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SAMUEL VAN ALSTYNE AND DORIS VAN ALSTYNE (*Defendants*) ..... APPELLANTS;

AND

LINDSEY D. RUCK, EDMOND E. GOWETT, THOMAS P. COMPEAU AND JOHN H. SCOTT (*Plaintiffs*) ... RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Real property—Effect of plan of subdivision—Right of way shown on plan but not included in subdivision—"Access"—The Registry Act, R.S.O. 1950, c. 336, ss. 84(1), (5), (14), 89(1)—The Surveys Act, R.S.O. 1950, c. 381, s. 11(2).

One T, the owner of land bordering on the St. Lawrence River, subdivided part of it in 1943 and registered a plan showing lots numbered from 1 (on the west) to 7, all bounded on the south by the river and lots 1 to 6 bounded on the north by a "Right of Way 20' wide". This right of way ran from the west boundary of the plan to a private road leading from the river north to highway no. 2. Lots 1 to 6 were to the west of this private road and lot 7 was to the east. The plan bore the notation "lands registered outlined Red" and there was a red outline surrounding lots 1 to 6 and lot 7, but not the private road or the 20-foot strip. T conveyed lots 1 and 2 and a parcel to the north of these lots to the defendants and lots 3 and 6 to the plaintiffs or their predecessors in title. All the deeds of lots 1 to 6 included the use of the right of way and private road "shown on said plan". The defendants built a garage and fence immediately to the north of lot 2 which had the effect of blocking the 20-foot right of way to the west of lot 3. The plaintiffs sued for the removal of this obstruction.

Held: The action must fail.

Section 84(14) of *The Registry Act* did not assist the plaintiffs. Section 84 dealt with the preparation of plans, their contents and the formalities attending their registration, and it was only "for the purposes of" that section that "a public or private . . . way . . . being the only access to a lot or lots laid down on a plan . . . shall be deemed to be a street or highway". The subsection did not create rights in individuals or the public generally. This wording was to be contrasted with that of s. 11(2) of *The Surveys Act* which expressly provided that the roads, streets, etc., there referred to "shall be public highways", etc. The 20-foot strip here in question did not fall within s. 11(2) of *The Surveys Act* since it was described merely as "a right of way" and it was clear from the conveyances that the right intended to be given to the plaintiffs was in the nature of an easement.

Nor could the plaintiffs rely on the general principle that where lots were sold according to a particular plan the purchasers acquired an interest in the streets or lanes shown on that plan. These conveyances had not simply described the lots with reference to the plan but had

*PRESENT: Kerwin C.J. and Taschereau, Kellock, Cartwright and Nolan JJ.

expressly given rights of way over the 20-foot strip and on a proper construction of the deeds that right of way did not extend to the part of the 20-foot strip lying to the west of lot 3.

Per Kellock J.: It followed by implication from the wording of s. 89(1) of *The Registry Act* (which must be read with s. 84(14)) that when a sale had been made according to a plan the plan became binding, but the plaintiffs obtained no assistance from the statute in this case since the word "access" in s. 84(14) contemplated a means of approach connecting the lot or lots to some street or way over which the public were entitled to travel. The 20-foot strip here in question did not connect with any such public street or way but merely with a private road. It was also to be observed that s. 84(5) required that a plan should show all roads and streets "within the limits" of the land subdivided. This plan was expressly confined to the numbered lots and excluded both the 20-foot strip and the private road to highway no. 2. It could therefore not be contended that either of these areas was "on" the plan.

APPEAL from the judgment of the Court of Appeal for Ontario (1), reversing a judgment of Reynolds Co.Ct.J., of the County Court of the County of Frontenac. Appeal allowed.

J. J. Robinette, Q.C., for the defendants, appellants.

W. B. Williston, Q.C., and *C. M. Smith,* for the plaintiffs, respondents.

The judgment of Kerwin C.J. and Taschereau, Cartwright and Nolan JJ. was delivered by

CARTWRIGHT J.:—This appeal is brought, pursuant to special leave granted by the Court of Appeal for Ontario, from a judgment of that Court (1) reversing, by a majority, a judgment of His Honour Judge Reynolds and restraining the appellants from maintaining a fence and building on certain lands over which the respondents claimed to be entitled to a right of way and ordering the appellants to remove the fence and building.

In order to make the issues clear it is necessary to state the facts in some detail.

In and prior to the year 1943 one William Turcotte was the owner of the west half of lot 32 in concession 2 of the township of Pittsburgh in the county of Frontenac. In 1943 Turcotte had a plan of part of his land prepared by an Ontario Land Surveyor. This plan is dated October 12, 1943 and was registered in the Registry Office for the

(1) [1955] O.R. 738, [1955] 4 D.L.R. 41.

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County of Frontenac on October 28, 1944 as plan 338. The plan shows seven lots numbered consecutively from 1 at the west to 7 at the east. The southerly boundary of all the lots is the northerly bank of the River St. Lawrence and the northerly boundary of lots 1 to 6 is a straight line drawn on a bearing south 88 degrees, 43 minutes east from a point in the westerly boundary of lot 32 concession 2 to a point in the westerly limit of a road marked with the words "Road to Highway No. 2". The plan shows only the southerly portion of this road. There is a note on the plan reading:

> Private Road from Highway No. 2 South along West limit Lot 32 Concession 3 for 1,100′ and along West limit Lot 32 Concession 2 to the valley which it follows to the level a total of 2,600′.

It is common ground that this is a private road. To the east of this road is lot 7. There is a broken line shown on the plan running parallel to the line which marks the northerly boundary of lots 1 to 6 and distant 20 feet northerly therefrom; between these lines there is a notation "Right of Way 20′ wide". Lots 1 to 6 inclusive and lot 7 are outlined in red and on the face of the plan there is a note as follows: "Note—lands registered outlined Red." At all material times there was a fence erected on the line between lots 32 and 31 in concession 2, lot 31 being to the west of lot 32. The lands to the west of this fence were owned by one Paddle and occupied by him as a farm. This fence formed the west boundary of lot 1 plan 338 and continued northerly therefrom for a considerable distance. At its westerly end the strip of land marked "Right of Way 20′ wide" was blocked by this fence and at its easterly end it opened into the private road above referred to.

By deed dated August 24, 1944 Turcotte conveyed to the respondent Lindsey Ruck and his wife as joint tenants:

> ALL AND SINGULAR that certain parcel or tract of land and premises situate, lying and being part of the west half of lot 32, in the second concession of the Township of Pittsburgh, in the County of Frontenac, and more particularly being lot six, according to a plan on fyle in the Registry Office for Kingston and Frontenac as No. 338, together with a right-of-way as shown on said plan over said lot to the King's Highway No. 2.

By deed dated September 17, 1945 Turcotte conveyed to the appellant Doris Van Alstyne:

> ALL AND SINGULAR these certain parcels or tracts of land and premises situate, lying and being in the township of Pittsburgh in the County of

Frontenac and being composed of Lots # 1 and # 2, according to a plan of part of the front of the West half of Lot # 32 in the second concession of said township on file in the Registry Office for Kingston and Frontenac as # 338. Together with the use of the right of way shown on said plan and together with [another right of way with which we are not concerned].

By deed dated August 10, 1946 Turcotte conveyed lot 3 to one Isabelle Connor, and by deed dated July 11, 1949 she conveyed this lot to the respondents Gowett, Scott and Compeau; the descriptions of the lands conveyed in these two deeds are identical and read as follows:

ALL AND SINGULAR that certain parcel or tract of land and premises situate, lying and being in the Township of Pittsburgh, in the County of Frontenac and being composed of Lot number Three (3) according to a plan of the front of the west half of Lot number 32, in the Second Concession of said township on file in the Registry Office for Kingston and Frontenac as No. 338. Together with the use of a right-of-way and private road to and from Highway No. 2, shown on said plan.

By deed dated May 17, 1949 Turcotte conveyed to the appellant Samuel Van Alstyne a parcel of land containing 1.58 acres bounded on the south by the northerly limits of lots 1 and 2 plan 338, on the west by the west limit of lot 32, concession 2, on the north by a line 149½ feet in length drawn on a bearing south 88 degrees 51 minutes east from a point in the west limit of lot 32 distant 520 feet northerly from the north-west angle of lot 1 plan 338 to a post and on the east by a line drawn from this post to the north-east angle of lot 2. The description in this deed concludes as follows:

Together with and subject to a right-of-way in common with those others entitled thereto over, on and across said Lot # 32, Concession Two and Lot # 31 in the Third Concession of said Township from Highway No. 2 to and from the land hereby conveyed.

In the spring of 1953 the appellants erected a garage and a fence which extend across the strip of land marked "Right of Way 20′ wide" on plan 338. These were still there at the date of the trial and prevent any of the respondents making use of that part of the said strip which lies to the west of the production northerly of the line between lots 2 and 3 on plan 338. The action was brought to compel the removal of these obstructions.

Paragraphs 3, 4 and 5 of the statement of claim read as follows:

3. In or about the months of April or May, 1953, the defendants or either of them, erected a building on the right-of-way running along the rear of Lots 1 to 6 inclusive as laid out on a plan of subdivision of part of

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Lot 32 in the Second Concession of the Township of Pittsburgh and registered in the Registry Office for the Registry Division of Kingston and Frontenac as Plan Number 338.

4. The Defendants have also erected, and maintain a fence, across the said right-of-way, at the easterly end of their lands.

5. The said building erected by the defendants, or either of them, and the fence built by the defendants, or either of them, obstruct the right-of-way of the Plaintiffs and deprives them of their use and enjoyment of the said right-of-way to which they are entitled by their deeds of ownership.

In their statement of defence the appellants refer to the conveyances mentioned above and plead that the right of way granted to the respondents is to and from highway no. 2 and not over the lands of the appellants. It was on the issue so defined that the action went to trial. At the trial there was no serious dispute as to the facts. The respondents gave evidence to show that prior to the erection of the fence and garage they had used that part of the 20-foot strip lying to the west of the boundary between lots 2 and 3 for the purpose of going to the Paddle farm to make purchases and sometimes to go through the Paddle farm to highway no. 2 but there was no suggestion that they had any right to travel over any part of the Paddle farm for this purpose or any right to climb the fence which formed the easterly boundary of the Paddle farm.

The learned trial judge construed the conveyances to the respondents as granting to them a right of way over the 20-foot strip from their lots to the private road, the southerly end of which is shown on plan 338, and over this private road to highway No. 2, but not as giving them any right of way over that part of the 20-foot strip lying to the west of the production of the boundary between lots 2 and 3. For the reasons given by Laidlaw J.A. in the Court of Appeal I agree with this construction.

Roach J.A., who delivered the reasons of the majority in the Court of Appeal, was of opinion that the plaintiffs were entitled to succeed on one or other of two grounds.

The first of these is that s. 84 (14) of *The Registry Act*, R.S.O. 1950, c. 336, is decisive of the rights of the parties. That subsection reads as follows:

(14) Any public or private street, way, lane or alley or block, tract or lot, being the only access to a lot or lots laid down on a plan of survey and subdivision, shall, for the purposes of this section, be deemed to be a street or highway.

The learned trial judge had rejected this argument on the grounds (i) that the strip marked "Right of Way 20' wide" was excluded from the plan because it was not outlined in red, and (ii) that the plan was improperly registered because its registration had not been consented to by the proper municipal council or the Ontario Municipal Board. Assuming, without deciding, that Roach J.A. was right in refusing to give effect to either of these grounds, I find myself unable to agree with his view as to the operation of the subsection.

Section 84 appears to me to deal with the method of the preparation of plans, their contents, and the formalities which attend their registration. It is only "for the purposes of this section" that "a public or private . . . way . . . being the only access to a lot or lots laid down on a plan . . . shall be deemed to be a street or highway". To construe the subsection as having the effect of creating rights in individuals or the public generally or imposing liabilities as to maintenance and repair upon municipalities seems to me to fail to give effect to the words "for the purposes of this section".

The wording of s. 84 (14) may usefully be contrasted with that of s. 11 (2) of *The Surveys Act,* R.S.O. 1950, c. 381, which reads as follows:

> (2) Subject to the provisions of *The Registry Act* and *The Land Titles Act* as to the amendment or alteration of plans, all allowances for roads, streets, lanes or commons, surveyed in any such city, town, village, lot, mining claim, mining location or any parcel or tract of land or any part thereof, which has been or may be surveyed and laid out by companies or individuals and laid down on the plans thereof shall be public highways, streets, lanes and commons.

From this it appears that where the intention of the Legislature is to create public highways or streets that intention is plainly expressed.

The reason that I think that s. 11 (2) of *The Surveys Act* does not assist the respondents is that the 20-foot strip shown on plan 338 seems to me not to fall within the words "allowances for roads, streets, lanes". All of these words are appropriate to describe highways but the words "right of way" are more apt to describe an easement. When the conveyances above referred to are looked at it is clear that the right intended to be given to the respondents was in

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the nature of an easement. I did not understand any of the parties to contend that the 20-foot strip had become a public highway and it would be surprising to find a public highway running from a private road to a dead-end. If it had been contended that the 20-foot strip had become a public highway it might have been necessary to consider whether an action to so declare would be properly constituted without the Attorney-General for the Province and the municipality in which the lands are situate being made parties. I do not pursue this question as what is claimed by the respondents is not that the 20-foot strip has become a public highway but that they are entitled to a right of way over all of it "by their deeds of ownership".

The second ground on which Roach J.A. proceeded is summarized in the following paragraph in his reasons (1):

> The lots were sold by Turcotte to the several purchasers according to a plan which showed a right of way extending all the way across in front of those lots. The law is well settled that if a person sells lots according to a particular map or plan, even though it is not registered, the purchasers acquire an interest in the streets or lanes shown upon it adjoining the lots sold, which places them beyond the vendor's future control to their injury.

As a general proposition this is not disputed; but in the case at bar the conveyances on which the respondents rely define their rights to the use of the strip of land in question. We do not have to decide what the rights of the parties would have been if their deeds had simply described their lots with reference to plan 338 and had made no mention of the 20-foot strip. The applicable rule of construction is that set out in the reasons of Strong J. in *Grasett v. Carter* (2) as follows:

> When lands are described, as in the present instance, by a reference, either expressly or by implication, to a plan, the plan is considered as incorporated with the deed, and the contents and boundaries of the land conveyed, as defined by the plan, are to be taken as part of the description, just as though an extended description to that effect was in words contained in the body of the deed itself. Then, the interpretation of the description in the deed is a matter of legal construction and to be determined accordingly as a question of law by the judge, and not as a question of fact by the jury.

I have already indicated my agreement with Laidlaw J.A. in holding that on the construction of their deeds, read with the plan therein referred to, the respondents are

(1) [1955] O.R. at p. 751. (2) (1884), 10 S.C.R. 105 at 114.

not entitled to a right of way over that part of the 20-foot strip lying west of the production of the line between lots 2 and 3.

I would allow the appeal and direct that the judgment of the learned trial judge be restored. The appellants are entitled to their costs of the action and of the appeal to the Court of Appeal but, in view of the terms of the order of the Court of Appeal granting leave to appeal, the only order as to costs in this Court should be that the appellants pay to the respondents the reasonable cost of preparing and printing their factum, a reasonable counsel fee and the reasonable expenses of their counsel in attending at Ottawa during the argument of the appeal.*

KELLOCK J.:—I have had the advantage of reading the judgment of my brother Cartwright and agree with his view, which was also that of Laidlaw J.A., as to the construction to be placed upon the conveyances here in question. I also agree that these conveyances define the rights of the parties as to the use of the strip in question.

I desire, however, to express my own view with regard to the effect of s. 84 (14) of *The Registry Act,* R.S.O. 1950, c. 336, which reads as follows:

> (14) Any public or private street, way, lane or alley or block, tract or lot, being the only access to a lot or lots laid down on a plan of survey and subdivision, shall, for the purposes of this section, be deemed to be a street or highway.

The respondents contend, and I think rightly, that regard must be had to s. 89 (1) of the statute, which provides that a plan, although registered, shall not be binding on the person registering it, or upon other persons unless a sale has been made according to the plan. This clearly indicates, I think, that where such a sale has been made the plan is binding.

I think, however, that the respondents obtain no assistance from the statute in the circumstances of the present

* The order granting leave to the defendants to appeal provided that the leave should "be conditional upon the defendants undertaking to pay to the plaintiffs in any event of the disposition of the appeal by the Supreme Court of Canada, the reasonable cost of preparation and printing of a factum, a reasonable counsel fee for counsel for the plaintiffs, plus the reasonable expenses of counsel for the plaintiffs in attendance in Ottawa during the argument of the appeal"

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case, as, in my view, the word "access", which is defined by the Oxford Dictionary as "a way or means of approach", contemplates that the means is one which connects the lot or lots to some street or way over which *the public* are entitled to travel. As pointed out by my brother Cartwright, the strip here in question does not connect with any such public street or way but, so far as the evidence shows, merely with a private right of way. I think the word "access" in the statute is used in the same sense as in the statute which was under discussion in *Oakley v. Merthyr Tydfil Corporation* (1).

I think it could hardly be contended, and it has not been contended in the case at bar, that that part of the "Road to Highway No. 2", which is the private right of way to which I have referred and which is sketched in outside the red lines which depict the limits of the subdivided lands, is to be regarded as a public highway by virtue of s. 84 (14). So far as *the plan* is concerned, this particular road or way ends "in the air". In my view, the status of this road or way differs in no way from that of the strip here in question.

It is to be observed that subs. (5) of the section, which is mandatory, requires that the plan shall show all roads and streets "within the limits" of the land subdivided. Plan 338 is expressly confined to the numbered lots and excludes both the strip and the "Road to Highway No. 2". I therefore think it cannot be contended that either of these areas may be considered as being "on" the plan and that in any event the strip to the north of lots 1 to 6 does not come within the word "access" within the meaning of s. 84 (14).

By s. 453 (1) of *The Municipal Act,* R.S.O. 1950, c. 243, the burden of repairing all highways within its jurisdiction is placed upon a municipality. In my opinion, it would be impossible to contend that the local municipality here in question has any such responsibility with respect to a strip of land to which the municipality itself has no right of access. That strip, therefore, cannot "be deemed to be a street or highway".

(1) [1922] 1 K.B. 409.

The appeal should be allowed and the judgment of the learned trial judge restored. I agree with the order as to costs proposed by my brother Cartwright.

Appeal allowed.

Solicitors for the defendants, appellants: Gibson, Sands & Flanigan, Kingston.

Solicitors for the plaintiffs, respondents: Smith & Smith, Kingston.

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*PRESENT: Kerwin C.J. and Kellock, Locke, Cartwright and Nolan JJ.