BYRNES V. BOWN

(1850), 8 U.C.Q.B. 181

Upper Canada Queen's Bench, Robinson C.J., Draper and Burns JJ., 1850

12th clause of Highway Act, 50 Geo. III, ch. 1--As to what constitutes a public road running through Indian lands.

> The 12th clause of the Highway Act, 50 Geo. III., ch. 1, cannot be taken to mean that every bye-road or short cut used by the Indians across the plains or flats is to be established as a permanent highway. It only means, that roads which, under the provisions of that act, are to acquire the character of legal highways should have that same legal character where they passed through Indian lands as in other parts of their course, although they might not be (as to such portion of them) public allowances made in any original survey, not had any public money been expended or statute labor performed on them.

Trespass *qu. cl. ft.*, describing the close as abutting on the north-west by the Grand River, on the south-west by a certain close or field known as lot number seven, on the south-east by a certain other close or field known as lot number eight, and on the north-east by a certain close or field known as lot number seventeen, in what is called the Oxbow Bend, in the township of Brantford. The declaration contained only one count in the common form, for treading down the grass, subverting the soil, &c., breaking gates, prostrating fences, &c.

The defendant pleaded:--1st not guilty.

2nd, That the close was not the plaintiff's.

3rd, That the gates, locks, fences, &c., were not at the said time when, &c., the property of the plaintiff.

4th, He justified the entry and a right of common and public highway through the close, and pleaded that he removed the gates, fences, &c., because they obstructed the highway.

5th, That there was before and at the time when, &c., a common public highway in, through and over the said close; that before the said time when, &c.,--viz., on the 8th of August, 1843--the District Council of the District of Gore enacted a by-law that pathmasters, (meaning thereby over- seers of highways,) in their respective beats or districts, should remove any nuisance or obstruction which might be placed or remain in any highway; that after the passing of the by-law and before and at the said time when, &c., the defendant was a pathmaster and overseer of highways, duly appointed for that part of the township of Brantford in which the said close is situated, and that the fences, gates, &c., of the plaintiff having been wrongfully erected, and being then standing in the said highway and obstructing the same, the defendant, as overseer and under the authority of the said by-law, entered upon the said highway in the said close, &c., for the purpose of removing the said obstructions, and removed the said fences, &c., doing no unnecessary damage, &c.

The plaintiff joined issue on the 1st, 2nd, and 3rd pleas; replied to 4th plea, traversing the right of way alleged; and to 5th plea, that at the several times when, &c., there was not, nor of right ought there to have been, a common and public highway into, through, over and along the said close in

which, &c., as the defendant hath in that plea alleged, &c.

Verdict for the plaintiff, 6*d*. damages-- the jury finding that there was no public highway, nor any right of way in the place in question.

The defendant obtained a rule for a new trial on the law and evidence.

ROBINSON, C.J., delivered the judgment of the court.

We have considered the evidence and are all satisfied with the verdict. The case turns altogether on the evidence, and it went properly to the jury. The plaintiff is contending for nothing unreasonable; but what the defendant, on the other hand, wishes to establish has the appearance of being extremely unreasonable. It is proved that the road which the government has directed to be laid out, along the bank of the river running in the same direction and at a short distance from the other, is on ground more suitable for a road, and is equally convenient for the public; but the defendant would nevertheless insist on a continued right of passage through the center of the plaintiff's fields, in addition to the highway which the government has laid out, to connect the same points.

If the evidence had been such as to five quite clearly the character of a legal highway to the Indian road or path in question, so that there was really no question of fact for the jury to consider, then the plaintiff must have submitted, though it would have seemed harsh in any one to desire to subject him to the inconvenience of having this road run through his farm without any particular advantage accruing from it to the public. But the evidence well warranted the conclusion which the jury came to, that there was no public highway, nor any right of way in the place in question. There had been a road, it appears, for some years, leading what is now the plaintiff's land--a more principal road than many others which led from different Indian houses into it--while the whole was an Indian settlement. But still this was a road not always allowed to lie open to the public but only in the winter season, when no damage to the Indians living there from its being traveled.

In the summer, the Indians, it was proved, generally kept up a fence across the neck, thereby enclosing the flats within the bend of the river, which were usually planted with corn. The *locus in quo* is within the tract from which the public were commonly shut out in the summer by this fence. It was sworn that it was so enclosed generally in summer up to the time of this plaintiff becoming the proprietor, which was five or six years ago. He shut up this alleged road, leaving, however, a road to run parallel with it, near the bank of the river, which the government, in laying out and disposing of the land for the benefit of the Indians, have desired to substitute and establish as the public road.

Reliance has been placed on the 12th clause of the High- way Act, 50 Geo. III., ch. 1, as having the effect of making this a permanent road. That enacts that any roads whereon public money has been expended or statute labor usually performed, *or any roads passing through the Indian lands*, shall be deemed common and public highways. But it never could have been meant by that clause that every bye- road or short cut used by the Indians across the plains or the flats was to be established as a permanent highway, even though they should be roads only left open during the winter. The meaning of that clause, I think, is, that roads which, under the provisions of that act were to acquire the character of legal highways, should have that same legal character

where they passed through Indian lands as in other parts of their course, although they might not be (as to such portions of them) public allowances made in any original survey, nor had any public money been expended or statute labor performed on them.

So long as any portion of the public lands has not been surveyed or organized, and generally indeed as to all lands before they are in great part cultivated and enclosed, people pass freely wherever it suits their convenience, and great inconvenience and injustice would follow if every such temporary road must become a permanent highway. Intention to dedicate and a variety of circumstances are to be considered in each case, and any attempt or claim which is unreasonable should be discountenanced by courts and juries.

Per Cur.--Rule discharged.