

requiring defendants to restore the Queen street avenue to its former condition, to replace the fence across the southerly 34 feet of Anderson street, and to refrain "from using Anderson street as an access to that avenue to any larger extent than the footpath 6 feet wide."

Defendants assert a right under the agreement of 1889 to do what has been done; and, in any event, they aver that the acts complained of were done by their engineer without authority, and should not be held to work a forfeiture of their lease.

Under the original lease of 1859 it is conceded that defendants had no rights such as they assert in this action. Mr. Fullerton contends that by the dedication of the Queen street avenue to the public, under the agreement of 1889, and the removal of all restrictions as to traffic thereon, the right to open streets into that avenue was conferred upon the municipality as one of the incidents of its dedication as a highway; . . . that, because this dedication is made in express terms "subject to conditions hereinafter set forth," it is necessarily freed from all other restrictions to be inferred either from circumstances surrounding the dedication, or from earlier provisions of the instrument by which it is made. It is conceded that a party taking by dedication can only claim *secundum formam doni*, but counsel for defendants stoutly maintains that the expression of certain restrictions or limitations excludes any inference of others.

The rule or canon of construction upon which this argument rests, though of undoubted force, "is not of universal application. It depends upon the intention of the parties as it can be discovered upon the face of the instrument or upon the transaction:" *Saunders v. Evans*, 8 H. L. C. at p. 729. A guide to enable the Court to ascertain that intention, which when clearly discerned must govern, it necessarily yields to clearer and more conclusive indications afforded by the language of the instrument.

In the present instance the clause of the agreement of 1859 containing the words of dedication of the Queen street avenue is immediately preceded by the clause confirming, amongst others, as an existing street opening into that avenue, shewn on the plan to the agreement annexed, "Anderson street, footpath 6 feet wide." . . . The presence of this provision in the agreement is, in my opinion, entirely inconsistent with the existence of an intention that the dedication which follows it should be unqualified and absolute. . . . I cannot read these words of limitation or restriction as tantamount to "subject to the conditions hereinafter set forth and no others."