CASES

DETERMINED BY THE

EXCHEQUER COURT OF CANADA.

HOMELINE BOURGET..... CLAIMANT; 1888

AND June 30.

HER MAJESTY THE QUEEN ..... RESPONDENT.

Compensation and damages—Dedication of highway—Similarity of the law of England and of the Province of Quebec respecting the doctrine of dedication or destination—18 *Vic. (Prov. Can.) c.* 100 *s.* 41, *sub-sec.* 9—*Construction of.*

Prior to the construction of the St. Charles Branch of the Intercolonial Railway, the claimant was in possession of property in the village of Lauzon, in the County of Lévis, P. Q., which was divided into 41 lots with a street laid out through them. A plan of the lots showing the location of the street, had been recorded in the Registry Office for the County of Lévis.

In the construction of the railway the Crown diverted this street, purchasing for that purpose one of the 41 lots in the claimant's property. Although the municipal corporation had never taken any steps to declare the said street a public way, it was used as such, was open at both ends, and formed a means of communication between two other streets in the village, and work had been done and repairs made thereon under the direction of the rural inspector of roads. The municipal council had also, at one time, passed a resolution for the construction of a side-walk on the street, but nothing was done thereunder.

Upon the hearing of the claim it was contended on behalf of the claimant that the street in question, at the time of the expropriation, was not a highway or public road within the meaning of *The Government Railways Act*, 1881 (44 Vic. c. 25), but was her private property, and that she was entitled to compensation for its expropriation.

The Crown's contention was that, at the date of the expropriation, the street was a highway or public road within the meaning

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of *The Government Railways Act*, 1881 (44 Vic. c. 25), and that the Crown had satisfied the provisions of sec. 5, sub-sec. 8 and sec. 49 thereof, by substituting a convenient road in lieu of the portion of street so diverted, and that the claimant was therefore not entitled to compensation.

Statement of Facts.

Held:—(1.) That the question was one of dedication rather than of prescription; that the evidence shewed that the claimant had dedicated the street to the public; and that it was not necessary for the Crown to prove user by the public for any particular time.

(2.) That the law of the Province of Quebec relating to the doctrine of dedication or destination is the same as the law of England.

Semble.—That 18 Vic. c. 100, sec. 41, sub-sec. 9 (Prov. Can.) is a temporary provision having reference to roads in existence on July 1st, 1855, which had been left open and used as such by the public without contestation during a period of ten years or upwards. *Myrand* v. *Légaré*, (6 Q. L. R. 120) and *Guy* v. *City of Montreal* (25 L. C. J. 132), referred to.

THIS was a claim arising out of an expropriation, for the purposes of the St. Charles Branch of the Intercolonial Railway, of a street whereof the property was alleged to be in the claimant, and for damages to other lands belonging to her caused by the construction thereof. The claim was originally referred to the full board of the Official Arbitrators, but being pending before them when *The Exchequer Court Act* (50-51 Vic. c. 16) came in force, it was transferred to the court under the provisions of the 59th section of said Act.

The facts of the case are fully set out in the judgment.

April 26th, 1888

Belleau, Q. C. for the claimant: The property in the street has never passed out of the claimant's hands. There are only two ways whereby the municipal corporation could have gained title to it, viz., either by grant from the claimant, or by prescription. (Cites *Quebec Municipal Code*) (1). There

(1) Art. 749.

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Argument of Counsel.

has been no grant ; but has there been a title acquired by prescription ? By statute passed by the Legislature of the Province of Canada in 1855 (18 Vic. c. 100, sub-sec. 9), there must be uninterrupted user by the public for ten years to give a prescriptive title to the municipal authorities. If this statute was repealed by the *Municipal Code* (it not being reproduced therein) then we go back to the old term of prescription of thirty years. There has been no title gained either by ten or thirty years prescription as the corporation has never taken any steps to declare the street a public way. Cites *Parent* v. *Daigle* (1), *Johnson* v. *Archambault* (2).

Drouin, Q. C. for the respondent: There has been a dedication of the street by the claimant in asmuch as she deposited a plan of her property, showing the location of the street, in the Registry Office for the County of Lévis. The municipal council has also expended money on the road, presumably with the claimant's knowledge and consent, and so title has been gained by prescription as well. The claimant could not have closed the road up before the expropriation. It was a highway within the meaning of art. 749 of the Quebec *Municipal Code*, and within the meaning of *The Government Railways Act*, 1881. Cites *Myrand* v. *Légaré* (3), as to law of dedication of highways in the Province of Quebec.

Belleau, Q C., in reply : The case of *Myrand* v. *Légaré* did not decide that dedication of a highway was sufficient of itself to devest an owner of his property therein. There must also be user by the public, and title gained by prescription.

BURBIDGE, J., now (June 30th, 1888) delivered judgment.

(1) 4 Q.L.R. 154.

(2) 14 L.C.R. 222.

(3) 6 Q. L. R. 120.

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Reasons for Judgment.

This is a claim for $681.00 for 2,724 square feet of land in the village of Lauzon, County of Lévis, expropriated by the Crown for the purposes of the St. Charles Branch of the Intercolonial Railway, and for $1,350 for damages to other lands of the claimant caused by the construction of the said St. Charles Branch. Some time not later than the year 1877, the claimant, being possessed of property in the village of Lauzon, divided it into 41 lots, as shown by the plan thereof (exhibit No. 3). Through these lots a street named Couillard street was laid out, connecting St. Joseph street with Port Joliette, a small cove or harbour on the River St. Lawrence. The plan put in evidence (exhibit No. 3), on which this street is indicated, does not purport to be a copy of a plan on file in the registry office of the County of Lévis, but it is apparent that a plan or description of the division was recorded, for the lots shown on the copy bear the numbers of the cadastre of the village of Lauzon, and Mr. Carrier, the registrar, gave from the books of reference in his office a list and the numbers of the lots which still belong to the claimant.

Of the 41 lots, all of which front upon Couillard street, the claimant sold 13 before the year 1880. From that date to 1882, when the St. Charles Branch Railway was built, none appear to have been sold. In the construction of the railway, the Crown diverted Couillard street, purchasing for that purpose from the claimant the lot indicated on exhibit No. 3 by the cadastral number 271, and opened a way to Joliette street, also indicated thereon, the grade and character of the way from Joliette street to the Port being very considerably improved.

It appears that the village corporation had never taken any steps to declare Couillard street a public way. It was, however, used as such, was open at both ends, formed a means of communication between

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St. Joseph street and Port Joliette, and work had been done and repairs made thereon under the direction of the inspector of streets. The village council, it also appears, had at one time passed a resolution for the construction of a sidewalk on the street, but nothing was done thereunder.

The claimant's contention was that Couillard street, in 1882, was not a highway or public road within the meaning of *The Government Railways Act*, 1881 (44 Vic. c. 25), but was her private property, for the expropriation of which she is entitled to compensation; and that as the street formed part of the whole property, she is entitled to be indemnified for any depreciation in value of the 27 lots still held by her, caused by the construction of the railway. The lots immediately adjoining the railway she had previously parted with, and unless Couillard street at the time belonged to her, no part of her property was expropriated; and it was admitted that, in that case, there was no damage caused thereto by the construction of the railway for which she would be entitled to compensation.

The Crown's contention was that, at the date of the expropriation, Couillard street was a highway or public road within the meaning of *The Government Railways Act*, 1881, which authorized the acts complained of, and that the Crown had satisfied the provisions of the statute (44 Vic., c. 25, sec. 5, sub.-sec. 8, and sec. 49) by substituting a convenient road in lieu of the portion of street so diverted, and that the claimant was, therefore, not entitled to compensation. That, I think, would be the result if Couillard street, in 1882, was a highway or public road within the meaning of the act referred to; and if the law of the Province of Quebec is, in respect of the doctrine of dedication, the same as the law of England, I shall have no difficulty in coming to the conclusion that it was at that time a public and not a private way.

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The facts and circumstances of the case disclose, I think, most clearly an intention on the part of the owner to dedicate the street to the public use as a public highway, and in such a case use by the public for any particular time is not necessary. (*Woodyer* v. *Hadden*) (1). The question is not primarily one of prescription, but of dedication. An intent to dedicate may, speaking generally, be presumed from the user by the public for a period corresponding with the statutory limitation of real actions, and such a user for a period less than that may be important in connection with other facts concurring to show an intent to dedicate. (*Dillon on Municipal Corporations*) (2). The public right in such cases, however, rests upon a dedication actual or implied.

For the claimant, it was urged that the law of Quebec with respect to dedication was not the same as that of England, and that, in such a case as the present, a prescription of ten years was necessary to create the public right, and that at any time before the expiry of that period the claimant could, so far as the public is concerned, have closed the street. In this connection I was referred to *Parent* v. *Daigle* 1871, (3), in which Meredith, C.J., and Stuart, J. held, (Casault, J. *dissenting*) that the road in question which had been enjoyed as such for 30 years and upwards by the plaintiff, the defendant and others having occasion to use it, was to be deemed a public road within the meaning of sub-sec. 9, sec. 41, of the *Lower Canada Municipal and Road Act of* 1855 (18 Vic. c. 100). By that sub-sec. it is provided that:

> 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 the Act.

(1) 5 Taun. 125; 2 Sm. Lead. Cas. 9th ed. 165.
(2) 3rd ed. ss. 637-8.
(3) 4 Q. L. R., 154.

Referring to this provision Ramsay, J. in *Guy* v. *The City of Montreal* (1), says:

By the 18th Vic., cap. 100, sec. 41, s-s. 9, a special statutory prescription of ten years was given to all roads left open and used by the public for ten years. That is to say, a right of way or servitude was established in favor of the public by ten years enjoyment. But in the Act of 1860, which was an Act to consolidate the Act of the 18th Vic. and its amendments, the section giving the prescription was omitted, and it does not appear in any subsequent Act. There was however, no clause repealing the section referred to. It may be a question whether the 18th Vic. was not impliedly repealed by the consolidating Act. But this does not appear to be applicable to roads in towns, and, therefore, we must hold that the only prescription that can accrue to the public in towns is that of 30 years: It may be a fair enough inference from the judgment of *Myrand* v. *Légaré* (2), that we had decided that the 18th Vic. was still in force. I am not prepared to say that I feel bound by that dictum. There was a sixty years possession; the road being perfectly cut off from the rest of the property, and I see by my notes, which are not printed in the report, that this was the view I expressed. It can hardly be seriously contended that there is evidence in the case before us of a prescription of 30 years. We have, therefore, only to enquire whether, as matter of fact, there was an abandonment of the continuation of the street by Mr. Guy, the father, and subsequently by the children, to the public.

It is further to be observed that the competent authority mentioned in sub-sec. 9, is defined in sub-sec. 8, which reads as follows:

Every road declared a Public Highway by any *Process-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.

Sub-section 8 is clearly a temporary provision having reference to roads in existence at the date of the coming into force of the Act, and I am inclined to the opinion that sub-sec. 9 is to 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, during a period of

(1) 25 L. C. J. at p. 136. (2) 6 Q. L. R. 120.

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ten years or upwards. That view of the scope of the provision affords a reason for its not appearing in any later statute.

But even if the 18th Vic. c. 100 sec. 41 sub-sec. 9 is still in force, I do not think that it is conclusive of the proposition that, in the Province of Quebec, there can be no dedication of the public way without a prescription of ten years. It is said in *Angell on Highways* (1), that the doctrine of dedication is of purely common law origin. I think, however, that the dicta of Sir A. A. Dorion, C. J., and of Ramsay, J. in *Myrand* v. *Légaré* (2), and in *Guy* v. *City of Montreal* (3), justify me in concluding that, in reference to the doctrine of dedication or destination, the law of Quebec does not differ from the law of England, as will be seen from the following extracts. In *Myrand* v. *Légaré* (4) (*ut supra*), Sir A. A. Dorion C.J. says:—

Une propriété privée peut devenir propriété publique, lorsqu'elle est déclarée telle par une autorité compétente ou encore par la dédication que le propriétaire en fait pour l'usage du public. Un chemin ou une route peuvent être établis par un procès-verbal ou autre acte émanant des autorités municipales, (autrefois des officiers de voiries) conformément aux dispositions de la loi, ou ils peuvent l'être par tout acte du propriétaire indiquant clairement son intention de le céder au public. Ainsi lorsqu'un propriétaire ouvre sur sa propriété une rue ou une place publique et qu'il y concède des terrains en les désignant comme attenant à telle rue ou place publique, sans aucune réserve de son droit de propriété, il n'y a aucun doute, que par l'usage que le public en fait, cette rue ou place publique ne devienne propriété publique, à l'usage non seulement de ceux qui y ont acquis des terrains riverains, mais à l'égard de tous ceux qui peuvent avoir à y passer, c'est-à-dire, à l'égard du public en général. Cet effet ne résulte pas de la convention faite avec les acquéreurs des terrains cédés, car alors il n'y aurait qu'eux et leurs ayants-cause qui pourraient exiger l'accomplissement des conventions portées dans leurs contrats, ni de la prescription qui acquiert toujours une possession pendant une période déterminée par la loi, pour qu'elle puisse conférer un droit quelconque ; ce qui imprime ce caractère de rue ou de place publique au terrain

(1) § 133.
(2) 6 Q. L. R. p. 120.
(3) 25 L. C. J. p. 132.
(4) Page 122.

indiqué comme tel par le propriétaire, c'est la dédication ou l'abandon qu'il en a fait au public par une déclaration expresse et qui reçoit son exécution par l'ouverture de telle rue ou place à l'usage du public.

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Il n'est pas même nécessaire que cette dédication soit faite par écrit ; il suffit que les circonstances soient telles, qu'elles indiquent clairement que l'intention du propriétaire a été de faire un abandon de son terrain au public, pour qu'il ne puisse plus s'opposer à ce que le public s'en serve conformément à sa destination.

Page 123 :

Comme l'on voit cet arrêt n'a pas été fondé sur la prescription, mais sur l'abandon que le propriétaire avait fait de partie de sa propriété en reconstruisant son mur de clôture.

Les auteurs reconnaissent du reste que le public peut, comme un particulier, acquérir par la prescription la propriété d'un chemin. En effet si un particulier acquiert, par trente ans de possession exclusive, la propriété d'un terrain qui appartient à autrui, on ne voit pas pourquoi la possession non interrompue du public, pendant trente ans, ne lui ferait pas également acquérir la propriété d'un chemin, d'une rue ou d'une place publique.

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Cependant comme ce n'est pas tant par la prescription que par l'abandon que le propriétaire est censé avoir fait de sa propriété que le chemin devient chemin public, il n'est pas nécessaire que le public en ait eu la possession pendant trente ans.

Il n'est pas question dans ces citations de la possession de trente ans. C'est aux tribunaux à juger, si d'après les circonstances, le public a joui d'un chemin assez longtemps pour faire présumer que le propriétaire en a fait l'abandon.

And in *Guy* v. *City of Montreal* (*ut supra*) the learned Chief Justice remarks (1) :—

C'est ce que cette cour a décidé à Québec, dans une cause de *Myrand* v. *Légaré*, en s'appuyant sur des principes du droit français qui, sur ce point, ne diffèrent guère des règles indiquées par Dillon. Nous avons même déclaré dans cette cause, qui est rapportée au 6e vol. des rapports judiciaires de Québec, p. 120, où toutes les autorités sont citées, qu'il n'était pas nécessaire que la destination du propriétaire fut établie par écrit, mais qu'elle pouvait s'inférer des circonstances sous lesquelles le public avait joui du terrain en litige.

In the latter case Ramsay, J. says (2) :

(1) Page 134. (2) Page 136.

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The law of England and that of France appear to agree, although Mr. Dillon calls the doctrine anomalous (1), and the Supreme Court of the United States has likewise adopted it. This indicates, I think, that some great principle justifies the existence of the doctrine, and I don't think it is difficult to discover it. When the law requires that a donation shall be in writing, it is a rule of positive law that it declares, and not what is essential to the contract. A donation might quite well exist without a writing, and certain donations without writings are maintained.

Dillon (2) says that the doctrine of dedication is founded in public convenience and has been sanctioned by the experience of ages, that without such a principle it would be difficult, if not impracticable, for society in a state of advanced civilization to enjoy the advantages which belong to its condition and which are essential to its accommodation, that the importance of the principle may not always be appreciated, but we are in a great degree dependent on it for our highways and streets and the grounds appropriated as places of amusement or of public business.

I am, therefore, of opinion that, at the date of expropriation of the land in question in this matter, Couillard street was a public highway, and that the claimant is not entitled to compensation.

Judgment for respondent, with costs.

Solicitors for claimant: *Belleau, Stafford & Belleau.*

Solicitors for respondent: *Casgrain, Angers & Hamel.*

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(1) *Mun. Corp.* 3rd ed. § 630. (2) *Mun. Corp.* 3rd ed. § 627.