

leave of the Board. The contest before the Railway Commission, was as to the terms upon which the railway should be permitted to cross the public road. Nothing was said about the adjoining private way; no contest was raised as to whether this 15 feet was or was not part of the public road; and I do not think that the Board ever adjudicated, either intentionally or unintentionally, upon the matter now in issue.

The title to the right of way of the railway was not disclosed before me, and I must, therefore, assume that the railway has not acquired any title to the 15 feet, and that their action must fail, unless there has been a dedication to the public.

On the facts I do not think there was a dedication. As said by Lord Macnaghten in *Simpson v. Attorney-General*, [1904] A. C. 493, "it is clear law that a dedication must be made with the 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 of itself amount to dedication."

I do not think, in this case, that the defendant has done anything amounting to a dedication. In this view the action of the plaintiff fails, and must be dismissed. For the like reason an injunction should be awarded to the defendant upon his counterclaim.

The railway, undoubtedly, has a right to expropriate; and the piece of land to be taken is of such trifling value that it is a great pity that the parties have not up to the present been able to settle. The defendant and his brother take this piece of land, impressed with the expression of their father's intention that it should be made a public highway. Probably the defendant himself will, sooner or later, desire to convert the strip of land to the east of the railway track into a highway, so widening the road from 25 to 40 feet. In the meantime the proper course is, I think, indicated by the Supreme Court, and I ought not to dissolve the injunction which has been granted to the plaintiffs or make operative the injunction which I now award to the defendant, until an opportunity is given to the railway to take expropriation proceedings. This course is justified by what is said in the Supreme Court in *Sandon v. Byron*, 35 S. C. R. 309.