CASE AND COMMENT

HIGHWAYS—MUNICIPAL ACT, 1913, SEC. 432—DEDICATION.—*Point Abino Association* v. *Township of Bertie*[1] turned upon the words "all roads upon which Statute labour has usually been performed * * * shall be common and public highways" in sec. 432 of the Municipal Act, 1913. In earlier legislation the word "deemed" occurred before the word "common." It was held at trial, and upon appeal, that the law was not changed by omission of the word "deemed" in the revision of 1913 and that cases upon the earlier legislation still apply notwithstanding the omission of that word. The "road" in question had been laid out by two Plans in 1894 and 1898 showing it and another as private entrances. The owner's certificate in each Plan stated that the "private entrances" were all private approaches to the lots and for the exclusive use of the owners of the lots in this tract. The "road" in question ran down the East shore of Point Abino southerly in front of the lots laid out by the Plan, and it gave to the lot owners on Point Abino access to the side line laid down by Township Survey. In 12 out of 17 years the Township had done some seasonal work on the "road," filling holes and doing some scraping, but in the same time the lot owners had spent many times more money in permanently improving the travelled way. The case made at trial was that of a privately owned way upon which some public money had been spent. The trial judgment, affirmed upon appeal was in favour of the private owner. The learned Trial Judge found that the evidence of public user was insufficient, that there was no possibility of finding that a public right had been established before a former owner of Point Abino became entitled in 1874, and that it was clear that neither he nor his successor in title ever had any intention of dedicating a road to the public. The Trial Judge stated that the defendants must rely therefore solely on the effect of the work done by them upon the road. The following citations were made:

1. The judgment of Robinson, C.J., in *Regina* v. *Rankin*,[2] in which after referring to *The King* v. *Sanderson*,[3] and *Belford* v. *Haynes*,[4] Robinson, C.J., said:

[1] [1927] 4 D.L.R. 503; 61 O.L.R. 120 (Rose, J.) and 610 (App. Divn.)
[2] (1859) 16 U.C.Q.B. 304 at p. 310.
[3] 3 O.S. 103,.
[4] 7 U.C.Q.B. 464.

The fact of the public using it (the road) for ten years, or expending labour and money upon it between 1846 and the present time, is not sufficient to establish it as a lawful highway, against the will of the owner of the soil, where there is no sufficient ground for presuming a dedication.

2. The judgment of Osler, J.A., in The Township of *St. Vincent* v. *Greenfield*,[5] part of the citation being:

It is impossible to suppose that a highway can be created by merely expending the public money in opening out a road over lands of private individuals, unless such road is as regards them laid out and established in a lawful manner by expropriation, dedication, or otherwise. It must first be a road which may be lawfully opened. So with regard to the performance of statute labour: "Any *road* whereon the statute labour has been usually performed" * * * the continued performance of statute labour upon a road which was in its inception a trespass road does not in my opinion, by force of the statute absolutely make such road a public highway. It may at most raise a presumption of dedication, or be evidence from which a dedication by the owner may be inferred, and may throw upon him the onus of rebutting such presumption or inference. I do not think it has any higher effect.

3. The judgment of the Court of Appeal in *Macoomb et al* v. *Welland*,[6] in which *Regina* v. *Rankin* (*supra*) and *St. Vincent* v. *Greenfield* (*supra*) were cited and approved.

The judgment of the Appellate Division affirming the trial judgment in referring to the change of wording in Section 432 of the Municipal Act 1913 states that:

If a highway is to be established against the will of a private owner it must be by expropriation in the manner provided by the Statute with compensation (vide Section 322 et seq.) and cannot be accomplished without compensation by merely doing statute labour or expending public money upon it. The intention of the legislature to effect so radical a change in the law, effecting prejudicially the vested rights of owners of property, is not to be deduced, unless such intention is clearly expressed in plain and unambiguous language. Such intention is not to be gathered from the slight alteration in the words of the Section when it was re-drafted.

Ferguson, J.A., in approving the trial judgment stated that he did not consider it necessary to express an opinion whether the work done pursuant to a by-law compounding statute labour was "statute labour" within the meaning of Section 432.

Some relevant decisions, in addition to those referred to at trial, are; the judgment of Park, B., in *Poole* v. *Huskisson*:[7]

In order to constitute a valid dedication to the public of a highway by the owner of the soil, it is clearly settled that there must be an *intention* to dedi-

[5] (1887) 15 O.A.R. 567 at pp. 570 and 571.
[6] (1907) 13 O.L.R. 335.
[7] 11 M. & W. 827 at p. 830.

cate—there must be an *animus dedicandi,* of which the user by the public is *evidence,* and no more; and a single act of interruption by the owner is of much more weight upon a question of intention, than many acts of enjoyment.

Belford v. *Haynes* (*supra*), in which Robinson, C.J., cited with approval *Poole* v. *Huskisson* (*supra*) giving the reference there as 2 M. & W., American Edition, 828, and setting out a rule contained in a foot-note to that edition as one approved in several American cases: "A dedication to the public use takes effect from the intention of the person making it and the merely opening or widening a street for the convenience or benefit of the person doing it and permitting the public to use will not constitute a dedication." Chief Justice Robinson went on to say "Each case must depend on its own circumstances and it must commonly be a question for the jury with what intention the user has been permitted."

Belford v. *Haynes* (*supra*) was approved in *Regina* v. *Rankin* (*supra*).

In *Dunlop* v. *Township of York,*[8] Spragge, V.C., stated:

In a new country like Canada it would never do to admit user by the public too readily as evidence of an intention to dedicate. Such user is very generally permissive, and allowed in a neighbourly spirit, by reason of access to market or from one part of a township to another, being more easy than by the regular line of the road. Such user may go on for a number of years with nothing further from the mind of the owner of the land, or the minds of those using it as a line of road, than that the rights of the owner should be thereby affected.

In *Mann* v. *Brodie*[9] Lord Blackburn, after setting out the above extract from Baron Parke's judgment in *Poole* v. *Huskisson* (*supra*) continues:

But it has also 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.

In *Folkestone Corpn.* v. *Brockman,*[10] Lord Kinnear, after setting out Lord Blackburn's observations in *Mann* v. *Brodie* (*supra*), said:

The points to be noted are, first, that the thing to be proved is intention to dedicate, and secondly, that while public user may be evidence tending to instruct dedication, it will be good for that purpose only when it is exercised under such conditions as to imply the assertion of a right, within the knowledge and with the acquiescence of the owner of the fee.

[8] (1869) 16 Grant 216 at pp. 222-3.
[9] (1885) 10 A.C. 378 at p. 386.
[10] [1914] A.C. 338 at p. 352.

From the judgments cited above it would appear that the essential fact in cases of "roads on which public money has been expended for opening them or on which statute labour has usually been performed" is—dedication or no dedication by the owner of the land to the public use. The words of Meredith, J.A. (now C.J.C.P.) in *Macoomb* v. *Welland* (*supra*) while written with reference to the facts in that particular case, seem capable of general application: "The one question is whether any one owning the land in question ever dedicated it, that is, made a gift of it, to the public for the purpose of a highway."

Perhaps a short working rule could be stated thus: If no dedication, then no basis upon which Section 432 can operate, and therefore no public highway. H. W. MICKLE.

* * *

INSURANCE—AGENT—MISREPRESENTATION.—The case of *Mitchell* v. *Mount Royal Insurance Co.*[1] raises a rather important question as to the responsibility of both the insured and the insurer as to the acts of the agent of the Company who solicits insurance or to whom the assured applies for insurance. The judgment contains what is an apparent contradiction which makes it difficult to say what the case really decides. The defence was "material misrepresentations at the time when the insurances were obtained." The judgment then goes on to say that the agent did make material misstatements "at these times," referring clearly to the time mentioned before, namely "at the time when the insurances were obtained" but this is followed by the statement "but he was the agent of each of the defendants and made the misstatements *after* the policies had become effective."

Now, of course, the misrepresentations were made either at the time when the insurances were obtained or after the policies had become effective. If the misrepresentations were made at the time the policies were obtained and if they were material and if the assured was responsible for these misstatements, the policy should be void under Statutory Condition one. If they were not statements of the assured at all but purely the statements of the Companie's agent then the policy is valid. Even if the statements were the assured's if they were made after the policy had become effective the policy, as the judgment assumes, is not void on account of the misrepresentations.

The confusion in the judgment as to the time the representations were made may be explained in the following statement therein:

[1] 33 O.W.N., page 241.

In these days the insured does not, as a rule, seek the insuranc company, the company's agent seeks the insurance and gets it; and in these days a written application is not made by the insured and sent to the insurance company's head office for consideration; the agent has power to issue, and issues, the policy, and then makes his report to his company; and that is what was done in these cases.

Thus what happened probably was that the agent issued the policy and in his Daily Report no doubt made certain statements about the property in the space provided for that purpose but the judgment does not disclose this and it may not have been done. If this were not done then somehow or other the statements were communicated to the Company after the agent had issued the policy, consequently if no application were sent in and the agent had power to issue a policy and did issue one then the only remedy the Company had would be cancellation because as the judgment points out, the Company was already on the risk.

The importance of this is that Insurance Companies should realize the power of the agent to bind them if policies ase issued without tying the assured down to his statements or indeed without getting any statement. Often agents just take the risks as offered and then have to get particulars to fill in their Daily Reports and it may be that this was done in this case and the inaccurate statements made but, of course, it was too late. Companies should take care to find out, even after a policy is on, whether the statements upon which the Company is relying as embodied in the daily or other report of the agent were the agent's own or whether they were furnished to him by the assured and whether the agent wrote the policy first and enquired afterwards.

The case seems to leave the situation in a somewhat unsatisfactory position as no responsibility for the misstatements is fastened upon anyone nor indeed is any reason given whereby there should be liability upon the Insurance Companies unless one reads the judgment as stating only that the misrepresentations were made "after the policies had become effective" and not "at the time when the insurances were obtained." The question whether the policy might have been invalid on failure to disclose material facts at the time of application was not discussed. A.C.H.

* * *

INFORMING JURIES OF INSURANCE.—Two recent cases in England, *Gowar* v. *Hales*[1] and *Lothian* v. *Epworth Press*[2] devote a great deal

[1] [1928] 1 K.B. 191.
[2] [1928] 1 K.B. 199 at p. 202.

of space to the discussion of the question under what circumstances, if any a jury may be informed as to the fact of insurance. The head note in the *Gowar* case (*supra*) is in part as follows:

It is a well established rule of practice at the Bar, enforced by the Judges, that in an action against a motorist the jury should not be informed that the defendant is insured.

Both these cases were applications by defendants to have Insurance Companies joined as third parties on the plea that the defendants were indemnified by the third parties under policies of insurance against the claims in question in the action.

Such an unusual procedure brought forth exceedingly caustic comment by the Courts as to the wisdom of any defendant seeking to show that he is insured. To quote one instance only from the *Lothian* case (*supra*) will indicate the Court's view:

The defendant who brings in the Insurance Company as third party is generally asking for trouble. The defendant who advertises to the jury "I am insured" is pretty certain to get a verdict against him . . . I never heard before of a defendant being rash enough to ask to bring in an insurance company in third party proceedings. However, this defendant is asking for trouble, and my impression is he is going to get a good deal more than he bargains for, but that is his look out and not mine. I have to decide whether, if he does ask for trouble, he is on the wording of the rule entitled to get it.

Of course, the defendant when he is insured may not care although often enough his insurance does not cover the full amount of damages asked, but if the Insurance Company is defending in his name as is usual, or when the plaintiff is insured and the company is asking damages from a jury for injury to the assured or his property, there is the objection that if it became known that the plaintiff is insured he may not get a fair hearing from a jury. In the *Gowar* case (*supra*) one of the Judges cites an instance in which the Chief Justice of England took a case from a jury because during a trial a letter was put in evidence, quite properly, but which showed that the plaintiff was insured.

The discussion in these cases, which is very interesting, brings up for consideration the question which is constantly arising in practice, namely what should the Court do when the fact that one of the parties is insured comes out in evidence in a perfectly proper way. For instance, it may be that there was a conversation between the plaintiff and defendant in which the insurance of one or the other was spoken of as it often is. So far as the writer knows our Courts have not taken any notice where the evidence was properly

introduced; in fact has heard it said that the Court cannot exclude a conversation between the parties for the reason that it has or might disclose the fact of insurance. Would it not be better to have a settled rule of practice that the case should then be taken from the jury?

Sometimes this objectionable fact may even get on the pleadings. In *Thompson* v. *Hydro Electric Power Commission*,[3] Mr. Justice Middleton speaking of this says:

> One cannot help suspecting that the real object of placing this allegation upon the face of the pleadings is to enable the existence of this quasi-insurance to be made known to the jury. The principle which makes it entirely improper to mention to a jury at a trial the existence of insurance carried by the defendant makes it equally improper to maintain the existence of insurance carried by the plaintiff, or the analogous right where the plaintiff has a claim under the Workmen's Compensation Act. A violation of this rule would probably result in a mistrial.

In the same case Mr. Justice Middleton also speaks of the irrelevancy of the question of insurance and in the *Gowar* case (*supra*) at p. 194 there is the following statement on the point:

> It was of importance that the real issue between the parties . . . should be decided upon the merits of that issue without a supervening and prejudicial circumstance not really material being introduced—namely, that the defendant might have recourse under a policy against a large and in many cases a wealthy corporation.

If it were the accepted practice of our Courts to take the case from the Jury should the fact of Insurance come out no matter how or by whom brought out, Insurance Companies would feel a great deal safer and the cases would be much easier to try as now there is a great effort on one side to keep out the fact that there is insurance and on the other hand there may be, as Mr. Justice Middleton fears, an endeavour to bring out the fact of Insurance.

In regard to the two English cases above mentioned it is interesting to note that in one case the Insurance Companies were allowed to be joined as third parties and in another they were not and any lawyer interested in the question of relief over or indemnity would do well to make a careful study of them. In the *Gowar* case (*supra*) where there was a refusal to add an Insurance Company as a third party. Mr. Justice Scrutton, a very experienced insurance Judge, said at page 197:

> There was this undoubted rule of practice on which the Judges acted: and to have a rule of practice that a jury should not be informed that the

[3] (1928) 33 O.W.N. 349 at p. 350.

defendant is insured, and for the Judge at the same time to bring in the insurance company to take part in a trial of the action . . . seems to me to be entirely inconsistent.

So it is seen to what length the Courts in England go in order that the merits of a case may not be prejudiced by the introduction in any way of irrelevant facts. A. C. H.

* * *

DISCOVERY—NEGLIGENCE—NON-DISCLOSURE BY DEFENDANT OF CAUSE OF INJURY.—Although examinations for discovery are among the most frequent experiences in a lawyer's practice, and few are held without objections being made, instructive decisions on the relevancy of questions are comparatively rare. Some special interest may therefore attach to the brief judgment of Kelly, J., in *Armstrong* v. *McClelland*.[1] In an action against a physician for malpractice, the plaintiff alleged that the loss of her right hand resulted from negligence in administering a blood transfusion, the negligence being specified in the statement of claim and particulars. The defendant denied the alleged negligence or any other negligence.

At the examination the defendant was asked to state the cause of the loss of the plaintiff's hand. He admitted that he had obtained expert opinion on the point, but on the advice of counsed refused to answer the question. The Master ordered that the defendant should answer, and from this decision an appeal was taken. In his reasons for reversing the order of the Master, Kelly, J., cites the recent English case of *The Shropshire*.[2] This latter decision was in an action for damage to a ship which had been partly burnt while in the possession of the defendants for repairs. The plaintiffs alleged certain acts of negligence, which the defendants denied and also denied that they were guilty of any negligence. Interrogatories were allowed respecting the particular negligence alleged, but the Registrar disallowed the question: "What do you say was the cause of the fire?" On appeal the Registrar's decision was sustained by the President of the Probate Division, and again by a Divisional Court. (Warrington and Younger, L.JJ.).

The President (Sir Henry Duke) said:

The defendants do not set up any affirmative case, and the plaintiffs have covered by their specific questions the case on which they found their claim. On the whole it seems . . . to be an interrogatory of a vague kind intended by its general form to elicit information in the hope that it may furnish

[1] 33 O.W.N. 283.
[2] 127 L.T.R. 487.

the plaintiffs with proof of a cause of action not at present alleged, or with information as to the defendants' information on matters not required by the rules to be pleaded by them, but probably capable of use at the trial.

Warrington, L.J., thought that the interrogatory was framed with the object of compelling the defendants to set up an affirmative case, or, alternatively, to disclose their line of defence to the plaintiffs' attack, and in either case, that the question was improper. The Lord Justice also referred to the impropriety of an interrogatory which is directed to no part of the plaintiff's case, and which does not tend to disprove the case of the defendant.

These decisions emphasize the paramount importance of the statement of claim in relation to discovery.

The plaintiff in *Armstrong* v. *McClelland* (*supra*) moved for leave to appeal to a Divisional Court, and leave was refused by Wright, J.,[8] without, however, expressing an opinion on the merits.

H. A. H.

* * *

NEGLIGENCE—RADIAL RAILWAY—CAR RUNNING PAST STOP—DUTY OF MOTORMAN.—In *Dalgetty* v. *Hamilton Radial Electric Railway Co.*,[1] the Second Divisional Court (Ontario) discusses the duty of a motorman of a radial car to give warning to intending passengers of his intention not to stop at a particular station. In the case in question the Court found that while the plaintiff had been standing with a companion a few feet from the track at a regular stopping place, the testimony of the motorman was unimpeached that the plaintiff remained in a place of safety until the car was only ten or fifteen feet away. He then approached the track and was struck and seriously injured by the car, an express which did not stop at the place in question.

The jury, true to its traditions, absolved the plaintiff from blame and found a variety of grounds of negligence against the defendant, the only one worthy of consideration being the suggestion that where no stop was intended a warning whistle should have been sounded. The Court, however, refused to entertain this view, holding that where the track is clear and visibility good there is no responsibility upon a motorman to warn intending passengers, standing in a place of manifest safety, of his intention not to stop.

A necessary corollary of this decision would seem to be a holding that in the circumstances of this case the plaintiff had no right to

[8] 33 O.W.N. 325.
[1] 33 O.W.N. 362.

assume that the car would stop. In *Tinsley* v. *Toronto Railway Co.,*[2] it was held that under the facts disclosed in that case the plaintiff did not act unreasonably in assuming that a city car would stop at a regular stopping place for intending passengers. Having regard to the numerous unavoidable delays on an urban trolley system and the consequent frequent necessity of running past stops in order to maintain a schedule and to convenience the public, it might not unjustifiably be suggested that the reasonableness of the assumption made by the plaintiff in such case is, under modern traffic conditions, open to serious question. I. S. F.

* * *

COPYRIGHT IN LITERARY PHRASE.—The case of *Sinanide* v. *La Maison Kosmeo* which we noted in the April number of the REVIEW[1] has been reversed in the Court of Appeal.[2] At the trial before Mr. Justice Humphreys it was held that a certain literary phrase used by the plaintiff in an advertisement should be regarded as "original literary work" within the meaning of section 1 of the English Copyright Act 1911. In delivering the judgment of the Court of Appeal Lord Justice Scrutton said, amongst other things, that the dispute was one between two beauty specialists, "who traded upon the knowledge that they were people who had plenty of money and no brains who were prepared to spend that money in improving the faces that Providence had given them." He held that it was impossible to contend that there was original literary work in the words used by the plaintiff in his advertisement. He held further that the matter in which the copyright was claimed was too small for the Court to attach any value to it. In so phrasing that particular point it occurs to us that Lord Justice Scrutton intentionally shied away from the somewhat overworked legal cliché: *De minimis non curat lex.* It is worthy of note that the Court of Appeal allowed additional evidence in the case to be adduced on the appeal.

C. M.

[2] 17 O.L.R. 74.
[1] 6 C. B. Rev. 304.
[2] (1928) 44 T.L.R. 574.