

Walker was possessed of the west half of 31, Robert Bedford of the west half of 32, and Thomas McCoy of the east half of 32; that before that time the road between the east halves had been travelled; that a writing, produced, was then executed by Walker, Bedford and McCoy, in these words: "Whereas it is thought necessary that a road should be opened across the 2nd concession of Esqueving between lots 31 and 32 of the same, we, that is to say, Hamilton Walker, owner of the west part of 31, Robert Bedford, owner of the west of 32, and Thomas McCoy of 32, east of said 2nd concession, we, the above-mentioned Hamilton Walker, Robert Bedford, and Thomas McCoy, do promise and agree to give each a part for the purpose of opening the same; that is, Hamilton Walker one rod in width from the concession line, between 1st and 2nd to the centre of said 2nd concession; likewise Robert Bedford one rod in width from line between the 1st and 2nd concession to the centre of said 2nd concession; and Thomas McCoy two rods off his lot, if the owner of 31 should not be willing to give a part for the purpose of having said road opened. In witness, &c., set our hands, 12th April, 1836." (Signed by the three.) It was sworn that when the writing was given, the whole was formally opened, and had ever since been used.

John Cummings, who petitioned for this by-law, and who had since its passing stopped up the road, owned 25 acres of the east half of 32, off which McCoy, the former owner, thus dedicated the road. He also owned the east half of 31 south of the road.

Harrison, Q.C., shewed cause, the defence set up for the by-law being that it was considered a private road, and was only to be used till the town line was opened; that the town line had been opened, and the municipality had also caused a road to be opened parallel to this road between lots 23 and 27, in 2nd concession, for the convenience of the public.

Cummings swore that in 1840 he purchased 31 in 2nd concession from one Jones, and his deed contained no reservation of any road: his lot was then wild. He did not deny but that the road in question was then in existence and used; but he swore that eighteen or nineteen years ago, when he cleared up to the line, he made some alterations in the road, which was "accordingly moved to its present position." In 1846, he said, he bought the south-east 25 acres of 32 from Thomas McCoy, the deed containing no reservation; that he always considered he had the right to stop the road, but said he did not intend doing so till the town line was opened.

It was also sworn that at different times when the pathmasters were doing statute labour on the road, he forbade them putting stones on it or making holes in it; and his son swore the pathmasters submitted and did not do so, though it very clearly appeared that no attempt was ever made to exercise any right to obstruct or interrupt the use of the road. His son also swore that most of the road was on the lot 31, bought from Jones, and only a small portion on 32, bought from McCoy.

A large portion of the affidavits on the defence went to shew that it would be as convenient or nearly as convenient for the persons residing west of the road to go round by the town line as

to go straight to the east. This was strongly denied by the applicants.

McGregor and Guthrie, contra.

The following cases were cited: *Regina v. Plunkett*, 21 U. C. Q. B. 536; *Borrowman v. Mitchell*, 2 U. C. Q. B. 155; *Dawes v. Hawkins*, 4 L. T. N. S. 288; *Chapman v. Cripps*, 2 F. & F. 864; *Selby v. Gas Co.*, 30 Beav. 606; *Holmes v. Goring*, 2 Bing. 76; *Osborn v. Wise*, 7 C. & P. 761; *Carriek v. Johnson*, 26 U. C. Q. B. 65; *Regina v. Phillips*, L. R. 1 Q. B. 648.

HAGARTY, C. J.—It is clear that this road was not an original allowance, but has been a public travelled road for between thirty and forty years. The town line parallel to it being over rough land, remained for many years unopened till lately, and this road was used, it is sworn, as the regular high road from Toronto to Guelph. Statute labour seems to have been usually done upon it, and the farmers to the west seem to have used it extensively as their road to Acton village and station.

It seems to me that the evidence of this road having acquired the legal character of a public highway is irresistible. It was first used as a road; then we find the three owners, thirty-four years ago, in writing, declaring there was to be a road there, and each agreeing to give a portion of his land for that purpose. It is quite true that Jones, from whom Cummings purchased, in 1840, the east half of 31, does not appear to have done anything in the matter; but McCoy, who owned 31 on the north of the Jones lot, agreed to give double the width given by the other two if the owner of 31 should not be willing to give a part for that purpose.

Then, in 1846, Cummings purchases from McCoy the south 25 acres of 31, off or along which McCoy, his grantor, had already appropriated the allowance for the road, and dedicated it to the public as formally as he could.

It matters little, I think, that McCoy, in the deed to Cummings, did not expressly reserve this. The road was then open and travelled, and was always clearly in the knowledge and sight of Cummings, who then owned on both sides of it.

His declared opinion that it was only a private road or that he had the right to stop it or would stop it when the town line was made passable, cannot avail. It could not matter much to him that most of the road may or may not be on the McCoy part. When he took from McCoy the latter had dedicated two rods wide off his lot for this road.

The evidence, also, as to statute labour being usually done on it, is clear.

I think the case of *Regina v. Plunkett*, 21 U. C. Q. B. 536, cannot help the defendants. It was what was called "a trespass road," running diagonally across some lots on the Humber plains; in the view of the Court "only a temporary substitute for the proper allowance, which ran alongside of the lot," and that there was not sufficient evidence of dedication.

It cannot be pretended that this road comes under the class of "trespass roads," running as near perhaps as the irregularities of the ground of the public allowance for road will permit, or of the "short cuts" often made across unenclosed land, and used for years by the public with the permission of the owner till he finds it