1919
Oct. 16.
1920
Feb. 3.

S. O. BAILEY AND OTHER (DEFENDANTS). } APPELLANTS;

AND

THE CITY OF VICTORIA AND THE ATTORNEY GENERAL OF BRITISH COLUMBIA (PLAINTIFFS). } RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA.

Highway—Dedication—Intention—Acceptance—Public user—Registration—Pending application — Priorities — By-law — Publication — "Municipal Act," R.S.B.C., 1911, *c.* 170, *s.* 53, *ss.* 145a, 176, *ss.* 140, 147, 399—"*Land Registry Act*," *R.S.B.C.*, 1911, *c.* 127, *ss.* 22, 34, 104, 114.

The second paragraph of s.s. 176 of s. 53 of the "Municipal Act" provides that "every by-law * * * shall, before coming into effect, be published in the Gazette * * *"

Held, that this provision implies the publication of the by-law *in extenso*. *City of Victoria* v. *Mackay* (56 Can. S.C.R. 524) followed.

Held, also, Idington and Brodeur JJ. dissenting, that, under the circumstances of this case, the necessary conditions to establish a public highway by dedication were not satisfied.

Per Duff, Anglin and Mignault JJ.—In order that a public highway may be established by dedication, two concurrent conditions must be satisfied; there must be on the part of the owner the actual intention to dedicate; and it must appear that the intention was carried out by the way being thrown open to the public and that the way has been accepted by the public.

Per Duff, Anglin and Mignault JJ.—Such acceptance by the public can only be established by proof of public user, or *per* Duff and Anglin JJ. by the act of some public authority done in the execution of statutory powers.

---

*PRESENT:—Idington, Duff, Anglin, Brodeur and Mignault JJ.

Per Duff, Anglin and Mignault JJ.—The Registrar having declined to act upon the city respondent's application for registration of its title and no steps having been taken by it to appeal from this refusal under s. 114 of the "Land Registry Act," it is not now open to the respondent to allege that the appellant's mortgage, though registered under such application, must be taken subject to a *pending* registration. *National Mortgage Co.* v. *Rolston* (59 Can. S.C.R. 219) followed.

Per Idington and Brodeur JJ. dissenting.—The deed of sale by the owner to the city respondent, passed for the purpose of constituting the land sold part of a highway, being an abandonment of the property to the public use, and the payment by the respondent of the purchase price being an acceptance by the public or some one in authority to represent it, constitute a dedication of the land for the use of the public as a highway.

Judgment of the Court of Appeal [1919] 3 W.W.R. 19) reversed, Idington and Brodeur JJ. dissenting.

APPEAL from the judgment of the Court of Appeal for British Columbia (1) affirming the judgment of Murphy J. at the trial (2) and maintaining the respondents', plaintiffs' action.

The action was brought by the city respondent against the appellants to clear up the city's title to a strip of land required for the widening of Pandora avenue in the city of Victoria. A by-law was passed expropriating that land, the property of one Moody. The "Municipal Act" enacted that such a by-law should be published in the Official Gazette and in a local newspaper. Instead of publishing a copy of the by-law, the respondent published a notice containing a statement of some of its salient provisions. The respondent later on served Moody with a notice to treat, paid him the compensation claimed by him and took from him a deed of the land. The respondent applied for registration of its title, but the Registrar declined to act upon it; and the respondent made no appeal against this refusal. A year later, Moody

(1) [1919] 3 W.W.R. 19. (2) [1919] 1 W.W.R. 191.

1919

BAILEY v. CITY OF VICTORIA.

mortgaged his land, including the strip in question in this case, to the appellant, who registered in due course his mortgage in the land registry office. Subsequently to such registration, the respondent municipality completed the registration of its title and proceeded with the actual work of the widening of Pandora avenue, removing the fences and verandah encroaching on the strip of land and also building a sidewalk. The respondents assert rights, as against the appellant mortgagee, to the strip of land in question on three grounds: 1. by expropriation, provided the by-law has been published according to statute; 2, by grant from Moody, provided the respondent's application to the Registrar for registration of its deed was still "pending" when the appellant registered his mortgage; and 3, by dedication, provided the necessary conditions for such were satisfied.

J. A. Ritchie and *Leitch*, for the appellant.

Mayers, for the respondent.

IDINGTON J. (dissenting).—The respondent is a municipal corporation, created as a town by a British Columbia statute in 1867 (which was republished in the Revised Statutes of British Columbia 1871), and is endowed with all the powers given thereby, so far as not modified by later legislation, and was later constituted a city.

Its council proposed, in the year 1911, or thereabout, to widen Pandora Ave., one of the streets of said City, and first by resolution and later by a by-law declared the said street should be widened according to a plan prepared by its engineer.

That by-law was followed by another expropriating

by-law which never came into effect in law by reason of the failure to follow the requirements of the relevant statute as to publication which we held in *City of Victoria* v. *Mackay*, (1) to be an imperative condition precedent to such a by-law becoming effective.

I cannot accept the suggestion submitted in argument that a mere notice, such as was published, can be held a due compliance with the statute.

The respondents' counsel proceeded to carry out the said purpose of widening said street by procuring from one Moody, the owner of the land in question, a deed dated 23rd of May, 1912, of the strip thereof so needed for that part of the street fronting his lot, and paid him $6,200 therefor.

The deed recited as follows:—

> WHEREAS the Corporation of the City of Victoria, under the authority of the local improvement General By-law and Amendments thereto, and of certain by-laws relating to the particular work, have expropriated land for the purpose of widening Pandora Avenue from Douglas Street to Amelia Street;
>
> AND WHEREAS the said Party of the First Part is the owner or has some interest in the said lands hereinafter mentioned:
>
> AND WHEREAS the said lands hereinafter mentioned are necessary for the purpose of the said widening;

and then in consideration of $6,200 (the receipt of which is acknowledged) granted the said strip now in question to the respondent.

Moody thereby covenanted to execute such further assurances as necessary, and released to said corporation all his claims on said land.

The said price was duly paid out of the proceeds of the loan obtained to carry out the work of widening and paving on said street.

Stress was laid in argument upon the later use of said strip as part of the street, and also upon steps

(1) 56 Can. S.C.R. 524.

1920

BAILEY v. CITY OF VICTORIA.

Idington J.

taken and orders got validating said loan, and impliedly validating, it was urged, the whole proceeding.

In my view, the alleged implication of validating said by-law is ineffective save so far as needed to protect the debenture holders in their rights as against respondent and those ratepayers liable for the loan so got, to carry out the local improvement in question.

The fundamental question raised, upon which the claim of the respondent or either of them rests, is whether or not the said deed from Moody to the city respondent, and the payment of the consideration therefor by the said city, constitute a dedication of the said strip for the use of the public as a highway.

Dedication requires an abandonment to the public use of any property or part of the dominion over same by the owner and an acceptance thereof by the public, or some one in authority to represent it, in giving such acceptance.

I am quite unable to understand how it can be maintained that a deed of grant which expressly gives the entire property for the purpose of constituting it part of a highway and accepts voluntary compensation therefor, can be held less than a dedication, or that a duly constituted authority having power to deal with the question in paying the price can be said not to have accepted it.

The mode of giving, or the circumstances of its acceptance, and the proof of both as well as the extent of the gift, have given rise to many questions of law and fact, leading judges and writers upon these subjects to use, according to the exigencies of each case dealt with, more or less comprehensive language, in dealing therewith, respectively.

But the broad comprehensive lines of the principles

upon which dedication rests do not permit of rights created in accord therewith being frittered away by being limited to the appropriate language used by judges in some or even many of a very large class of cases falling within said principles, when accidentally defining the rights of each party in relation to the existence of possibly a very narrow right or power resting on said principles.

It seems to me idle to argue that because the by-law was ineffective as a means of enforcing expropriation therefore all the acts done by parties to such an express grant, must be treated as void.

Clearly the sole question which need be considered herein is whether or not there has been an effective giving of the land for the specific purpose of being used as a highway, and acceptance of that given, for the purpose claimed when that donated had been paid for by the donee or grantee and thus the grant became irrevocable.

The suggestion that a gift without any consideration is necessarily implied in the doctrine and that valuable consideration having passed renders the doctrine inoperative, is most remarkable.

Though it has been applied most frequently after long use by the public, when there did not appear to have been any consideration, that does not justify the assumption that where consideration having been paid then there is no place for the application of the doctrine.

The case for dedication is often much stronger when there has been an express or implied consideration. The case of dedication by a plan is one where certainly there is an implied consideration. There the consideration is the expectation of the benefits to

1920

BAILEY v. CITY OF VICTORIA.

Idington, J.

be received, by virtue of sales made by the proprietor to parties expected to purchase one or more of the lots set out in the subdivision plan, which is often revocable until use by the public of receipt of the expected consideration therefor, through the sale and purchase of some lot pursuant to the plan.

Then we have the case cited to us of *Cook* v. *Harris & al,* (1) where an express monetary consideration was given by neighbours desiring a dedication, and the owner gave a bond to the commissioners and it was held that even if the bond was invalid, yet the dedication was complete.

We have also the cases of *McLean* v. *Howland,* (2); *Fraser* v. *Diamond,* (3); *Reaume* v. *Windsor,* (4); supporting the same view as well as the dictum of high authority in the judgment in the case of *The Attorney General* v. *Biphosphated Guano Co.* (5)

There seems, I respectfully submit, a further confusion of thought in assuming that, because user is often relied upon in support of a claim of dedication, therefore until actual user there can be no dedication.

As pointed out by Buckley J. in the case of the *Attorney General* v. *Esher Linoleum Company, Limited,* (6) user is not dedication though in most of the cases dedication is proved by user.

The moment the consideration was paid and the land was conveyed, it thenceforward was devoted to the public for use as part of the highway and could not be used for any other purpose. Any one of the

(1) 61 N.Y., 448.
(2) 14 Ont. W.R. 509.
(3) 10 Ont. L.R. 90.
(4) 8 Ont. W.N. 505; 7 Ont. W.N. 647.
(5) 11 Ch. D. 327 at pp. 338-9.
(6) [1901] 2 Ch. 647 at top of p. 650.

public had then and ever since the right to use it as part of the street and no one could complain of such use.

The fact that the second by-law as an instrument designed to enforce expropriation was as such invalid, did not render it illegal in the sense that a fraudulent or criminal attempt taints all it touches. It was good and stood as a mere resolution.

In view of what had preceded it, that proposition is not absolutely necessary to maintain the actual acceptance by the council of the grant and thereby complete the dedication.

The question of the capacity of the respondent city to take, without a by-law, such a deed and accept thereby the grant and make it valid, is of graver import by reason of the curious language of the statute of incorporation which reads, in section 56, as follows:—

> The municipal council shall be capable of holding real estate and have the entire control of all corporate property.

The rather loose manner of expressing the power by designating the municipal council as the party to become vested, has caused me some concern; for it certainly could never have been intended by the legislature to vest the property in the council, but rather in the corporation of which the council is only the governing body.

I hold the capacity, though so expressed, to have been intended to enable the corporation acting through its council by mere resolution to take and hold real estate. I do so the more readily because the respondents claim in their factum that the city had such capacity, and no argument to the contrary has been presented by the appellants.

1920

BAILEY v. CITY OF VICTORIA.

Idington, J.

It seems to be assumed by the course of the appellants argument that the by-law being, as such, ineffective, all else done the way of executing the purpose of the city respondent must also be held void.

But if the city had, as I hold, the capacity to buy a road allowance without resorting to a by-law for expropriation, then that which had been done completely established the widening of the highway so far as that part in question herein is concerned.

The appellants rely on many Ontario cases, and some Quebec cases, where such projects for making or widening highways have quite properly been held, under the respective law applicable, invalid for want of a by-law.

In doing so they overlook the fact that the Ontario cases were decided under a municipal Act which expressly declared that the powers of the council shall be exercised by by-law when not otherwise authorized or provided for and that the like enactments in Quebec governed the decisions in that province, cited to us.

The British Columbia legislature adopted an entirely different conception and without rendering the by-law an imperative necessity in all cases enacted that the municipal councils might, in a long list of cases specified, if they chose to do so, enact by-laws for any of the given cases.

It was thus left open to the municipal council of respondent (Victoria) or any other similarly empowered to hold real estate, to proceed to constitute highways by the purchase of the right of way. Everything of that sort could thus be done by mere resolutions. Of course if driven to expropriation proceeding that would involve the necessity of passing a by-law.

And hence in this case if respondent city had to rely upon expropriation alone and had proceeded entirely thereunder and obtained Moody's title thereby, then it might well be held that in such a case the by-law being ineffective the whole proceeding would fail. But that not being the case and the deed having been got by virtue of a voluntary bargain, and presented for registration, the highway *pro tanto* was duly constituted. The failure of its non registration was entirely the fault of the registrar in whose hands it was for registration when Moody gave, inadvertently I suspect, a mortgage on this whole lot including that he had duly conveyed to the city.

I fail to find anything in the provisions of the "Land Registry Act" which can help the appellants as against either of the respondents asserting their respective rights to protect the public.

I do not think it is necessary to go through all the provisions of that Act to demonstrate that each of those relied upon is ineffective. Let us take the most drastic of all those provisions, which is contained in the amendment of the act by section 8 of ch. 36, passed 1st of March, 1913, which reads as follows:—

> Every certificate of indefeasible title issued under this Act shall so long as the same remains in force and uncancelled, be conclusive evidence of law and in equity, as against His Majesty and all persons whomsoever, that the person named in such certificate is seized of an estate in fee simple in the land therein described against the whole world subject to.

This is subject to a number of express exceptions set forth in section 22 of ch. 127 of the R.S.B.C. being "The Land Registry Act."

Of these s.s. (e) specifies

> any public highway or right of way, water course or right of water other public easement.

1920

BAILEY v. CITY OF VICTORIA.

Idington J.

If I am right in my conclusion that the right of way had been effectively constituted by what happened in way of dedication, how can this furnish any answer to the claim of the Attorney General maintained on behalf of the Crown which had always up to this enactment been wholly excepted?

I submit this does not as against him amount to anything in support of appellants on such facts.

Sections 4, 5 and 6 of the "Highways Act" (now R.S. B.C. 1911, ch. 99) are relied upon by respondents and I think rightly as to sections 4 and 5, which are as follows:—

> 4. All roads, other than private roads, shall be deemed common and public highways.
>
> 5. Unless otherwise provided for, the soil and freehold of every public highway shall be vested in His Majesty, his heirs and successors.

It seems clear that either the city or the attorney general representing the public must have a grievance and right to a remedy, and possibly both, under the peculiar circumstances of the case.

If either, then needless to pursue the inquiry.

The appeal should be dismissed with costs.

DUFF J.—The first point for consideration is this: Was by-law 1183 published witin the meaning of s.s. 176 of sec. 53, ch. 170 R.S.B.C. 1911? In common usage "publication" as applied to a document means, I think, something more than the giving of public notice of the existence of the document and information as to where it may be found and inspected. "Publication" of a document or newspaper means, I think, according to common speech in the absence of a qualifying context, the publication of the document *in extenso*. I think too much importance ought

not to be attached to the fact that in other provisions of the Act the direction is that the council shall publish a copy. In addition to the clause under consideration there are sections of the statute, see e.g. sections 140 and 47 as amended in 1912, in which the council is directed to publish the by-law. These last mentioned provisions contemplate mainly the circumstances and needs of rural municipalities and it is difficult to suppose that in these sections the legislature is providing for publication in the limited degree which is now contended is sufficient under s.s. 176.

It should also be noted that s.s. 176 applies, of course, to rural as well as urban municipalities and that the legislature must have had in view some practical expedient for bringing home notice of the plans of the council to persons being interested, we may, I think, not unreasonably assume that the legislative intention is best interpreted by reading the words according to their ordinary meaning.

The next question is: Can by-laws 1151 and 1183 have effect in the absence of publication? The enactments of s.s. 176 are explicit and they have been authoritatively interpreted by this court in *City of Victoria* v. *Mackay* (1), as imposing the requirement of publication as a condition of any by-law passed under the authority of them taking legal effect as such. It should be mentioned here that no very convincing reason was suggested why by-law 1151 is not subject to the requirement of publication. The point is not very material and it may be that by-law 1183 is complete in itself; it ought not to be supposed that the assumption that this by-law was not within the condition is approved by this judgment.

(1) 56 Can. S.C.R. 524.

1920

BAILEY v. CITY OF VICTORIA.

Duff J.

The respondent's counsel meets the difficulty by arguing that the by-laws are sustainable as enacted under the authority of another provision of the Act; the contention being that as regards by-laws passed under that authority the requirement of s.s. 176 in relation to publication is inoperative.

The provision invoked in support of this is s.s. 145a of sec. 53 and is in these words:—

> Sec. 53.—In every municipality the council may from time to time make, alter and repeal by-laws for any of the following purposes, or in relation to matters coming within the classes of subjects next hereinafter mentioned, that is to say:—
>
> (a) Subsection 145:—For accepting, purchasing, or taking or entering upon, holding and using any real property in any way necessary or convenient for corporate purposes, and so that the council may direct the taking or entering upon immediately after the passing of any such by-law, subject to the restrictions of this Act contained.

The reasons which have convinced me that this view is not the right one are these. Ch. 170 contains a number of provisions having a variety of purposes by which powers of compulsory taking are given explicitly to the council, in some cases some specific restriction being imposed while in others a specific procedure is laid down. As an example of a specific restriction, s.s. 166 may be referred to—a clause dealing with the construction of sewers in which authority to expropriate is given but the land to be taken is limited to such lands as the council may deem necessary for the purpose of "constructing the main sewer" and is not in any case to exceed "10 feet in width." In s.s. 176 we have a special procedure.

Whatever be the purpose served by s.s. 145 (a) there appears to be no reason for failing to give effect to the words "subject to the restrictions in this Act contained" and the object of this part of the subsection at all events appears to be plain. The words are

put there no doubt in order to exclude the construction which is now put forward, the effect of which would be that by resorting to this general provision the council could in those cases which have been specially provided for, escape the inconvenience of observing the specific restriction laid down or the specific procedure prescribed.

I conclude that by-laws passed with the purpose and intended to have the effect expressed in by-laws 1151 and 1183 can only become operative in law when the procedure laid down in s.s. 176 is observed.

It follows that subject to the question whether the highway was or was not established by dedication, the discussion of which I postpone for the moment, the proceedings necessary to establish a street by by-law under the authority of the "Municipal Act" were not taken; that the proceedings necessary to authorize the expropriation of property for the purpose of opening a street were not taken; and consequently that the respondent corporation cannot maintain its action on the ground that a title to the lands in question was acquired compulsorily for highway purposes.

In these circumstances, it seems impossible to hold that the corporation can establish a title under its conveyance from Moody as against the registered mortgage of Bailey. When Bailey applied for the registration of his mortgage, when he received a certificate of incumbrances, when he made his advance there was not even an application pending for the registration of the title of the corporation under the conveyance from Moody. An application had been made, it is true, for registration of the title but it was supported only by the production of the by-law, and it appears to have been only an attempt to comply with

1920

BAILEY v. CITY OF VICTORIA.

Duff J.

the requirement of s.s. 176 which prescribes that after the publication of a by-law for expropriation passed under that subsection the municipality shall apply for the registration of its title and shall file a copy of the by-law.

It is quite true that this application was made long before the registration of Bailey's mortgage but for some reason it was never entered in the list of incumbrances and noted against Moody's property. Nevertheless, whatever may have been the delinquencies of the officials of the Land Registry Office in their dealings with this application, the corporation appears to be concluded by the fact that after the registration of Bailey's mortgage its application was refused. In these circumstances sec. 104 of the Land Registry Act appears to be conclusive against the appellant.

The Registrar having declined to act upon the application and no steps having been taken under sec. 114, it is not now open to the defendant corporation to allege that the appellant Bailey's mortgage must be taken subject to a pending registration (see *National Mortgage Co.* v. *Ralston*) (1); *Howard* v. *Miller* (2) it is to be observed, was a decision relating to the effect of the registration of an agreement to purchase land and turned upon the point that on the facts disclosed the respondent was not entitled to enforce his agreement specifically as against the opposite party. No such situation arises here, Bailey's mortgage being a legal mortgage.

The substantive question for decision is that to which the learned judges in British Columbia evidently devoted their attention, namely whether in the locus

(1) 59 Can. S.C.R. 219. (2) [1915] A.C. 318.

in question a public highway has been established by dedication. For this purpose two concurrent conditions must be satisfied, 1st, there must be on the part of the owner the actual intention to dedicate, (*Folkstone* v. *Brockman*)m (1), and 2nd, it must appear that the intention was carried out by the way being thrown open to the public and that the way has been accepted by the public. (*Attorney General v. Biphosphated Guano Co.*) (2). I can find nothing in the legislation of British Columbia relating to municipalities giving the municipality authority on behalf of the public to accept a dedication by the mere acceptance of a deed of grant of land for the purpose of creating a highway, and in my opinion acceptance by the public can only be evidenced by public user or by the act of some public authority done in the execution of statutory powers.

It should be observed that by section 22 of the "Land Registry Act," ch. R.S.B.C. 1911, the title of the holder of a certificate of indefeasible title is expressly made subject to any "public highway," and it follows, I think, that if the public highway had been actually created by dedication before the registration of Bailey's mortgage, there could be no doubt that the public right would prevail as against the registered interest.

In the absence of some legal obstacle arising from the character of the municipality as a statutory corporation, governed as regards it capacity and the exercise of them, by the provisions of the "Municipal Act," the evidence in favour of the existence of the *animus dedicandi* on the part of both Moody and the corporation would appear to be very

(1) [1914] A.C. 338 (2) 11 Ch. D. 327, at p. 340.

1920

BAILEY v. CITY OF VICTORIA.

Duff J.

cogent. Moody conveyed to the municipality on the assumption, it is true, that a street had been established by the procedure laid down in the "Municipal Act," but on the other hand it is a most important circumstance that he, in transferring his land to the municipality, and the officers of the corporation in accepting it, were dealing with it as land devoted to the purpose of establishing a highway, an improved street along the front of that part of the property which Moody retained; a circumstance which no doubt affected materially both Moody and the corporation officials respectively in their judgment as to the amount to be demanded and paid by way of compensation. The intention of the council to devote the strip of land to that purpose is unequivocally declared, and had the intention been acted upon by the immediate opening of the street and that again followed by acceptance by public user, the only question I should have thought it necessary to consider at this point would have been whether or not the municipality could lawfully create a street by its ineffectual endeavours to follow the procedure laid down in s.s. 176 of section 53. As the municipality could not without a breach of faith continue to hold the land while applying it to a purpose other than that for which it was transferred, it is possible that the transaction (coupled with user by the public) might, in the hypothetical circumstances suggested, be regarded as a transfer to the municipality as a trustee for highway purposes and as amounting to dedication by the owner with the assent of the municipality and acceptance by the public. It may be that under the British Columbia statutes the results would be as suggested, namely, that the title to the fee would pass to the Crown

instead of to the municipality but the fact that this collateral and unexpected result would ensue would hardly be of sufficient importance to counterbalance the fact that it was the settled and unqualified determination of both parties to the transaction, that the highway was to be established. Reverting now to the actual facts before us, these facts fail to establish the existence of a highway at the time Bailey made the advance and took his mortgage; and as against Bailey it seems to be clear enough that the public right can only be held to have arisen if the facts in evidence are sufficient to support the inference that he assented to the setting apart of the strip in question for the public purposes of a street.

The principle to be applied is expressed by Lord Macnaghten in *Simpson* v. *Attorney General*, (1) thus:—

> As regards the second, it is, I think, enough for me to say that a dedication must be made with intention to dedicate, and that the mere acting so as to lead persons into the supposition that a way is dedicated to the public does not in itself amount to dedication; *Barraclough* v. *Johnson* (2).

The facts proved do not appear to me to be sufficient to support the inference which the learned judges below have drawn.

ANGLIN J.—The plaintiffs assert rights as against the defendant mortgagee to the strip of land in question on three distinct grounds: (1) By expropriation; (2) By grant; (3) By dedication. Under either the first or the second head the title would be vested in the plaintiff city; under the third head the right of highway would be in the public; hence the joinder of the Attorney General as co-plaintiff.

There can be no doubt that the expropriation proceedings taken by the city were instituted under

(1) [1904] A.C. 477, at p. 493. (2) 8 Ad. & E. 99.

1920

BAILEY v. CITY OF VICTORIA.

Anglin J.

ss. 176 of s. 53 of the "Municipal Act" (R.S.B.C., 1911, c. 170) and, since it makes special and specific provision for the acquisition of land for street widening (the purpose of acquiring the land in question) recourse, in my opinion, cannot be had to general powers for the acquisition of land conferred either by s.s. 145 of s. 53, or by s. 399 of the "Municipal Act" in order to escape the effect or failure to comply with an essential requirement of s.s. 176. *Generalia specialibus non derogant*; *Ex parte Stephens* (1). The heading of Part II of the "Municipal Act," of which No. 53 is the first section, viz., "Powers required to be exercised by By-law," makes it clear that a valid by-law is essential to the exercise of powers conferred by provisions included in that part of the statute. *Hammersmith Rly. Co.* v. *Brand* (2); *Eastern Counties and London & Blackwall Rly. Cos.* v. *Marriage* (3); *City of Toronto* v. *Toronto Rly. Co.* (4).

I agree with the learned trial judge that the by-law passed under s.s. 176 was ineffectual for want of publication as prescribed by that section. *City of Victoria* v. *Mackay* (5). The expense and trouble involved in publishing such a by-law *in extenso* might afford a strong argument for an amendment of the statute if the legislature should be convinced that the object of its policy would be sufficiently attained by the publication of a mere notice of the by-law, such as we have in this case, in some convenient and accessible place where a copy of it might be seen. But such an argument scarcely affords ground for a court undertaking to dispense with the

(1) 3 Ch. D. 659, at pp. 660-1.
(2) L.R. 4 H.L. 171 at p. 203.
(3) 9 H.L. Cas. 32, at p. 41.
(4) [1907], A.C. 315, at p. 324.
(5) 56 Can. S.C.R. 524.

observance of such a distinct requirement as that expressed in the words

> every by-law passed under the provisions of this sub-section before coming into effect shall be published.

I agree with the learned trial judge and the Chief Justice of the Court of Appeal, with whom Eberts J. concurred, that this implies publication in full. Sections 3 and 5 of the "Municipal Act" make it clear that s.s. 176 applies to the city of Victoria and that nothing in any special act relating to it shall "impair, restrict or otherwise affect" the powers which that subsection confers. The plaintiff municipality therefore did not acquire title by expropriation.

Neither can it assert title under its unregistered grant from the owner Moody in view of the provisions of s. 104 of the "Land Registry Act," (R.S.B.C. 1911, c. 27) that

> no instrument * * purporting to transfer * * land or any estate or interest therein * * shall pass any estate or interest either at law or in equity in such land until the same shall be registered in compliance with the provisions of this Act.

The city's application for the registration of the conveyance from Moody having been ultimately rejected and no steps having been taken to set aside the registrar's decision under s. 114, the case must be treated as if no application for registration of it had been pending when application was made to register the Bailey mortgage and it was in fact registered. *National Mortgage Co.* v. *Rolston* (1).

The claim of highway by dedication requires more consideration. In order to bind the mortgagee, against whom no finding has been made that he took his

(1) 59 Can. S.C.R. 219.

1920

BAILEY v. CITY OF VICTORIA.

Anglin J.

mortgage with notice either of the city's attempted expropriation or of its negotiations with Moody and the conveyance given by him—and the evidence would not warrant such a finding—it must be established either that a highway existed when he obtained and registered his mortgage, which would in that case be subject to this public right, ("Land Registry Act," s.s. 34 and 22 (e),) or that the mortgagee himself dedicated his interest for highway purposes or is estopped by his conduct since becoming mortgagee from denying the existence of the highway claimed.

After fully considering the testimony of Bailey himself and all the other evidence in the record I have failed to find anything on which the existence at any time of the essential *animus dedicandi* (*Simpson* v. *Attorney General* (1); *Mann* v. *Brodie* (2); *Barraclough* v. *Johnson* (3) could safely be attributed to him. Neither do I see in his conduct, which was purely negative or passive, enough to found an estoppel against him. There is, in my opinion, nothing whatever to show that he was aware of circumstances which might give to his inaction the significance that the plaintiff now attributes to it—nothing to shew that a situation arose which called for active interference by a mere mortgagee at the peril of loss or impairment of his rights.

Notwithstanding the undoubted fact that it was the purpose of Moody, the owner, to convey the land in question to the city as a vendor and because he deemed himself obliged to part with it under the expropriation proceedings which had been instituted, I incline to the view and shall assume that his deed,

(1) [1904], A.C. 477-493. (2) 10 App. Cas. 378 at p. 386.
(3) 8 A. & E. 99.

though wholly ineffectual to convey any estate or interest, may be taken to evidence sufficiently the existence on his part of intention to dedicate the land described in it for a public highway—that it may even be regarded as an express dedication. *Reaume* v. *City of Windsor* (1) affirmed here on the second day of May, 1916. The appropriation and setting apart of the land for a public street would seem (to adopt the phrase of counsel for the respondent) to be "the conclusive factors" in dedication rather than the voluntary or gratuitous character of the transaction on the part of the owner.

But, in order to bring a highway into existence by dedication in addition to the intention of the owner of the soil to dedicate it to the public for that purpose, however directly evidenced, an acceptance by the public is also essential; *Moore* v. *Woodstock Woolen Mills* (2); *Mackett* v. *Commissioners of Herne Bay* (3); *Attorney General* v. *Biphosphated Guana Co.* (4); and the crucial question is this case in my opinion is whether there was such an acceptance as was necessary to make the land in dispute part of Pandora Avenue before the execution and registration of the defendant's mortgage. User by the public—the usual indication of acceptance by the public—is entirely absent. Nothing was done to throw the strip of land open until after Bailey had become the registered mortgagee of it. There was no expenditure of public money upon it. It remained fenced in with, and, to all appearances, part and parcel of, the Moody property.

But it is said there is abundant evidence of acceptance by the municipal corporation and that that is

(1) 7 Ont. W.N. 647; 8 Ont. W.N. 505.
(2) 29 Can. S.C.R. 627.
(3) 35 L.T. 202.
(4) 11 Ch. D. 327 at p. 340.

1920

BAILEY. v. CITY OF VICTORIA.

Anglin J.

acceptance on behalf of the public, or its equivalent. Of the intention of the municipality to devote this land to highway purposes there can be no question and there seems to be some American authority which may be invoked in support of the position that acceptance by the municipality without statutory authorization may be tantamount to acceptance by the public. The cases are collected and reviewed in 18 Corpus Juris, Vbo. Dedication, pars. 79, 80, 88 and 99. But I have failed to find any English authority which accepts that view.

The municipal corporation is a purely statutory body and it has and can exercise only such powers as are conferred upon it by statute. Its position in this respect is well stated by Brayton J. delivering the judgment of the Supreme Court of Rhode Island in *Remington* v. *Millerd* (1):—

> Supposing the dedication to be proved, is there in this case any evidence of an acceptance by the public, any assent on their part to the use of the land in the mode intended? The usual evidence of such acceptance, namely, a user by them, is here wanting. This way has never been used. In all the cases cited there had been a use by the public from which their assent might be inferred, and in many of them the use had been for so long a period as to warrant the presumption not only of their assent, but of the act of dedication also. It is not easy to perceive how otherwise than by user this assent is to be shewn. The term public includes the whole community, the whole mass of individuals in the state. They cannot constitute agents to assent for them. The whole doctrine of dedication is based upon the fact that the public have no agents; that there is no one with whom the owner of the land can agree or contract directly; and it is therefore said that in these cases it is not necessary that the public should be a party, and that, from the necessity of this case, they cannot be.
>
> Does the plea contain any other evidence of an acceptance on the part of the public? If so, it is the fact that the town council of East Greenwich, on the 31st day of August, 1844, declared the way to be an open highway, and ordered it to be repaired at the expense of said town. If this be evidence of such acceptance, it must be because the

(1) 1 R.I. 93.

town council are to be deemed the general agent of the public, and for this purpose represent them, or because they are by statute specially empowered to accept the way in the mode set forth.

But are they such agent? Have they any such representative character? They are the creature of the statute, invested with certain definite powers. They are enabled to do such acts as the statute authorizes and to do them in the mode prescribed; and if they assume to do other acts, or to do them in other modes, their doings are merely void, and cannot become the more valid from any representative character which may be imputed to them. It is difficult to see how they are the agents of the public, more than the surveyor of highways.

Here the sole authority of the municipal corporation for

establishing * * * opening, * * * making, * * * improving * * * widening, * * * roads, streets, * * * or other public thoroughfares.

is conferred by s.s. 176 of s. 53 of the "Municipal Act." A by-law meeting the requirements of that section is the method prescribed for the exercise of those powers. The by-law passed by the council was inefficacious because of non-compliance with an essential requirement. (*City of Victoria* v. *Mackay*) (1). It follows that the only power which the city possessed to widen Pandora Avenue or to procure or apply land for that purpose has not been exercised. To permit it to establish or widen a street otherwise than by following the specific method prescribed would be in effect to supersede the statute and to concede to the municipal corporation a power which it does not possess. It follows in my opinion that there was no highway in existence when the defendant's mortgage was executed and registered.

I would, for these reasons, allow this appeal with costs here and in the Court of Appeal, and would direct the entry of judgment dismissing the action with costs.

(1) 56 Can. S.C.R. 524.

1920

BAILEY v. CITY OF VICTORIA.

Brodeur J.

BRODEUR J. (dissenting).—The respondents claim the title to a strip of land on Pandora Avenue, in Victoria, B.C.

Notice of expropriation of that piece of property had been given by the city of Victoria, and after notice to treat, the owner Moody agreed, on the 23rd of May 1912, to sell that strip of land to the municipal corporation for a certain sum of money. The city unfortunately did not register its title; and in March, 1913, Moody gave to the appellant Bailey a mortgage affecting his property on Pandora Avenue and, by the description which is made in the deed, covering the strip of land sold to the corporation.

There was evidently no fraud on the part of the parties to the deed of mortgage and it is evident that they have acted in absolute good faith. In 1917 the city of Victoria having discovered its omission to register its conveyance applied to the Land Registry Office for registration but having found that the conveyance could only be registered subject to the Bailey mortgage, and Bailey having refused to sign a release, the present action has been instituted to have the Moody conveyance registered in priority to the Bailey mortgage.

The action was maintained by the trial judge and by the court of Appeal, the Chief Justice and Mr. Justice Eberts dissenting.

The trial judge found that the expropriation by-law was invalid because it had not been duly published but that the Moody conveyance constituted a dedication of the strip of land in question and that Bailey had acquiesced in such dedication.

The dissenting judges in the Court of Appeal held that there was no legal evidence of dedication, that the

transaction between Moody and the city was a compulsory sale, that Moody never intended to dedicate and that Bailey never acquiesced in such dedication.

The most important issue to dispose of at first is whether there is dedication.

There was at first a by-law passed by the city for the expropriation of the land in question, but the by-law was never duly published and registered. This court in a case of *The City of Victoria* v. *Mackay* (1), held that the publication of a by-law is a necessary condition to its validity.

The proceedings which have subsequently taken place consist in a notice to treat to Moody, in the delivery by the latter of his claim which seemed to have been accepted by the city since it issued its cheque for it and a conveyance was duly executed by him on the 23rd May, 1912, of a strip of land in front of his property for the purpose of widening Pandora Avenue.

Would that constitute dedication of this strip of land? I would not hesitate in answering in the affirmative. No formal conveyance is required to affect a common law dedication; but where there is a deed or writing as in this case, the conclusion is still more certain. Dedication means the setting apart by the owner of land for the use of the public. In most of the cases of dedication, the title is a matter of inference as to the intention of the owner and as to the acceptance by the public. But in this case there is no doubt as to the intention of the owner Moody, since he formally signed a deed in which he declared that the land was granted for the purpose of widening a public street. There is no doubt also as to the grant

(1) 56 Can. S.C.R. 524.

1920

BAILEY v. CITY OF VICTORIA.

Mignault J.

being accepted by the municipal corporation representing the public.

But, besides, works have been carried out by the municipal corporation on this strip of land in order to utilize it as a public street. The fences and verandah which were encroaching on the strip of land were removed and a sidewalk was built. All this was done when Bailey was the mortgagee of the property. Since he claims to-day that his mortgage was covering the whole lot, including the strip of land in question, he should have protested against the municipal authorities using part of his property.

He was fully aware of the situation. For months and months this widening of Pandora Avenue was discussed in the press and was the subject of public discussion in the municipal council amongst the residents of the locality. When he loaned money to Moody he made inquiries as to the value of the property; and it may be reasonably inferred that the estimation he got was as to the property less the strip of land in dispute. He saw the front of the property being altered, the fences and the verandah and the steps being removed; he saw the sidewalks being built and he did not object. He must be held as having acquiesced in the corporation respondent taking and using this strip of land. His conduct shews that he has himself dedicated it to the public. It is now too late for him to claim certain rights which the mortgagor did not intend to convey and which he himself did not intend to recover.

It is not necessary that the public should have possession of the lands dedicated for any great length of time. All that is required is the assent to the use of the property by the public and the actual enjoy-

ment of the same by the public for a length of time sufficient to have created on the part of the public such reliance upon the enjoyment of such easements as that the denial of such rights would now interfere with the public convenience and with private rights.

The appellant claims that the city of Victoria not having registered the conveyance by Moody of the strip of land, no estate or interest has passed; (sect. 104 of the "Land Registry Act," 1911).

Under the provisions of the "Land Registry Act," the holder of a registered mortgage, as Bailey, is only *primâ facie* entitled to the estate interest in respect of which he is registered subject to the rights of the Crown (R.S.B.C. 1911 ch. 127, s. 34) and if a person has an indefeasible fee under section 22 he is seized of an estate in fee simple in the land against the whole world subject to different reservations; amongst others is the public highway.

The evidence, as I have said, shews to me that a public highway on the strip of land in dispute exists and the appellant cannot successfully claim that his title could prevent the public from using it.

For these reasons the appeal should be dismissed with costs.;

MIGNAULT J.—My learned brothers have so fully dealt with this case that my conclusions may be briefly expressed.

The City of Victoria had decided by by-law to widen Pandora Avenue and to take by expropriation a strip from Moody's land facing on that avenue, and a notice to treat was served on Moody. This was in 1912, and Moody, whose land was being taken compulsorily, filed in April, 1912, a claim with the city for compensation, cost of removal of buildings and depreciation in

1920

BAILEY v. CITY OF VICTORIA.

Mignault J.

rental value amounting to $6,260. The city decided to pay this amount to Moody and the latter, on the 23rd May, 1912, executed a conveyance to the city for the sum of $6,260, of the strip of land required for the widening of the avenue. This conveyance was not registered and it is only in March 1917, that the city applied for its registration.

The expropriation by-law was not published as required by R.S.B.C., ch. 170, sec. 53, sub-sec. 176, par. 2, and the notice of its adoption, which was published in the Gazette, is not, in my opinion, the publication required as a condition of the by-law coming into effect. I concur with the reasons of my brother Duff on this branch of the case and hold that this by-law did not come into effect, although Moody—and this is a feature of the case in so far as the question of dedication is concerned— must be taken to have assumed that under this by-law his land was expropriated for the purpose of the street widening and that the sole question was as to the amount of the compensation to be paid him.

The city, it is true, applied for registration of the by-law in June, 1912, and this application should have been noted as pending by the registrar, which however was not done. The application was refused in October, 1914, and the city did not appeal from the refusal.

In the meantime it was proposed to Bailey, who then resided in Victoria, to loan $15,000 on Moody's property, and after Bailey had ascertained the assessed value of the property, a mortgage was granted to him by Moody of this property on the 8th March, 1913. On the 10th March, 1913, Bailey obtained from the Registrar-General a certificate of incumbrance shewing

that there were no charges on Moody's land save Bailey's application to register his mortgage. Bailey duly advanced the $15,000 to Moody on the security of the property and his mortgage was registered on the 15th April, 1913.

As matters then stood, Bailey's mortgage was the only charge on Moody's property and was unaffected by Moody's unregistered conveyance to the City of Victoria. The latter however being unable to set up against Bailey the expropriation by-law for want of publication and Moody's conveyance for want of registration, claims that Moody dedicated the strip of land for the purposes of the highway and the Attorney General of British Columbia, as representing the public, joined the city in demanding that this dedication be declared effective.

Dedication is of course a matter of intention, and I will assume that Moody, who had received a notice to treat and who was submitting to a by-law expropria-, ting a strip of his land for the widening of the highway intended to dedicate this strip as a part of the highway. But intention to dedicate, although of course essential, does not alone suffice for a complete dedication. There must be an acceptance by the public and this acceptance is complete when there has been user of the dedicated land by the public.

Now it cannot be questioned that any user of this strip of land by the public was subsequent to the registration of Bailey's mortgage, and unless Bailey acquiesced in the dedication by Moody, I would think that no dedication of the strip of land by Moody can be set up against Bailey. To my mind, under the circumstances of this case, the only question is whether or not Bailey assented to Moody's dedication.

1920

BAILEY v. CITY OF VICTORIA.

Mignault J.

The learned trial judge was of the opinion that the dedication had been accepted by the city before the Moody mortgage, because he apparently thought that public user—and there was none before April, 1914—was not essential to a valid dedication. But assuming that this view was incorrect and that the mortgagee's assent or public user was essential to complete the dedication, the learned trial judge held that Bailey had assented to the dedication. This, as the learned judge clearly indicates, was merely an inference. He says:—

> Assuming that where a mortgagor is in possession of mortgaged premises, the mortgagee's assent is necessary to a dedication, and further assuming that user is essential to a valid dedication, I hold, on the facts here, the defendant must be held to have given such consent. The inference of assent by a mortgagee, cannot, I think, require more cogent proof than does the inference of dedication by the owner. If so, the evidence (excluding everything that occurred prior to April, 1914), already referred to as establishing dedication by Moody, establishes, in my opinion, assent by Bailey. In addition to this evidence, the record shews that Bailey was throughout this period resident in Victoria, that at any rate, some short time after the actual work was entered upon, he devoted particular attention to this property because of default in the payment of interest, that he has personally used the sidewalk built on the disputed land and that he made no objection until his pleadings in this action were filed.

Bailey was not called to testify before the learned trial judge, but his evidence on discovery was put in at the trial, and his story is that so long as his interest was paid, and it was regularly paid for a couple of years, he did not bother about the property at all. He saw that the fence had been removed, that a sidewalk had been built along the strip, but he considered that it did not concern him at all so long as his interest was paid. There was of course a good deal of talk about the future of Pandora Avenue, for at the time there was quite a boom in real estate in Victoria, but Bailey's position seems to be this, that when he lent the money

the property was assessed at a value of from $75,000 to $80,000, that he thought he had a gilt edge security, and it only was when the interest payments stopped and very high taxes were imposed on the property for the widening, that he concerned himself with the matter.

With all deference, I cannot think that from Bailey's evidence a fair inference can be drawn that Bailey assented to the dedication by Moody of a strip of his property as a part of the highway. As I have said, the assent of Bailey was merely inferred by the learned trial judge from the circumstances, and in a matter of inference this court is in as favourable a position as was the learned trial judge. Thinking as I do that Bailey, by the registration of his mortgage after obtaining a certificate from the Registrar that the property was clear of charges, acquired a title which was unaffected by the expropriation scheme of the City of Victoria, I would not without the clearest evidence assume that Bailey assented to anything which would deprive him of his security as to any portion of the land covered by his mortgage. The City of Victoria acted with extreme carelessness in this matter. It paid Moody, obtained a conveyance from him and neglected to register it. It passed an expropriation by-law and failed to publish it as required by statute. It attempted to register this by-law, and when registration was refused, it did not appeal from the refusal as it could have done. The allegation that there was dedication by Moody appears to have been an afterthought, and was only made by an amendment. I would not under these circumstances come to the assistance of the city so as to affect in any way a security obtained for a *bonâ fide* advance of money made on the faith of the public register.

1920

BAILEY v. CITY OF VICTORIA.

Mignault J.

In arriving at this conclusion I have given due consideration to the fact that the finding of the learned trial judge that Bailey assented to the dedication was concurred in by a majority of the learned judges of the Court of Appeal. But I do not think that the great weight which is generally given to concurrent findings of fact prejudices me in a matter of this kind from expressing my own judgment as to the inference drawn by the learned judges. In *Montgomerie & Co., Ltd.*, v. *Wallace-James* (1), the House of Lords decided that there was no law or settled practice of that House to prevent it from differing even from two concurrent judgments of fact, and that the House could not decline the duty of formally expressing its own judgment. Of course, as stated by Lord Macnaghten in *Johnston* v. *O'Neill* (2), adopting the dictum of Lord Watson in *Owners of the "P. Caland"* v. *Glamorgan Steamship Co.* (3),

> a court of last resort ought not to disturb concurrent findings of fact by the courts below, unless they can arrive at—I will not say a certain, because in such matters there can be no absolute certainty—but a tolerably clear conviction that these findings are erroneous.

Here I feel convinced that the finding that Bailey assented to a dedication by Moody is erroneous, may I say so with all possible respect for the learned judges who thought otherwise. Moreover, as I have said, this is a matter of inference and does not rest upon the credibility of witnesses, and the recent case of *Dominion Trust Co.* v. *New York Life Ins. Co.* (4), is an authority for the proposition that

> where the question is as to the proper inference to be drawn from truthful evidence, then the original tribunal is in no better position to decide than the judges of an appellate court.

(1) [1904] A.C. 73.
(2) [1911] A.C. 552, at p. 578.
(3) [1893] A.C. 207.
(4) [1919] A.C. 254.

The appeal should, in my opinion, be allowed and the respondents' action dismissed with costs throughout.

Appeal allowed with costs.

Solicitor for the appellants: *John R. Green.*

Solicitor for the respondents: *R. W. Hannington.*