

convenient to fence in his property and leave the public to the legal allowances. See also *Borrowman v. Mitchell*, 2 U. C. Q. B. 155.

All such cases should be dealt with in a liberal spirit and with a due regard to the customs and necessities of a new country, where roads are in their infancy and much land unenclosed.

Here the origin of the public user and the express dedication by the owners is established.

In *Daves v. Hawkins*, 8 C. B. N. S. 848, an adjoining proprietor had illegally stopped up an ancient highway without interference by the owner of the soil. He substituted for it a new road which the public used over twenty years; then the obstruction on the ancient road was removed, and the owner of the soil of the substituted road shut it up.

Sir W. Erle's judgment fully discusses the law. He held there was no sufficient user of the substituted way, from which a jury could infer a dedication: "The user of the line of deviation over the adjoining land by reason of a wilful obstruction is no more the user of a deviation over adjoining land by reason of the highway being foundrous. I know of no decision and no principle making a distinction between a road impassable by non-feasance, that is, neglect to repair, and a road impassable by misfeasance, that is, by a ditch and bank wilfully made."

Byles, J.: "It is clear there can be no dedication of a way to the public for a limited time, certain or uncertain. If dedicated at all it must be dedicated in perpetuity. It is also an established maxim, "once a highway always a highway," for the public cannot release their rights, and there is no extinctive presumption or prescription. * * It was plain the public had never used the deviating track, except when they were shut out from the true ancient highway. The public user, therefore, was referable to the right of the public to deviate on to the adjoining land whenever the owner of the soil illegally stops a highway."—*Abor v. French*, 2 Show. 28.

I have quoted from this judgment to illustrate the marked distinction between the case before us and the common case in this country, already noticed, of a line deviating from, or used close to, or adjoining as near as practicable, a road allowance unopened or impassable.

I am clearly of opinion that the road stopped up by this by-law was in every sense a public highway.

The question remains as to the right to stop the highway.

The Act of 1849, 12 Vic. ch. 81, sec. 31, sub-sec. 10, gave power to open, &c., any new or existing highway, road, &c.

Sec. 187 absolutely forbade the stopping up of any original allowance for road.

20 Vic. ch. 69 (1867), sec. 2, allows the municipality to stop up and sell the original allowance, and sec. 7 introduces, as I believe for the first time, the provision that it should not be lawful to close up "any public road or highway, whether such road or highway be an original road allowance or a road which has been opened by Quarter Sessions, County or Township Councils, through any land by which any person shall be excluded from ingress or egress to and from a place of residence over the said road; but all such roads shall remain open for the use of the person who shall require the same."

In the Consol. Statute of 1859, ch. 54, sec. 318, and in the Municipal Act of 1866, cap. 51, sec. 320, the clause, slightly altered, reads thus: "No Council shall close up any public road or highway, whether an original allowance or a road opened by the Quarter Sessions, or any Municipal Council, or otherwise legally established, whereby any person will be excluded from ingress and egress to and from his land or place of residence over such road, but all such roads shall remain open for the use of the person who requires the same."

We are called on to place a construction on this clause, so far as I know, for the first time.

The power to stop up a road was before the court in *Johnston v. Reesor*, 10 U. C. Q. B. 101. This was prior to the passing of the act as to egress and ingress. Sir J. B. Robinson says: "Here was a road first allowed at an early period as a mere accommodation to the immediate neighbours, for enabling them to pass through private property, by a short road, from one concession to another, instead of going round by the nearest public allowance when the ground might have been wet or unfavourable. It may be very reasonable, afterwards, when the township becomes cleared and populous, and roads can be made more easily, to relieve the proprietor of the land from the disadvantage of having the thoroughfare through his property, and to have only the public allowance."

It would seem that the municipality then had unlimited powers to stop all highways not being original allowances. Then the Act of 1857 extended their power over original allowances, and added the restrictive clause as to ingress and egress, applicable to all roads legally established. Are we to construe this clause as applicable only to cases where, by shutting up a road, ingress and egress would be totally barred? This would confine the restriction to cases chiefly where the road to be stopped was what is commonly called a *cul-de-sac*.

Under the usual system of laying out roads in this country there are not many cases where a person would be excluded from ingress and egress to and from his land by the stopping of any one road. He would generally have an approach by going round by another road. Small holdings could of course exist along a road cut across lots from one concession line to the other, where the stopping up of such road might effectually cut off the owners of such holdings.

In the case before us it does not appear that by the stoppage of this road any persons will be completely cut off from ingress and egress, but the affidavits shew that a very serious inconvenience and injury must be done to them by forcing them to make a circuit of nearly a mile longer to reach the village of Acton and the railway station.

We can see no shadow of justice in the course taken by the council. Mr. Cummings has no right to complain. He bought his land from the man who had already expressly dedicated a portion to the public, and the road was there, visible to all. If councils have power to shut up such a road as this road, the general result may be most serious. A person desirous of selling off a portion of his land in small building lots, or of having a short access from a valuable mill to a railway station, might pay a large sum of