

J. S. Fullerton, K.C., and A. F. Lobb, for plaintiffs.  
 Walter Cassels, K.C., and Walter Gow, for defendants.  
 MACMAHON, J. (after setting out the facts and referring to the evidence):—Assuming, as I must, that the plan registered by the hospital trustees in July, 1855, shews correctly the work done on the ground, it is clear there was no dedication by the trustees of Cherry street south of Mill street as a highway.

Joseph Cadieux, who came to the locality in 1844, said that Cherry street was then open, and that a stream of water ran north-east, and a pond was there which he passed over in his skiff. Lots 10, 11, and 12 were not conveyed by the trustees to Jones until 1850, and lots 13 to 19 to Barnes not until about the same time, and a fence was not built on the west side of 13 until 1859, so that these lots formed an open common, and, according to the evidence of Latham, the traffic was not confined to any definite way. But, even if it be assumed that the public in 1850 commenced to use what is now alleged to be Cherry street, it required thirty years' user to confer a right of way to the public.

There being no right of way created by prescription south of Mill street, and no dedication of a highway by the trustees, they could up to 1880 have sold and conveyed to a purchaser the 60 feet running south of Mill street to the marsh.

If the plaintiffs could not up to that date have contended that it was part of the highway known as Cherry street, as against a purchaser from the trustees, I cannot comprehend how they can successfully contend that in 1857, when the defendants went there, Cherry street formed part of the highway across which they built the railway embankment.

No act done by defendants has created an estoppel preventing them from setting up that when they went there in 1857 and built an embankment through the marsh, Cherry street did not extend further south than a line co-terminous with the north edge of the marsh.

Judgment dismissing the action with costs and declaring that Cherry street does not extend across the right of way of defendants.

BRITTON, J.

TRIAL.

JANUARY 3RD, 1903.

### CORNELL v. HOURIGAN.

*Mortgage—Covenant—Sale of Equity of Redemption—Agreement to Look to Purchaser—Novation—Neglect of Assignee of Mortgage to Insure—Trusts—Parol Evidence.*

An action upon the covenant in a mortgage made by defendants upon hotel property in the village of Freeleton.