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*Oct. 27-29.
*Dec. 15.

ARMITAGE RHODES AND OTHERS (DEFENDANTS) ..... } APPELLANTS;

AND

JOSEPHINE PERUSSE (PLAINTIFF) ..... } RESPONDENT.

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

Dedication of highway—Conditions in Crown grant—Access to beach—Plan of subdivision—Destination by owner—Limitation of user—Long usage by public—Acquisitive prescription—Recitals in deeds—Cadastral plans, references and notices—Evidence—Presumptions.

A strip of land, extending from a public road to the River St. Lawrence, formed part of a beach lot granted by the Crown, in 1854, on condition that, in case of subdivision into building lots, "a sufficient number of cross-streets shall be left open so as to afford easy communication between the public highroad, in rear of the said beach lot, and low water mark in front thereof." Prior to 1865 the lot was subdivided and, on the plan of subdivision, the strip of land was shewn as a lane or passage. Reference to this lane or passage was made in a deed of sale executed by the owner, in 1865, and the cadastral plan of the municipality, made in 1879, for registration purposes, shewed it as a public road. In 1881, in connection with the registration of charges on the land, the owner made a statutory declaration and gave a notice to the registrar of deeds, as required by the "Cadastral Act," describing the strip of land in question as "a road 20 feet wide." It was also shewn that, during more that thirty years prior to the action, the strip of land had been used as a lane or passage by the general public.

Held, affirming the judgment appealed from (Q.R. 17 K.B. 60), Idington J. dissenting, that these circumstances constituted complete, clear and unequivocal evidence of the intention of the owners of the beach lot to dedicate the strip of land in question

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

for the purposes of a public highway, that no formal acceptance of such dedication by the corporation of the municipality was necessary to render such dedication effective in favour of the general public, and that, even if there had originally been any limitation reserved as to the use thereof by a special class of persons only, it had become a public highway by reason of long user as such.

Although no right of ownership can be affected by cadastral plans, they must, in view of their publicity, be considered as having some probative effect in respect to persons having interests in the lands described therein.

APPEAL from the judgment of the Court of King's Bench, appeal side(1), affirming the judgment of the Superior Court, District of Quebec, which maintained the plaintiff's action with costs.

By her action, the plaintiff claimed the right to a declaration that a strip of land between St. Lawrence Street, in the Town of Lévis, and the River St. Lawrence, was by destination and dedication intended for and, by long user, had become a public highway, and asked to have an obstruction removed, and for damages.

The judgment of the Superior Court, rendered by Mr. Justice Lemieux, declared the land in question to be a public highway, ordered the defendants to remove the fence which had been placed across it, and that the defendants in warranty, who had taken up the *fait et cause* of the principal defendant, should indemnify him against the damages, interest and costs which were awarded to the plaintiff.

The circumstances of the case and the questions at issue upon this appeal are stated in the judgments now reported.

(1)Q.R. 17 K.B. 60.

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G. G. Stuart K.C. for the appellants.

C. E. Dorion K.C. and *Eusèbe Belleau K.C.* for the respondent.

THE CHIEF JUSTICE.—By the action out of which this appeal arises the plaintiff (now respondent) asks for a declaration that a small strip of land leading from St. Lawrence Street, in the Town of Lévis, towards the River St. Lawrence, is a public highway. The appellant, who sold the property to the defendant, Vézina, intervened as his warrantor and, taking up the instance in the cause, denied that the strip of land in question was a public road or had ever been used as such. The trial judge held in favour of the plaintiff and, on appeal to the Court of King's Bench, his judgment was affirmed, Mr. Justice Bossé dissenting.

The question at issue is a very narrow one and in my opinion depends largely for its solution upon the terms of a grant of the foreshore over which the road passes made by the Crown to Wm. Rhodes, father of the appellant, by Letters Patent, in 1854.

At that time the beach was open to the public. Certain *censitaires* referred to in the grant, and some of whom are represented by the plaintiff, owned property to the south of the highway now known as St. Lawrence Street, which separated their lands from the River St. Lawrence, at this point both tidal and navigable. It appears by the conditions of the grant that these *censitaires,* under the impression no doubt that they had, as riparian owners, a claim on the foreshore, sold some beach lots to Rhodes. Further there is evidence that during the high tides of the spring and fall the river crossed the highway and

flowed onto the lands to the south. It might possibly be contended on the facts that the *censitaires* were then riparian owners and entitled as such to a right of access to the river. *Lyon* v. *Fishmongers Co.*(1). However this may be it can at least be said of them, adopting the language of Lord Cairns in *Metropolitan Board of Works* v. *McCarthy*(2), at page 252, that they had two highways, the one highway being a road or a street, and the other, immediately beyond and abutting upon the road or the street, being a highway by water. It is further proved as a fact that the general public had free access to and from the river from the highway which ran along the shore and in daily contact with the ebb and flow of the tide.

Briefly stated these were the conditions existing when the grant was made and in the light of these conditions we must construe the grant in which are provisions not usually found in such instruments and evidently inserted for the purpose of meeting the exceptional circumstances, as the effect of the grant must be, if the beach lot was laid out, as contemplated, in building lots, to cut off the right of access and destroy the highway by water.

The lot granted by letters patent contains a superficies of 96,198 feet in what is now the Town of Lévis, immediately opposite the City of Quebec, and proved, as established in this record, a most valuable concession. The money consideration for the grant was £656 19s. 4d., of which one-quarter was payable in cash and the balance in four equal annual instalments. There are other obligations imposed on the grantee with respect to the building of wharves which

(1) 1 App. Cas. 662.

(2) L.R. 7 H.L. 243.

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all persons are to be permitted to use for the moorage of vessels and to which free access is to be given both from the river and the highway; and finally there is a clause which is for our present purpose the most important and reads as follows:

> Provided always and these our letters patent are granted upon the *express condition* that our said grantee, his heirs and assigns do and *shall renounce and give up all and every claim against and shall hold harmless all and every the censitaires holding lands in the immediate rear of the beach lot hereby granted, for or by reason of any sale or transfer of property by them or any of them heretofore made to our said grantee or of right of property in the said beach lot or any part thereof; and further that, in case the said beach lot shall at any time hereafter be laid out* for building lots, *a sufficient number of cross-streets* shall be *left open* so as to afford *easy communication between the public highroad* in rear of the said beach lot and low water mark in front thereof, and that such streets shall be made in the manner and of the dimensions that shall be prescribed by municipal regulation then lawfully established.

What is the meaning of the latter part of this clause? Is it not, under the circumstances to which I have referred, equivalent to a reservation of so much of the beach lot as might be necessary to give, by means of a public highway, easy communication from the public street to the river in case the beach lot is thereafter laid out for building purposes? This appears to me to be very clear. In the first part of the proviso it is made an express condition of the grant that Rhodes renounces and gives up all claims against the *censitaires* which he may have by reason of the sale made by them to him under the erroneous impression no doubt that the property in the foreshore passed to them under their deeds of concession from the seigneur; then—the private interests of the *censitaires* being protected—the interests of the general public are safeguarded in the second part. The Crown, as owner of the foreshore, had undoubtedly the right to cut it

up and dispose of it as it deemed best; but clearly in so doing it owed a duty to the general public, irrespective of the special rights of the riparian owners to protect them in the enjoyment of the common law right of *accès et sortie* to the river which they then had and of which they must necessarily be deprived in the contingency then foreseen that the beach might be laid out for building lots. It is not to be assumed that the Crown would be more solicitous for the private interests of certain individuals than for the common law rights of the general public, and there can be no doubt in my mind, reading the whole grant, that it was as clearly the intention of the Crown to protect the right of *accès et sortie* to the river as it was to effect a settlement of the disputes then existing between Rhodes and the *censitaires*. That Rhodes so construed his title appears by fair inference from several deeds to which he was a party and by his acquiescence in the use made of the strip of land now in question by the general public during many years.

Apparently, at some time previous to 1865, it was decided to lay out the property conveyed by the Crown to Rhodes, or at least that portion of it lying to the east, in building lots, as contemplated by the grant, and in that connection a plan is said to have been made by one O'Brien, land surveyor. This plan was not produced at the trial, although diligent search was made for it by both parties, and there is no direct evidence that it was prepared under the instructions of Mr. Rhodes, but both courts below have come to the conclusion, as warranted by the evidence, that such a plan was made and existed in 1865. In that year, Rhodes, and others who had acquired an interest in the property with him, sold a portion of it to one Simp-

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son, now represented by the respondent, and in the deed of sale the property is described in these words:

> A certain lot or parcel of ground situate and being at the place called Rhodes's Cove, heretofore McCaw's Cove, in the town of Lévis, containing fifty-nine feet in front and gradually increasing in width from front to rear until at its extreme depth it measures seventy-six feet by fifty feet in depth, the whole more or less, English measure, bounded in front towards the south-east by the *public highway* or cove road, in rear toward the north-west by a *reserved road or street* on one side to the south-west by lot number three sold to the said William Simpson and on the other side to the north-east by a *lane or passage of the width of twenty feet between the property above described and that of Benjamin Huot dit Saint Laurent together with the right of way over the said passage in common with the neighbouring proprietors as the said lots are laid down* and distinguished under the numbers one and two on the plan of a *large extent* of property drawn up and prepared by G. P. O'Brien of Quebec, land surveyor, and deposited in the office of Noel Hill Bowen, one of the subscribing notaries.

This plan here referred to, known in the record as the O'Brien plan, was evidently from the use made of it in this deed of sale prepared for the purpose of laying out the beach in building lots and if not made under the instructions of Rhodes and his associates is so fully adopted by them and made part of this transaction that they and their successors in title should not be allowed to repudiate it or treat it otherwise than as conclusively binding upon them for all the purposes of the deed. The property sold is described by metes and bounds, it is true, but also by reference to the numbers on the plan which is said to have been deposited of record in the office of one of the subscribing notaries. It would be impossible to identify the plan and the deed more closely. It further appears by the terms used to describe the boundaries of the lot sold that the strip of land now in question is called by the vendors a lane or passage (lane is included in the word road under the Municipal Law of

Quebec, art. 19, par. 27), and this lane is said to connect the public highroad on the southeast with a reserved road or street on the northwest. The public highroad referred to being the road to the rear of the beach lot and between which and low water mark easy communication must, in the terms of the grant, be given so that this lane is the means of access reserved from the public highway to the river and the only means of access which is proved to exist. It is quite true that the beach lot does not appear to have been actually divided into and sold for building purposes except to a limited extent, but the condition of the grant is that a street is to be left open to afford easy communication between the highroad and low water mark not, as argued here, when the beach lot is divided up and sold, but when it is laid out in building lots.

Next in the order of time we have the cadastral plan prepared in 1879 by the public officials of the province for registration purposes and on this plan the strip of land is indicated as a public road. I concede that no right of ownership is affected by any error in the cadastral plan; but it is impossible to imagine that this plan which the law requires to be kept in a public office for inspection and correction by parties interested is not to be considered as of some probative effect. It was open to examination and no doubt would and might have been altered if it erroneously represented the conditions then existing.

Further, on the 5th of August, 1881, Rhodes made a declaration in writing, as required by the "Cadastral Act," in connection with the renewal of the registration of a ground rent due to him on one of the lots sold to St. Laurent, which forms part of the beach lot, and

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in that declaration this strip is again described as "a road 20 feet wide."

We have, therefore, as the foundation of the theory of dedication: 1st. The grant which in effect provides in certain contingencies which have been held by both courts to have arisen for easy communication from the highroad to the water; 2ndly. The O'Brien plan adopted by Rhodes which purports to lay out the beach in building lots, with this lane or passage marked on it; 3rdly. The deed to Simpson, in September, 1865, with the lane or passage again referred to; 4thly. The cadastral plan on which the strip of land appears as a highway; 5thly. The notice to the registrar in which Rhodes describes the strip of land as a road.

In these circumstances, if complete, clear, unequivocal evidence of an intention to dedicate the strip of land is required, have we not got in such a case as this where the land came to the grantee originally burdened with the obligation to give easy communication over it between the public highroad in the rear and low water mark in the front?

There is also the uncontroverted evidence of usage by the public, during more than thirty years, of this lane or passage; and if originally it had been reserved for the use of the proprietors and tenants of Rhodes, has it not, by reason of this long usage, become a public highway?

See Ancien Denisart, *vo.* "chemin," no. 11:

> Un chemin particulier devient chemin public par la seule possession du public.

Idem, par. 3, No. 1:

> Les simples sentiers dont nous parlons dans le paragraphe suivant doivent aussi être mis au rang des chemins publics, quand le public est en possession de s'en servir depuis longtemps.

It has been argued that Rhodes may have intended by the deed to Simpson to create only a servitude of passage, but that contention fails entirely. Such a servitude, *i.e.*, a real servitude is a charge imposed on one real estate for the benefit of another belonging to a different proprietor. Where is the servient and dominant estate here? There is no reference to a particular dominant land.

Planiol, vol. 1, p. 590:

Pour qu'il y aît véritablement servitude, il ne suffit pas qu'un propriétaire soit gêné dans l'exercise de son droit; il faut qu'il y aît un *fonde dominant*. C'est là le point qui doit toujours être considéré, si l'on veut éviter cette confusion.

Mr. Justice Bossé relies upon the fact that the dedication was not accepted by the corporation, but this is not necessary; the dedication was not to the corporation, but to the public. There could be a valid acceptance by the public user of the way and, under the Municipal Code of Quebec, a road in use for ten years and divided off on each side from the remaining land, as this was, becomes municipal by mere lapse of time. Art. 749 C.M.

The appeal should be dismissed with costs.

GIROUARD J. agreed with the Chief Justice.

DAVIES J.—I concur in dismissing this appeal and confirming the judgment of the Court of King's Bench, for the reasons given by the Chief Justice.

IDINGTON J. (dissenting).—In 1854 a patent was issued granting the late Mr. Rhodes what was called therein lot No. 2 defined by metes and bounds and forming part of the foreshore lying adjacent to a high-

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way, now known as St. Lawrence Street, which, on its side next the foreshore thus granted, skirted the same at high water mark.

The frontage of this grant extended 446 feet along this street and ran back therefrom several hundred feet to the low water line of the river.

To comply with one of the conditions of the grant, a wharf was built of about thirty-five feet in width running at right angles to the said street some two hundred and fifty feet from the street across the beach and towards the said low water line.

It is alleged that next to that wharf three small lots, having frontage of 75 feet altogether on the said street and fifty feet in depth, were laid out and sold, in 1865 or previous thereto. Another lot some distance to the eastward and of thirty-three feet front on the same street had been sold earlier and is No. 7 on later cadastral plan. It is deeper than these others. Next to that on its easterly side was another piece now called No. 6 on that plan.

That seems all that had been done up to the 5th September, 1865, or eleven years after the grant, when a deed was made by Rhodes to one Simpson, under whom respondent claims, of a lot, known now as No. 12 on the cadastral plan, having a frontage on the St. Lawrence Street of fifty-nine feet and a depth of fifty feet and widening out so as to be wider in the rear than in front.

The configuration of these lots when regard is had to their varying sizes and shapes and depths, indicates they were not the result of any plotting of the ground as a whole or even of any considerable extent of it, but the result of bits having been carved out as occasion required.

The reference in the deed last mentioned to lots one and two as appearing on such a plan by one O'Brien is not at all inconsistent with this view. A plan may have been projected but discarded when lots would not sell.

If it had been adhered to I think we would have had the fact demonstrated by careful comparison of the contents of all the other deeds and records in any way attributable to Mr. Rhodes instead of being asked to make a few guesses, and indeed guesses inconsistent with the very terms of this one deed.

In the absence of evidence of original numbers of lots on either side of it, I, with great respect, fail to see how, as the majority judgment of the court below has it, this land was without a number.

A space of twenty feet fronting on St. Lawrence Street was thus left between the said lot No. 7 and this Simpson lot.

The heirs of Rhodes shortly before this suit sold this space.

Respondent claims this space had been dedicated as a highway and that she, one of the public, entitled as such to use such highway, had been specially injured beyond the rest of the public by the building erected thereon by the purchaser.

The appellants as warrantors of title of the said space have defended to protect their purchaser.

She puts her claim relative to the dedication of this space as street in a two-fold way. She says Rhodes was bound by the conditions of this grant to furnish a cross-street, and although conceding he was not bound to locate it in this exact spot yet as he left a space for a passage way it must be attributed to him that he intended such passage way as part fulfilment of the

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obligation resting upon him and, hence, to be used as a public highway, and that in any event he intended to and did dedicate this space as a public highway and again that by reason of the condition imposed upon him we can the more readily infer such intention.

I think, whether we consider the question raised to be one of dedication or of the discharge of a duty cast upon the grantee by virtue of the terms of the patent granting him a certain area of foreshore it must be determined by what we find to have been the intention of the grantee.

The condition in question amongst numerous other provisos and conditions contained in the patent is the following:

> Provided *always, and these our letters patent are granted upon the express condition, that* our said grantee, his heirs and assigns do and shall renounce, quit and give up all and every claim against and shall hold *harmless all and every the censitaires holding land in the immediate rear of the beach lot hereby granted, for or by reason of any sale or transfer of property by them* or any of them heretofore made to our said grantee or of right *of property in the said beach lot or any part thereof,* and further that *in case the said beach lot shall at any time hereafter be laid out for building lots, a sufficient number of cross-streets shall be left open so as to afford easy communication between the public highroad* in rear of the said beach lot and low water mark in front thereof, and *that such streets shall be made in the manner and of the dimensions that shall be prescribed by municipal regulations then lawfully established.*

Let us consider the peculiar terms of this condition. No one arguing seemed able to explain the purpose of the first part. Possibly the intended cross-streets had some relation to the rights referred to and never had any relation to the rights of the general public. Passing that and assuming that the convenience or possible right of the general public was within the scope of the purpose of this provision for cross-streets when was it to become operative? It is plainly

written that it was only *in case the said beach lot shall at any time hereafter be laid out for building lots* that the cross-streets were to be provided. No such thing has happened. The trifling grants made for building lots are, as a whole, but a mere fractional part of the beach lot which, taking this literally, means the whole lot.

Read, however, not literally, but in a broader way as merely anticipating some substantial approximation of the whole being laid out in building lots, necessitating and entitling the public to demand the cross-streets in order that they would not be inconvenienced, can any one, looking at what happened, conceive of such a provision as this alley afforded, as meant, to meet such a case as that?

Plainly the scope and purpose of the whole grant was formed upon a vision of immediate or early realization of something that has not even yet come to pass.

The bright outlook of 1854 probably became overcast and the hoped-for, expansive, busy harbour turned out a dream.

It seems to me absurd to attribute to any sane man the intention of laying out, as in conformity with what was expected and provided for, a cross-street formed in such a zigzag fashion as this alleged cross-street.

Can any one imagine such a thing deliberately presented either to the municipal council or the officers of the Crown for approval had the events calling therefor arisen?

But if the shape of the thing is not of itself enough to prove the absurdity let us see what was stipulated for in the condition. These cross-streets were to have been made

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in the manner and of the dimensions that shall be prescribed by municipal regulations then lawfully established.

23 Vict. ch. 61, sec. 40, sub-secs. 10 and 11, are as follows:

10. No front road, opened after the first day of July, one thousand eight hundred and fifty-five, shall be less than thirty-six feet French measure, in width, between the lines of the fences on each side thereof;

11. No by-road and no road leading to a banal mill opened after the day last aforesaid, shall be less than twenty-six feet French measure, in width, between the lines of the fences on each side thereof.

These sections continued to be law until the Municipal Code of the Province of Quebec, which slightly modified them in terms used in the sections 768 to 770 thereof which do not, however, touch the case in hand.

The law was so continued by that code till the law, as amended by 53 Vict. ch. 47, required roads in cities, towns and villages to be sixty-six feet wide. Of course special legislation or leave given, as once was provided for by the Lieutenant-Governor in Council, are to be excepted, but these are not in question here.

I am, with respect, quite unable to understand how anything done, as all that was done, which is relied upon here for dedication of a street can be held such or at all in execution of the condition of the deed in face of the express statutory requirements shewing it would be contrary to this law and thus to the above cited proviso of the grant.

It is, however, seriously urged that the terms of the said deed to Simpson imply an intention to dedicate.

But for the adoption of the argument I should have thought such an inference to be absolutely inconceivable. I quote the following from the description in said deed:

Bounded in front, towards the south-east by the public highway or cove road, *in rear towards the north-west by a reserved road or street* on one side to the south-west by lot number three sold to the said William Simpson and on the other side to the north-east *by a lane or passage of the width of twenty feet between* the property above described and that of Benjamin Huot dit Saint Laurent *together with the right of way over the passage in common with the neighbouring proprietors as the said lots are laid* down and distinguished under the numbers one and two on the plan *of a large extent* of property drawn up and prepared by G. P. O'Brien.

The cove road is now St. Laurent Street. The reserved "road or street" in the rear is thirty-six feet in width, being the then usual width of streets. Clearly it was intended as the words and width imply to have this reserved road become a permanent street. But when the description comes to the north-east side and refers to this land in question the words used are changed to read "by a lane or passage of the width of twenty feet." Clearly something different from the other road or street is meant and the width is what did not conform to statutory municipal widths as the other might fairly claim to have done. And, moreover, when we read further and find that there is specially assigned to the grantee a right of way thereon in common with the neighbouring proprietors of the said lots its use when thus restricted is quite inconsistent with the notion of absolute abandonment to the whole public. If this latter had been intended it would have been so much easier to have used the same language as in the preceding description of the rear boundary. Besides, how can we suppose such difference of widths intended for these respective streets?

The desire to exclude all the public therefrom but those desiring and requiring communication with the limited number of the neighbours or any of them or they with others beyond their respective premises, is quite conceivable and that such a narrow passage

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ought not to be thrown open to general use hindering its ready use by those few evidently intended to benefit by it is also so.

For reasons one may suspect this right not being open we are asked to imply something else.

In many ways the expected development fell short. We may guess many things as to these plans for development, but this guess of including the alleged street now in question as part of a public highway seems the most hopeless of many that are open to one reading the evidence and plan which probably presents but a fraction of what Mr. O'Brien had begun.

By reason of the obvious failure of the scheme as a whole, and of demands for building lots there, the general convenience of the public never had been disturbed for want of cross-streets. If this outlet had been occupied, and all the lands Rhodes alienated had been built upon, it would have withdrawn only about a third of the frontage from public use. But to this day lot 7 is unoccupied and probably nothing was built on in 1865. The wharf was and is no doubt travelled over. The one half of the entire frontage granted Rhodes has never been laid out into lots or occupied. Hence it never occurred to anybody to ask for a cross-street or to the council to adopt this as a cross-street, much less to Rhodes, in 1865, to dedicate such a street as alleged by such curious methods as alleged.

The next thing claimed to be important in support of the respondents' contention is that in the renewal of registration of a ground rent to comply with new enactments he on the 5th August, 1881, referred to the said lot No. 7 as bounded to the south-west by a road of "20 feet wide."

This is not inconsistent with the road being of the private character originally indicated, though if followed up and coupled with other things it might start a new basis for an express case of dedication or be held as an adoption in that sense of previous public use as quite justifiable and in accord with his intention to dedicate.

The fact is, however, even this equivocal description arose from a palpable error in following some one else's error, for which Mr. Rhodes was not responsible, and a few days later his renewal of his registration of his rights resulting from the letters patent is made in such a way as to shew he claimed this very land and other parts as being one lot, "8a," as they appear on the cadastral plan.

Besides all this, from 1873 down we have evidence that this lot thus named "8a" was assessed and taxes thereon paid by Mr. Rhodes and his heirs or representatives, almost, if not altogether, continuously.

This is quite inconsistent with a settled purpose to dedicate and with the accidental use of the word road as an indication that he had already dedicated.

In 1879, or thereabout, the Intercolonial Railway was built through and along this beach and altered, no doubt, the original purposes and plans of Rhodes and others, respecting these properties. Yet no new building lots seem to have been demanded or need for the cross-streets arisen.

The contractor for this railway, which was built by the Crown, left an opening in the trestle work carrying that railway along the beach.

Nobody pretends this was done at the request of Mr. Rhodes. It was doubtless done at the request of his grantees or their assigns.

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Their doing so was quite in accord with an extension of the rights reserved to *them* as shewn by the deed to Simpson.

How it created any right in the general public or is evidence in itself of dedication I am unable to understand.

Lastly, we are asked to find that such general use of this alleged road was for a long, continuous period made by the public with the knowledge of Mr. Rhodes as to furnish proof of dedication.

I should be sorry to deprive any man of his property by giving the effect claimed to such meagre evidence of general and continuous user by the general public as we have here. Nor as I understand would any one else but for the supposed dedication being held conformable to the above-quoted proviso in the grant despite the obvious conflict therewith already referred to.

Indeed, to hold this evidence as sufficient for such a purpose would be a menace to the rights of many good-natured people whose property has been for years crossed without consideration of such an effect as possible.

The proprietor did not live where this alleged crossing took place. No one testifies he ever was aware of it.

It is conceded this foreshore was used as such spaces, when ungranted and unoccupied, always are used by the public or at all events those of the public having access thereto.

Doubtless this use was expected to continue and continued after the grant as freely as before on all parts thereof unoccupied by grantees of Rhodes.

Until the building of the Intercolonial Railway the

public had, as well as over this, free access, as open as ever, over the remaining unalienated frontage and the wharf to reach the river.

The municipal council, in or about the year 1868, widened and improved St. Lawrence Street, and in doing so erected a sea-wall, so to speak, to prevent the street from being inundated.

At the point where this alleged 20 feet wide street, which it is claimed was becoming dedicated by virtue of this user, joined this St. Lawrence Street the wall so erected was about six feet high above the land in question and one desiring to step from St. Lawrence Street on to this new street had that difficulty to overcome, or jump down into a hole.

Nay, more, it was so dangerous that a barrier was erected, consisting, it is said, of two oars nailed up at this entrance, to prevent passers-by falling into the cavity.

Those, therefore, desiring to use and thereby accept for the public this proffered dedication had to jump over or go round this barrier. They did the latter by means of crossing the end of lots 7 or 12. In course of time the rubbish thrown there or drifted by the tide there partly filled up the hole and made it easier of access, and hence we have varying estimates of its depth.

It seems a pretty strong thing to impute upon and only upon such evidence an intention on the part of the proprietor to dedicate.

But what of the acceptance necessary to complete dedication?

The council usually represents the public in relation to such acceptance. They did not do so here.

Again, when the user in time has by a continuous

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assertion of such right taken on a definite form so that apparently a public way has been created, those concerned are not usually slow to ask their municipal council to improve what seems to have grown by common consent to be a public road.

Nobody ever thought of such a thing in relation to this alleged road. Why? It needed certainly something done to facilitate travel if that travel had really existed which ought to evidence either acceptance of a dedication by long use or abandonment of property thereby. Is it not obvious that either the travel did not exist to justify such a conclusion or that every one knew it was a mere piece of private property over which only some persons could, as of right, pass, and that all the travel done by others beyond these was of the trifling character that would not warrant either the council to assume it or any one to ask them to assume it and fill up the space so as to make it bear some resemblance to a public way.

All this time the tide is going in and out over this alleged highway and nobody caring until some person recently in connection with some work on the Intercolonial Railway saw fit to fill it up level with the street and render it travellable.

Inasmuch as no point was made and argued of the peculiar nature of the title Mr. Rhodes got as grantee of the foreshore (see the case of *Lord Fitzhardinge* v. *Purcell*(1)), I have not rested my conclusion upon such considerations, but I may be permitted to doubt if there ever could have been a dedication in the ordinary sense of this land for a public highway, and if there ever could be invoked by the respondent (even if not impliedly restricted to a user in common with the

(1) (1908) 2 Ch. 139.

specified neighbours) any such rights as she asserts except by and through the intervention of the Attorney-General by way of insisting upon the due observance of the proviso above quoted from the grant.

Had the need for "easy communication," which is the gist of the proviso, arisen and such a proceeding been taken by the Attorney-General, how could Rhodes have answered it by alleging or tendering this zigzag space only twenty feet wide at the place in question as an "easy means of communication."

Such are the several, and as I find insufficient, grounds of the claim when each is taken in detail.

And if taken as a whole I fail to see how they can found in law such a claim as set up by the respondent.

I therefore conclude the appeal should be allowed with costs here and in all the courts below.

MACLENNAN J.—I would dismiss the appeal for the reasons given by the learned Chief Justice.

DUFF J. concurred in the judgment dismissing the appeal.

Appeal dismissed with costs.

Solicitors for the appellants: *Pentland, Stuart & Brodie.*

Solicitors for the respondent: *Belleau, Belleau & Belleau.*