the Montmorency Cotton Company sold its undertaking, including lot 59a, to the plaintiff company.

1917
HARVEY
v.
DOMINION TEXTILE CO.
Anglin J.

To the north of the plaintiff's property and above the "Côte à Courville" was the village of St. Louis de Courville, which had a population of some 200 to 300 families, and the Beauport Road. To the east of the road now in question and between it and the "Côte à Courville" lay private property from which it was separated by a fence maintained with indifferent care.

The defendant Harvey is the proprietor of a grocery shop built facing the east side of the road in question on property purchased by him in 1907 from M. le Curé Ruel. With this property he acquired a lane or passage giving him access to the "Côte à Courville" to the east. Used for a short time as a forge, Harvey's building was afterwards rented as a storehouse for several years to one Vachon, who kept a grocery shop on the plaintiffs' property on the opposite side of the road in question. Harvey resumed possession of his premises and opened a grocery business there during the fall of 1913. The entrance to his shop was from the road in question through a break in the fence between it and the plaintiff's property. One Leclerc subsequently leased the Vachon shop from the plaintiffs for a similar business. Wishing to destroy the competition of Harvey, through Paul Leclerc, his brother, one of its employees, he urged the plaintiff company to take steps to exclude Harvey from access to the road in question. The company first formally contested the right of user of the road by the public on the 30th May, 1914, by placing at its entrance in the "Côte à Courville" a notice, "Chemin Privé," and about the same time it caused a barrier to be erected closing the opening in the fence opposite Harvey's shop. This action *négatoire* was begun on

the 15th June, 1914, and the trial took place in October, 1914

Such, in outline, are the essential facts. While other facts which appear to be material will be noticed in dealing with the several aspects in which the defence is presented, for a more detailed and complete statement, reference may be had to the opinions in the courts below.

The plaintiffs having shewn that the property covered by the road was conveyed to them as part of cadastral lot 59a, the burden is on the defendant to establish his right to use it. Not alleging anything in the nature of a private right of way over it, he has undertaken to prove that the public has had from the time of its opening, or has since acquired, rights in the road of such a nature that the plaintiffs cannot now prevent their exercise. This he has endeavoured to do on three distinct grounds:

(a) That dedication to the public has been shewn;

(b) That under arts. 749 and 750 of the Municipal Code the road has become a municipal road;

(c) That under art. 9 of sec. 41 of 18 Vict., ch. 100, (hereinafter referred to as art. 9) it has become a public road.

Assuming that under the law of Quebec, notwithstanding the provisions of arts. 549 and 776 C.C., dedication of a road to the public may be proved by evidence of conduct and acquiescence, as some authorities entitled to great weight indicate, I need only refer to *Chavigny de la Chevrotière* v. *Cité de Montréal* (1); *Mignerand dit Myrand* v. *Légaré*(2); and *Rhodes* v. *Pérusse*(3), any intention on the part of the respondent

(1) 12 App. Cas. 149, at p. 157. (2) 6 Q.L.R. 120, at pp. 122 *et seq.*
(3) 41 Can. S.C.R. 264, at p. 273.

1917
HARVEY
v.
DOMINION
TEXTILE
Co.
Anglin J.

company or its predecessor to dedicate the road in question as a highway is, in my opinion, rebutted by the circumstances in evidence before us—notably by the facts that the purpose of the company in opening the road was to afford to its employees for whom it had constructed dwellings on lot 59a direct and convenient access to and from the "Côte à Courville" above and that its purpose in acquiring a right of way and constructing a stairway down the cliff on the property of the Episcopal Corporation was to afford the same employees a direct and convenient means of communication between their dwellings and the company's works; that the company constructed and has since maintained and cared for the road and the sidewalk upon it as well as the stairway down the cliffside at its own expense; and that a fence was erected and maintained shutting off the property on the east side of the road from access to it except where breaks were from time to time made, *Roberts* v. *Karr*(1), whereas it was left open and directly accessible from the remainder of lot 59a. There is in addition the cogent evidence of the appellant himself and of M. le Curé Ruel that until quite recently, when the idea was spread abroad that ten years' user had made of it a public road, the road in question was regarded by them as a private road, the property of the company, to which the one had not the right to take, or the other the right to give, an exit from the lot bought by Harvey from M. le Curé, and the further important fact, not contested, that Harvey himself, as recently as 1914, took part with an official of the plaintiff company in defining the line between properties lying to the east of it, including his own, and the roadway in question for the purpose of having the fence separating

(1) 1 Camp. 262n.

them from the roadway rebuilt on the correct line of the eastern limit of the company's lands.

We have the authority of the Privy Council for the proposition that, although the law of Quebec as to the ownership of the soil of a road differs from the law of England (p. 159), in the matter of dedication to be presumed from long continued public user and absence of contestation evidencing an abandonment of right by those who might have disputed that user "there seems to be no difference between the law of Lower Canada and the law of England and Scotland. *Chavigny de la Chevrotière* v. *Cité de Montréal*(1). Long continued user by the public is only evidence of the intention to dedicate. Its value depends on the circumstances. *Folkestone Corporation* v. *Brockman*(2); *McGinnis* v. *Letourneau*(3). Abandonment or dedication to the public will not be lightly presumed. *Chamberland* v. *Fortier*(4); *Peters* v. *Sinclair*(5); affirmed in the Privy Council(6); *Corporation of St. Martin* v. *Cantin*(7).

Viewed most favourably to the defendant, the facts here in evidence are as consistent with an intention not to dedicate as with an intention to dedicate: and that will not suffice. *Piggott* v. *Goldstraw*(8). But, as I have already said, the circumstances under which, and the manner in which the road was opened, I think, actually rebut an intention to dedicate it to the public, and the presumption to be drawn from long continued user is of "a complete dedication coëval with the early user," *Turner* v. *Walsh*(9).

(1) 12 App. Cas. 149, at p. 157.
(2) [1914] A.C. 338, at pp. 352, 363-6.
(3) 14 Leg. N. 314.
(4) 23 Can. S.C.R. 371.
(5) 48 Can. S.C.R. 57; 13 D.L.R. 468.
(6) 49 Can. S.C.R. VII.; 18 D.L.R. 754.
(7) 2 L.N. 14.
(8) 84 L.T. 94, at p. 96.
(9) 6 App. Cas. 636, at p. 642.

1917
HARVEY
v.
DOMINION TEXTILE CO.
Anglin J.

It must always be remembered that we are here dealing with a question of presumed intention, not with one of prescription. Dedication must rest upon intention. The clear and unequivocal proof from which intention to dedicate might properly be presumed in my opinion is not found in the record. Upon this aspect of the case I therefore agree with the views expressed in the Court of King's Bench by Mr. Justice Carroll and Mr. Justice Cross.

Nor does the evidence bring the case within arts. 749 and 750 of the Municipal Code. I find no difference, such as Mr. Justice Flynn suggested in the Court of Review, between the English and the French versions of those articles. "Fenced on either side" means not on one side or the other, but on each side, *i.e.*, on both sides, and is the equivalent of "clôturés de chaque côté." While the road in question was not habitually kept closed at its extremities," it was, in my opinion, not "fenced on either side or otherwise divided off from the remaining land" within the meaning of the articles under consideration. The fence on the east side of the road, though merely a line fence between adjoining properties of different proprietors, and not meant to define or separate it as a road from the adjoining lands but rather to exclude the owners of those lands from access to it, was possibly sufficient to meet the requirement of arts. 749 and 750 as to that side of the road. But on the west side, except possibly for a few feet at the extreme north end, there was no fence at all. The sidewalk was built on the roadway. The line of the buildings was not continuous, nor does it appear that they came out to the street line. There is no evidence of a ditch or other boundary mark. The road on this side was not "fenced or otherwise divided off from the (company's)

remaining land" in any manner which met the requirements of arts. 749 and 750. On the contrary, it was enclosed as part of one property or holding with the remainder of lot 59a by the fence which separated it from the properties to the east. There is no suggestion of any separation of the southerly 25 feet, where a footpath or walk led across a field from the end of the defined roadway to the head of the stairway. Moreover, although those articles declare that lands or passages used as roads by the mere permission of the owner or occupant (*chemins de tolérance*) are 'municipal roads" if they fulfil the prescribed conditions it may not follow that the owners have lost all control over them or the right to close them. They retain the property in the soil and are subject to the obligation to maintain them. (Arts. 749 and 750 M.C.; compare arts. 748 and 752 M.C.) The municipality is liable for injuries sustained through defects in such roads (arts. 757 and 793 M.C.) and is, no doubt for that reason, empowered, not to close them itself, as it would probably have been authorized to do had they ceased to be "chemins de tolérance," but to order the owners or occupants to do so. Without further consideration I am not prepared to disagree with the view of Mr. Justice Malouin, Mr. Justice Carroll and Mr. Justice Cross that if the road in question was a municipal road within arts. 749 and 750 M.C., that fact would not prevent the owner exercising the right to close it or to forbid its use as a "*chemin de tolérance.*"

The defence chiefly relied on, however, is that a prescriptive public right has arisen under 18 Vict. ch. 100, sec. 41, art. 9. The English and French texts of arts. 8 and 9 of sec. 41 of this statute are as follows:—

1917

HARVEY v. DOMINION TEXTILE CO.

Anglin J.

8. Every road declared a Public Highway by any Procés Verbal, By-law or Order of any Grand Voyer, Warden, Commissioner or Municipal Council, legally made, and in force when this Act shall commence, shall be held to be a Road within the meaning of this Act, until it be otherwise ordered by competent authority.

9. And any road left open to and used as such by the public, without contestation of their right, during a period of ten years or upwards, shall be held to have been legally declared a Public Highway by some competent authority as aforesaid, and to be a Road within the meaning of this Act.

8. Tout chemin déclaré grand chemin public par un procès-verbal règlement ou ordre d'un grand-voyer, préfet, commissaire, ou conseil municipal, légalement dressé et en vigueur au moment où cet acte entrera en opération, sera considéré comme chemin suivant l'esprit de cet acte, jusqu'à ce qu'il en soit autrement ordonné par l'autorité compétente;

9. Et tout chemin ouvert et fréquenté comme tel par le public, sans contestation de son droit, pendant l'espace de dix années ou plus, sera censé avoir été légalement reconnu comme grand chemin public par quelque autorité compétente comme susdit, et être un chemin suivant l'esprit de cet acte.

Three questions are involved in this branch of the case:

(1) Is art. 9 still in force?

(2) Does it apply to roads not already in existence for ten years when it was enacted?

(3) Does the evidence establish a user by the public of the road as such for ten years prior to the 30th May, 1914?

Art. 9 has not been expressly repealed and I find nothing in the Municipal Code or in any other Act to which our attention has been directed so repugnant to it or so inconsistent with it that repeal by implication would follow therefrom. I accept without hesitation the unanimous opinion of all the judges of the provincial courts who have dealt with this question in the present case, that art. 9 is still in force, which follows a practically uniform line of decisions extending from

Parent v. *Daigle*(1), to *Nolin* v. *Gosselin*(2), if we except doubts expressed by Ramsay J. in *Guy* v. *Cité de Montréal*(3), and by Bossé J. in *Fortin* v. *Truchon*(4).

The other two questions cannot be so easily disposed of. For convenience I propose to deal with them in inverse order.

I am, with deference, unable to accede to the "*considérant*" in the judgment of the Court of Appeal expressed in the following terms:

> Considérant que le public ne peut prescrire un chemin par l'usage qu'il en fait, en vertu de la loi 18 Vict. ch. 100, sec. 9, à moins que cet usage ne soit exclusif de celui du propriétaire qui possède à l'encontre du public.

We are now dealing not with a question of intention to dedicate, but with one of prescription. The statute does not exact a user exclusive of that of the owner of the soil and of his tenants as members of the public. For aught that appears there was nothing to distinguish their user of the road in the present case from the user by other members of the public. It did not amount to a contestation of the public right. All that the statute requires is a user of the road as such by the public without contestation of its right during ten years. I am, with great respect for the Court of King's Bench, in which the contrary view prevailed, of the opinion that the evidence fully establishes such a user.

Had the traffic on the road been solely to and from the dwellings of the company's employees it might be urged with much force, notwithstanding its extent, that it was throughout a private user by permission of the company. I am not certain that traffic to and from Vachon's shop, since he was a tenant of the company, might not be viewed in the same light.

(1) (1877), 4 Q.L.R. 154.
(2) (1912), Q.R. 24 K.B. 289.
(3) 3 L. N. 402.
(4) 15 Q.L.R. 186.

1917
HARVEY
v.
DOMINION
TEXTILE
CO.
Anglin J.

But the traffic of the residents of St. Louis de Courville to and from the railway station and to and from the church was certainly not of that character. It was undoubtedly a user of the road as such by the public. There is a mass of evidence that this user has been very extensive and has been going on without let or hindrance for over fourteen years.

From the wording of the transfer of the right of way down the face of the cliff in the deed from the Montmorency Cotton Company to the Dominion Textile Company Mr. Justice Carroll has drawn the inference that the stairway down the cliffside was built after that deed was executed (June 15th, 1905) and that the traffic to and from St. Louis de Courville therefore began within ten years before the present action was instituted. But, although if that were the fact it could have been readily established, there is not a tittle of actual evidence to that effect. The deed of the right of way from the Episcopal Corporation to the Montmorency Cotton Company is not in evidence. Even its date has not been given. The description of the right of way in the deed of June, 1905, was not improbably copied from the deed given by the Episcopal Corporation. It bears some internal evidence that it was. The words "by the said company," if in the earlier deed, would there refer only to the purchasers, the Montmorency Cotton Company. No other company was a party to that deed. In the deed of 1905 the reference is ambiguous. It may be either to the vendor company or to the purchaser company. Both were parties to it. If the description was copied from the earlier deed the use of these words is accounted for and the presence of the words

by a flight of steps or footpath *to be made*, placed and maintained thereon,

in the deed of 1905, notwithstanding that the stairway had already been constructed, is also explained.

But any inference from the language of that deed cannot weigh for a moment against such positive and uncontradicted testimony as that of Philippe Côté who says that he has used the stairway for fourteen or fifteen years, that it was built at the same time as the block of dwellings, and that it was he who arranged the foot of the stairway where it joins the "Côte à Courville." Antoine Mailloux, the plaintiff company's superintendent, though he cannot say just when the stairway was built—a little after the block he thinks—says the public has made use of the road and stairway for fifteen years. M. le Curé Ruel says the road has been built as it now is for about fifteen years and has been used by the public with the stairway during that period in coming to and going from his church. There was no church at St. Louis de Courville until recently. The road and stairway were also used in going to and from a hospital which was situated for a couple of years on its east side near the north end. Vital Giroux says many people arriving by the electric cars used the stairs and road for fifteen years past and that they were also used by the public in going to church. J. W. St. Pierre says everybody (tout le monde) has used the road like any other public road since the stairway was built—for fifteen years—and he refers specially to the traffic of residents of St. Louis de Courville to and from the electric cars. Adelard Lortie, Mayor of the Village of Montmorency, says that for fifteen years the public has treated the road as a public road without any hindrance. Even Paul Leclerc admits that the road was used for traffic of

1917
HARVEY
v.
DOMINION TEXTILE CO.
Anglin J.

all kinds publicly, openly and without obstruction, and that it was regarded as a public road.

These are all witnesses called for the company. Taken with the evidence given for the defendant their testimony puts beyond doubt the character and the extent of the user by the public of the road as a public road, without any contestation of its right, for a period upwards of ten years. On this point I find myself in accord with the conclusion of Mr. Justice Pelletier and the learned judges who sat in the Court of Review.

It therefore becomes necessary to decide whether art. 9 of sec. 41 of the 18 Vict., ch. 100, applies to a road first opened, as was that here in question, in 1899 or 1900. The appellant insists that it should be held that it does both upon the proper construction of its terms and because, as he maintains, that view has been taken of it in a long and unbroken series of decisions in the Quebec courts and has thus become a recognized rule in regard to public rights and property which should not lightly be broken in upon or disturbed.

Without questioning our right to review and, if thought proper, to overrule even a long series of provincial decisions based on an erroneous construction of a statute, *Hamilton* v. *Baker*, *"The Sara"*(1); *Maddison* v. *Emmerson*(2): having regard to the nature of the subject and to practical results, although the doctrine of *stare decisis* has not been accepted under the French system to the same extent as in English jurisprudence, I should probably have thought it the better course not to interfere with a uniform and unquestioned line of decisions which people had considered as having settled the law on a particular subject and had acted on for a long period. *London*

(1) 14 App. Cas. 209. (2) 34 Can. S.C.R. 533; [1906] A.C. 569, at p. 580.

County Council v. *Churchwardens etc. of Erith*(1); *Morgan* v. *Fear*(2); *Cohen* v. *Bayley-Worthington*(3). But it is necessary to examine with some care the line of cases alleged to be numerous and uniform, because a decision, though followed, if it has been often questioned and doubted is clearly open for reconsideration in a court of superior jurisdiction. *The "Bernina"*(4); *Pearson* v. *Pearson*(5); (overruled on other grounds); *The Queen* v. *Edwards*(6). I shall therefore briefly refer in chronological order to the cases cited in the judgments below and in the factums.

In *Johnson* v. *Archambault*(7), the Court of Queen's Bench dealt with a lane which it held to have been a public street long before 1834. No reference is made to art. 9.

In *Parent* v. *Daigle*(8), Meredith C.J. and Stuart J. treated art. 9 as in force and applicable to the road there in question, which, however,

had been used * * * as a public road for thirty years and upwards, in fact as long ago as the time to which the memory of the oldest witnesses examined in the case can extend.

In *Théoret* v. *Ouimet*(9), the road dealt with had always served the purposes of the neighbouring proprietors and the court held that the defendant had obstructed this road without any right or title. No allusion is made to art. 9.

In *Mignerand dit Myrand* v. *Légaré*(10), the Court of King's Bench, Dorion C.J. presiding, again applied the same statute (pp. 127, 128); but the road dealt with had been open and in public use for over sixty years and both the learned Chief Justice and Mr.

(1) [1893] A.C. 562, at p. 599.
(2) [1907] A.C. 425, at p. 429.
(3) [1908] A.C. 97, at p. 99.
(4) 13 App. Cas. 1, at p. 9.
(5) 27 Ch. D. 145, at p. 158.
(6) 13 Q.B.D. 586, at pp. 590-1, 593, 595.
(7) (1864), 8 L.C.J. 317.
(8) (1877), 4 Q.L.R. 154.
(9) (1878), M.L.R. 1 S.C. 275.
(10) (1879), 6 Q.L.R. 120.

1917
HARVEY
v.
DOMINION
TEXTILE
CO.
Anglin J.

Justice Tessier, who alone delivered judgments, upheld the public right as having been acquired by prescription "de droit commun."

In *Guy* v. *Cité de Montréal*(1), the decision rests on dedication and Dorion C.J. refers to *Myrand* v. *Légaré* (2), as an authority that for dedication a title in writing is not necessary. The street in question had been referred to as a highway in a petition made in 1831. In this case Ramsay J. who had sat in *Myrand* v. *Légaré*(2), questions whether art. 9 is in force, and is not prepared to say that he "feels bound by the dictum in *Myrand* v. *Légaré*(2).'

In *Chavigny de la Chevrotière* v. *Cité de Montréal*(3), the statutory provision dealt with is not art. 9 of sec. 41 of the 18 Vict., ch. 100, which does not apply to Montreal, but a somewhat similar provision of 23 Vict., ch. 72, which is the charter of the City of Montreal and applies to it alone. As such its non-inclusion in th revised statutes of course lacks the significance which attaches to the omission therefrom of art. 9 of sec. 41 of the 18 Vict., ch. 100. Their Lordships held that there was

> evidence of long user and an abandonment of right by those who could have disputed that user sufficient to sustain at common law the public right.

This case affords no assistance in the construction of art. 9.

In *Bourget* v. *The Queen*(4), Burbidge J. having held that dedication was established, added, at page 7, that in his opinion art. 9 was a temporary provision having reference to roads in existence at the date when it came into force and in public use for ten years theretofore.

(1) (1880), 3 L.N. 402.
(2) (1879), 6 Q.L.R. 120.
(3) (1886), 12 App. Cas. 149.
(4) (1888), 2 Ex. R. 1.

In *Fortin* v. *Truchon*(1), the Court of King's Bench held that the evidence did not establish a ten years' user without contestation of right. But Mr. Justice Bossé, who alone appears to have delivered reasons for the judgment, said, in the course of his opinion,

> C'est une question fort douteuse que de savoir si la section citée de la 18 V., à été en vigueur sous notre code municipal.

In *Childs* v. *Cité de Montréal*(2), Pagnuelo J. although he disposed of the case on the ground of dedication, refers incidentally, at page 398, to art. 9 as being in force and as having been reproduced in the charter of Montreal, 23 Vict., ch. 72.

In *Leveillé* v. *Cité de Montréal*(3), Mathieu J. at pages 419-20, makes a similar passing reference to the statute.

In *Lavertu* v. *Corporation de St. Romuald*(4), Andrews J. at page 260, cites *Myrand* v. *Légaré*(5); *Guy* v. *Cité de Montréal*(6), and *Childs* v. *Cité de Montréal*(7), as authorities on the effect of user of a road opened in 1870—a question, he adds, not before him.

Town of Westmount v. *Warminton*(8), was also a case of dedication (destination). Blanchet J. who alone delivered reasons for the judgment of the Court of Queen's Bench, said, at page 114, that in his opinion art. 9, though not repealed, is restricted in its application to roads existing before the 1st of July, 1855, the date of its adoption.

In *Banque Jacques Cartier* v. *Gauthier*(9), Ouimet J. in giving the judgment of the Superior Court, at page 251, refers to art. 9 as applicable to a modern street on the authority of *Mignerand dit Myrand* v. *Légaré*(10);

(1) (1888), 15 Q.L.R. 186.
(2) (1890), M.L.R. 6 S.C. 393.
(3) (1892), Q.R. 1 S.C. 410.
(4) (1896), Q.R. 11 S.C. 254.
(5) (1879), 6 Q.L.R. 120.
(6) (1880), 3 L.N. 402.
(7) (1890), M.L.R. 6 S.C. 393.
(8) (1898), Q.R. 9 Q.B. 101.
(9) (1900), Q.R. 10 Q.B. 245.
(10) (1879), 6 Q.L.R. 120.

1917
HARVEY
v.
DOMINION
TEXTILE
Co.
Anglin J.

Childs v. *Cité de Montréal*(1); *Bourget* v. *The Queen*(2); *Johnson* v. *Archambault*(3); *Guy* v. *Cité de Montréal*(4) and *Town of Westmount* v. *Warminton*(5). His judgment was reversed, however, in the Court of Appeal on other grounds, and no allusion is there made to art. 9.

In *Jones* v. *Village of Asbestos*(6), Mr. Justice (now Chief Justice Sir Francis) Lemieux refers to art. 9 as not abrogated and an existing means by which the public may acquire a highway. The learned judge, however, held that dedication was established and the report does not shew when the user of the highway in question had begun

In *Shorey* v. *Cook*(7), Dunlop J. held a road to be established as a highway by dedication. He also expressed the view that art. 9 was in force and applicable to a street in use since 1892.

The King v. *Leclaire*(8), Lavergne J. says, at p. 219:

> The prescription established by 18 V., c. 100, art. 9 of s. 41, as to possession during ten years by a municipal corporation must be restricted to roads existing before the 1st July, 1855.

In *Rhodes* v. *Pérusse*(9), this Court held that there was complete, clear and unequivocal evidence of dedication, and there had been public user for over thirty years. No reference is made to art. 9.

In *Nolin* v. *Gosselin*(10), a road in public use for ten years after an attempt had been made in 1856 by the council of the municipality to abolish it was held by the Court of King's Bench to be a public highway, presumably under art. 9. But the Court also held that the road had not been in fact abolished within the meaning of art. 753 M.C. Mr. Justice Carroll

(1) (1890), M.L.R. 6 S.C. 393.
(2) (1888), 2 Ex. R. 1.
(3) (1864), 8 L.C. Jurist. 317.
(4) (1880), 3 L.N. 402.
(5) (1898), Q.R. 9 Q.B. 101.
(6) (1901), Q.R. 19 S.C. 168.
(7) (1904), Q.R. 26 S.C. 203.
(8) (1906), Q.R. 15 K.B. 214.
(9) (1908), 41 Can. S.C.R. 264.
(10) (1912), Q.B. 24 K.B. 289.

was of the opinion that art. 9 was inapplicable, but agreed in holding that the road had not been abolished.

In applying the doctrine of *stare decisis* it must always be borne in mind that only that part of a judicial decision is binding as authority which enunciates the principle on which the question before the court has been actually determined, *Kreglinger (G. & C.)* v. *New Patagonia Meat & Cold Storage Co. Ltd.*(1), and that mere dicta, even in speeches of individaul members of the House of Lords, while no doubt entitled to the greatest respect, do not bind even the lowest courts. *Latham* v. *Johnson* (2).

An analysis of the Quebec cases in which art. 9 has been referred to shews that in only one instance—and that as late as 1912—(*Nolin* v. *Gosselin*(3)), has the Court of Appeal held it applicable to a road opened after it was enacted. In two other Court of Appeal cases, *Fortin* v. *Truchon*(4) and *Town of Westmount* v. *Warminton*(5), the sole opinion delivered in each casts doubt on the point, Bossé J. in the former questioning whether the provision is in force and Blanchet J. in the latter expressing the view that it applies only to roads existing before its enactment. In one of the two remaining cases referred to, *Mignerand dit Myrand* v. *Légaré*(6), the question now under consideration did not arise, and in the other, *Guy* v. *Cité de Montréal*(7), Ramsay J. referring to the view expressed in *Mignerand dit Myrand* v. *Légaré*(6), that the article in question is in force, as a dictum, was not prepared to say he felt bound by it.

In four cases in the Superior Court, art. 9 has been treated as applicable to roads opened since 1855—

(1) (1914), A.C. 25, at pp. 39-40.
(2) (1913), 1 K.B. 398, at p. 408.
(3) (1912), Q.B. 24 K.B. 289.
(4) (1888), 15 Q.L.R. 186.
(5) (1898), Q.R. 9 Q.B. 101.
(6) (1879), 6 Q.L.R. 120.
(7) (1880), 3 L.N. 402.

1917
HARVEY
v.
DOMINION
TEXTILE
CO.
Anglin J.

Lavertu v. *Corporation de St. Romuald*(1), (Andrews J.); *Banque Jacques Cartier* v. *Gauthier*(2), (Ouimet J.); *Shorey* v. *Cook*(3), (Dunlop J.), and *Jones* v. *Village of Asbestos*(4), (Lemieux J.). In *Childs* v. *Cité de Montréal* (5), Pagnuelo J. and in *Léveillé* v. *Cité de Montréal*(6), Mathieu J. dealt with it as in force but did not pronounce upon its applicability to roads opened since 1855. On the other hand, in *Bourget* v. *The Queen*(7), Burbidge J. and in *The King* v. *Leclaire*(8), Lavergne J. expressed positive opinions that art. 9 has no application to roads opened since it was enacted. The Privy Council case(9), and the early decision in *Parent* v. *Daigle*(10), throw no light on the question. In this state of the authorities, it is certainly not possible to say that the applicability of art. 9 to the road here in question is not open in this court.

Turning to the consideration of the statute itself, we find art. 9 connected with art. 8 by the conjunction "and," which affords at least an indication that the legislature understood that in these two articles it was dealing with cognate matters, viz., road conditions existing at the time when the statute was passed, to which art. 8 is explicitly restricted. The use in the descriptive terms of art. 9 of the past instead of the future-perfect tense ("left open to and used," not "which shall have been left open to and used") points in the same direction, though not at all conclusively in view of the rule of interpretation that a statute is to be regarded as always speaking. In the Municipal and Road Act," 18 Vict., ch. 100, revised and

(1) (1896), Q.R. 11 S.C. 254.
(2) (1900), 10 Q.B. 245.
(3) (1904), Q.R. 26 S.C. 203.
(4) (1901), Q.R. 19 S.C. 168.
(5) (1890), M.L.R. 6 S.C. 393.
(6) (1892), Q.R. 1 S.C. 410.
(7) (1888), 2 Ex. R. 1.
(8) (1906), Q.R. 15 K.B. 214.
(9) 12 App. Cas. 149.
(10) (1877), 4 Q.L.R. 154.

consolidated by 23 Vict., ch. 61, and embodied in the Consolidated Statutes of 1860 as ch. 24, sec. 41 became sec. 40. Arts. 8 and 9 were entirely omitted therefrom and are not found elsewhere in these statutes. The Consolidating Act, 23 Vict., ch. 61, contained no repealing provision and the two articles, 8 and 9 of sec. 41 of the Act of 1855, were omitted, no doubt because the revisors and the legislature deemed them applicable only to roads which had been in existence and in public use for ten years before the 1st July, 1855. By the 34 Vict., ch. 68, the municipal laws of the Province of Quebec were consolidated in the Municipal Code. The repealing section (No. 1086) has, I think properly, been held not to have affected art. 9 of sec. 41 of the 18 Vict., ch. 100. Neither in the revision of the statutes of 1888 nor in that of 1909 has that article been reproduced, however, although it may fairly be assumed that the legislature was apprised of the conflict of judicial opinion as to its scope and application. If applicable to roads coming into existence since the 1st July, 1845, and if the prescriptive period which it provides is still current, the article should be found either in the Municipal Code or in the revised statutes. Its absence from both under the circumstances affords almost conclusive proof that the legislature has thrice recognized that the article was properly omitted from the 23 Vict., ch. 61, as spent or effete because applicable only to conditions existing on the 1st July, 1855. I agree with the view expressed by the late Mr. Justice Burbidge in *Bourget* v. *The Queen*(1).

For these reasons, expressed, I fear, at inordinate length, I would dismiss this appeal.

(1) 2 Ex. R. 1, at pp. 7-8.

1917
HARVEY
v.
DOMINION
TEXTILE
CO.

Brodeur J.

BRODEUR J.—Il s'agit d'une action négatoire de servitude instituée par l'intimée contre le défendeur-appelant dans les circonstances suivantes:

L'intimée, la "Dominion Textile Company," possède une usine près des chûtes Montmorency, dans le village de St. Grégoire de Montmorency. Désireuse évidemment d'améliorer le sort de ses employés, elle a bâti sur un terrain qu'elle avait acheté en 1899, deux pâtés de maisons pouvant donner logement à environ une cinquantaine de familles; et elle a ouvert en face de ces maisons de magnifiques rues qu'elle a macadamisées et sur lesquelles elle a fait construire des trottoirs. Elle a en même temps ouvert et empierré une rue transversale pour communiquer avec un chemin public appelé la "Côte à Courville"; et, en outre de cela, comme ces maisons se trouvent sur un terrain élevé, elle a construit, sur la pente de la falaise, un escalier qui conduit de cette rue transversale au village situé dans le bas, de sorte que les fournisseurs, les visiteurs et les amis des employés peuvent communiquer librement avec eux.

Ces rues servent non-seulement à l'usage des employés de l'usine et de leurs visiteurs mais sont aussi utilisées par les personnes qui demeurent plus haut sur la Côte à Courville et sur le chemin de Beauport et qui désirent aller au village en bas de la falaise. Elles sont devenues des rues publiques utilisées par tout le monde sans aucune objection de la part de la compagnie et sans aucun indice qu'elles ne sont pas publiques.

Il y avait à l'est de cette rue transversale un terrain qui appartenait autrefois à M. l'abbé Ruel. Ce terrain connu sous le no. 63 du cadastre de Beauport fut vendu pour partie au défendeur en la présente

cause qui s'y est bâti une maison privée et une boutique de forge.

Cette boutique donnait sur la rue transversale en question et il y avait communication constante de cette rue à la boutique, à pied et en voiture. Ily avait eu là autrefois une clôture qui a été démolie afin de pouvoir faciliter cette communication.

C'est en 1907 que Harvey a acquis ce terrain-là et a construit cette boutique. Aucune objection dans le temps n'a été faite par l'intimée à ce que Harvey fasse cette ouverture et sorte directement sur la rue.

Deux ans après, cette boutique fut louée pour servir d'entrepôt à un marchand qui était l'un des locataires de la compagnie intimée dans le pâté de maisons qu'elle avait construites sur son terrain. Ce marchand nécessairement communiquait également de son magasin à la rue sans aucune objection et sans aucune difficulté.

Plus tard, Harvey a repris possession de sa boutique qui avait été convertie en magasin et commença à y faire commerce: et la compagnie, pour des raisons qui ne paraissent pas bien claires dans cette cause, a fermé la clôture qui séparait la rue de la propriété de Harvey, et lui a enlevé sa sortie. Ce dernier a de suite démoli cette clôture et de là action par la compagnie contre Harvey.

Le défendeur a plaidé:

1. la prescription décennale édictée par la loi 18 Vict., ch. 100, sec. 41, sub-sec. 9;

2. qu'il y avait eu abandon (*dedication*) de la rue en question en faveur du public.

Il plaide, en outre, que sous les dispositions de l'article 749 du Code Municipal cette rue est devenue un chemin municipal auquel il peut avoir accès comme toute autre personne.

1917
HARVEY
v.
DOMINION
TEXTILE
Co.
Brodeur J.

La première question qui se présente est de savoir si cette disposition de la loi 18 Victoria est encore en force et si elle s'applique aux chemins ouverts depuis 1855.

La portée de cette législation a été considérée par la Cour d'Appel en 1879, dans la cause de *Mignerand dit Myrand* v. *Légaré*(1), et il a été déclaré par l'honorable juge Dorion, qui a rendu le jugement de la cour, que

> Cette disposition détermine la période après laquelle un chemin ouvert au public devient un chemin public * * * .
>
> L'on a prétendu, que cette disposition avait été abrogée par le Code Municipal. Il est possible que l'on ait eu l'intention de le faire, mais je ne trouve rien dans le Code Municipal qui, soit expressément ou par inférence, ait eu l'effet de l'abroger. C'est aussi ce qu'a jugé la Cour de Revision dans la cause de *Parent* v. *Daigle* (2).

Cette opinion n'a pas été acceptée par tous les juges: mais elle a été généralement suivie, ainsi qu'on peut le voir en consultant les causes suivantes: 1880. *Guy* v. *Montréal*(3): 1887. *Lachevrotière* v. *Cité de Montréal*(4): 1888. *Fortin* v. *Truchon*(5): 1890. *Childs* v. *Montréal*(6): 1890. *Léveillé* v. *Cité de Montréal*(7): 1898. *Town of Westmount* v. *Warminton*(8): 1900. *Banque Jacques-Cartier* v. *Gauthier*(9): 1901. *Jones* v. *Village of Asbestos*(10): 1912. *Nolin* v. *Gosselin*(11). Mais dans cette cause de *Mignerand dit Myrand* v. *Légaré*(1), la seule question qui se présentait était de savoir si la loi n'avait pas été implicitement rappelée. On n'était pas appelé à décider si un chemin établi depuis 1855 était régi par cette loi: car le chemin dont il était question dans cette cause existait bien avant 1855.

(1) 6 Q.L.R. 120.
(2) 4 Q.L.R. 154.
(3) 1 D.C.A., 51.
(4) 10 L.N. 41.
(5) 12 L.N. 280.
(6) M.L.R. 6 S.C. 393.
(7) Q.R. 1 S.C., p. 140.
(8) Q.R. 9 Q.B., 101.
(9) Q.R. 10 Q.B. 245.
(10) Q.R. 19 S.C. 168.
(11) Q.R. 24 Q.B. 289.

Dans le cas actuel, nous avons à décider non-seulement si la loi 18 Vict. est encore en force, mais même si elle s'applique à un chemin ouvert dans les vingt dernières années.

Je suis d'opinion que les chemins ouverts depuis 1855 ne sont pas régis par la loi de 18 Victoria.

Quant à la question d'abandon ou de destination, que les auteurs anglais appellent "common law dedication," j'ai aussi des doutes tellement sérieux que je préfère ne pas exprimer d'opinion.

La "common law dedication" fait supposer la donation du terrain sur lequel est assis le chemin. Or, peut-on faire une donation d'immeuble sans titre? L'article 776 du Code Civil déclare que les actes portant donations entrevifs doivent être notariés à peine de nullité. Il me semble que cette disposition formelle du Code Civil rendrait illégale la donation d'une route dans le cas où il n'y aurait pas de titre. Mais cela n'empêcherait pas cependant ce chemin de devenir la propriété de la corporation municipale si pendant 30 ans elle en avait eu l'usage par l'entremise du public et par elle-même, car dans ce cas les relations légales des parties seraient régies par la prescription trentenaire édictée par l'article 2242 du même Code, qui n'oblige pas alors le donataire de montrer titre. Quant à la prescription trentenaire, elle ne saurait être invoquée dans la présente cause, vu que la possession du public ne remonte qu'à 15 années au plus.

Reste la question de savoir si la rue en question en cette cause-ci est un chemin municipal sous l'article 749 du Code Municipal et si elle peut être fermée.

Les chemins se divisent en chemins publics et en chemins privés. Les premiers sont sous la surveillance de l'autorité municipale ou gouvernementale,

1917
HARVEY
v.
DOMINION
TEXTILE
CO.
Brodeur J.

tandis que les chemins privés sont ceux utilisés par des particuliers et ne sont pas fréquentés par le public. On appelle aussi chemins privés des chemins de tolérance parce qu'ils sont ouverts par la volonté du propriétaire sur le terrain duquel ils passent.

Le chemin public est d'ordinaire ouvert par un pouvoir souverain, comme le conseil municipal. Il peut cependant devenir un chemin public par la prescription trentenaire, sous les dispositions de l'article 2242 du Code Civil qui déclare que

> Toutes choses, droits et actions dont la prescription n'est pas autrement réglée par la loi se prescrivent par trente ans sans que celui qui prescrit soit obligé de rapporter titre et sans qu'on puisse lui opposer l'exception déduite de mauvaise foi.

Dans le cas d'usage, pendant trente ans, d'un chemin non-seulement le droit de passage sur ce chemin est acquis au public, mais même la propri été du chemin lui-même appartient à l'autorité municipale (art. 752 C.M.).

Cette question de prescription trentenaire est admise généralement par la doctrine et la jurisprudence.

Proudhon, Domaine public, vol. 2, p. 372, dit:

> Quand un chemin qui sert de communication entre plusieurs lieux habités a été publiquement ouvert et librement pratiqué, c'est-à-dire paisiblement possédé par l'être moral et collectif que nous appelons le public, pendant plus de trente ans qui comportent aujour d'hui le terme extrême de notre prescription la plus longue, le droit en est acquis à ceux qui se trouvent à portée de s'en servir.

Les chemins deviennent donc chemins publics par l'action des autorités municipales ou par la prescription. Peuvent-ils le devenir autrement? Certainement: et c'est ce qu'édicte l'article 749 du code municipal quand il déclare que

> Les terrains ou passages occupés comme chemins par simple tolérance du propriétaire ou de l'occupant sont des chemins municipaux, s'ils sont clôturés de chaque côté ou autrement séparés du reste

du terrain et ne sont pas habituellement fermés à leurs extrémités: mais la propriété du terrain et l'obligation d'entretenir ces chemins continuent à appartenir dans tous les cas au propriétaire ou à l'occupant.

Le chemin de tolérance est un terme assez vague et assez indéfini dans la loi. Mais cette expression a rapport évidemment aux chemins ouverts par la volonté du propriétaire sur le terrain duquel ils passent. C'est un chemin privé sur lequel l'autorité municipale n'a aucun droit de propriété ni aucun contrôle. Mais ce chemin peut perdre son caractère de chemin privé s'il réunit les conditions édictées par l'article 749 du Code Municipal, c'est-à-dire s'il est ouvert aux deux extrémités et s'il est clôturé ou autrement séparé du reste de la propriété.

Proudhon, loc. cit., p. 373, nous dit que la solution de la question de savoir si un chemin peut être caractérisé comme chemin public présente beaucoup de difficultés et il ajoute qu'on devra examiner, en tr'autres choses,

s'il a été ferré ou recouvert en pierres, ce qui le mettrait hors de la catégorie des simples chemins de tolérance.

Le Nouveau Denisart, vo. Chemin, a tout un paragraphe sur les chemins de tolérance. C'est un des rares auteurs qui traite la question à fond. Les autres ne font que peu de commentaires et ce en passant, sans paraître approfondir le sujet. En parlant de ces chemins, Denisart nous dit que les chemins de tolérance peuvent être ouverts et fermés à la volonté du propriétaire et il base son opinion sur une décision du 10 juillet 1782, qu'il rapporte à la page 527 de son volume 4, où il a été jugé qu'un *chemin de tolérance entre des grilles* qui traversait le parc du château de Champigny et allait du Pont de St Maur au port de Chenevières, bien qu'il fût pavé, bien qu'il existât

1917
HARVEY
v.
DOMINION TEXTILE Co.
Brodeur J.

depuis très longtemps, pouvait être supprimé à la volonté du propriétaire.

Le principal moyen que M. de Champigny invoquait était que selon l'article 186 de la Coutume de Paris nulle servitude ne pouvait s'établir sans titre et que la possession même immémoriale ne suffit pas.

Il est évident par la doctrine et la jurisprudence moderne que le chemin sur une propriété ne constitue pas une servitude.

Proudhon, dans son traité du Domaine public publié en 1833, dit au no. 631, p. 368, que si un chemin s'est formé à travers un fonds, qu'il serve de communication entre des lieux habités ou d'un village à un autre village, il y a prescription acquisitive du chemin par la possession trentenaire et que l'article 691 du Code Napoléon, qui correspond à l'article 186 de la coutume, ne s'applique pas, que les chemins publics sont subordonnés à un tout autre régime que celui des servitudes.

Cette opinion est également enseignée par Massé et Vergé sur Zachariae, vol. 2, par. 336, note 2, et par Demolombe, vol. 2, no. 792.

La doctrine énoncée dans la décision rapportée dans Denisart n'a donc pas été acceptée par les auteurs qui ont écrit au commencement ou au milieu du siècle dernier.

Il n'est pas étonnant que nos rédacteurs du code municipal aient jugé à propos de trancher la question en déclarant dans l'article 749 quand un chemin privé pourra devenir un chemin public ou un chemin municipal. Cette législation me paraît d'ailleurs basée sur un jugement rendu en 1832 par la Cour d'Appel dans deux causes de *Porteous* v. *Eno*, non rapportées, mais citées dans les notes du juge en chef, Sir A. A. Dorion, dans la cause de *Mignerand dit Myrand* v. *Légaré*(1) où

(1) 6 Q.L.R. 125.

il a été déclaré qu'un chemin qui paraissait n'avoir été d'abord qu'un chemin privé fermé à ses extrémités par des barrières, mais dans lequel le public avait été de temps immémorial dans l'habitude de passer, ne pouvait plus être fermé au public parce que depuis neuf ans les barrières avaient disparu et que le propriétaire avait fait une clôture pour séparer ce chemin du reste de sa propriété(1).

Cet article me paraît aussi conforme à une décision rendue en 1864 par la cour d'appel dans une cause de *Johnson* v. *Archambault*(1).

En déclarant ces chemins de tolérance des chemins municipaux, le Code municipal se trouve à les mettre sous le contrôle de la municipalité (art. 757 C.M.) et rend cette dernière responsable des accidents qui peuvent y survenir par manque d'entretien. C'est le devoir des corporations municipales de voir à faire entretenir tous les chemins municipaux, qu'elles en soient propriétaires ou non et que ces chemins soient des chemins ouverts par la tolérance du propriétaire ou par ordonnance municipale. C'est le devoir, dis-je, des corporations municipales de faire tenir ces chemins en bon ordre (art. 793 C.M.): et si elles négligent de remplir cette obligation, elles sont passibles de pénalités et de dommages. Dans le cas du chemin de l'article 749 C.M., ces corporations auront alors un recours en garantie contre le propriétaire: mais elles n'en sont pas moins directement responsables envers celui qui a éprouvé des dommages. Si elles trouvent cette obligation trop, onéreuse, elles peuvent faire fermer le chemin (art. 749 C.M. et arts. 525-527 C.M.).

Ces dispositions de la loi s'appliquent également aux rues des villages (art. 765 C.M.).

Il ne faut pas oublier non plus que d'après les

(1) 8 L.C.J. 317.

1917
HARVEY
v.
DOMINION
TEXTILE
CO.
Brodeur J.

dispositions de la loi, les rues des villages sont entretenues, dans le cas d'absence de règlements, par le propriétaire du lot qui a front sur ces rues (art. 824 C.M.). Et alors il ne faut donc pas trouver exorbitante cette disposition qui met les chemins de l'article 749 C.M. à la charge de celui qui les établit sur sa propriété.

Dans le cas actuel, le chemin est ouvert à ses extrémités. D'un bout il communique à la Côte de Courville, qui est un chemin municipal, et à l'autre bout, au moyen d'un escalier, il rejoint une rue publique.

Personne ne prétendra que cela ne constitue pas une sortie conforme à la loi.

Les auteurs du Nouveau Denisart, vo. Chemin, par. 3, no. 4, disent que

> les simples sentiers * * * doivent aussi être au rang des chemins publics quand le public est en possession de s'en servir depuis longtemps.

Que la sortie ne puisse être utilisée que par les piétons, cela ne fait aucune différence. Il n'est donc pas nécessaire que les voitures y passent.

La rue est clôturée d'un côté: et de l'autre il y a un trottoir qui la sépare du reste de la propriété.

Elle a donc toutes les conditions exigées par la loi pour devenir une rue publique.

Je puis ajouter que notre article 749 du Code municipal est dans notre loi ce qu'est la "statutory dedication" dans le droit anglais. Alors, comme toute "statutory dedication," elle est irrévocable, le chemin doit rester chemin public et le propriétaire ne peut faire quoi que ce soit qui puisse restreindre un propriétaire riverain dans le droit qu'il a de se servir de ce chemin.

Pour ces raisons, je suis d'opinion que l'action négatoire de servitude instituée par l'intimée est mal

fondée et que l'appel du demandeur doit être maintenu avec dépens de cette Cour et des Cours inférieures.

Appeal dismissed without costs.

Solicitors for the appellant: *Taschereau, Roy, Cannon and Parent.*

Solicitors for the respondent: *Bédard, Prévost and Taschereau.*