1958
*Nov. 4, 5, 6
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Feb. 26

WILLIAM HOWARD WRIGHT AND PERCY MAGINNIS (*Plaintiffs*) .. } APPELLANTS;

AND

THE CORPORATION OF THE VILLAGE OF LONG BRANCH (*Defendant*) ..... } RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Real property—Public square—Dedication—Intention—Paper title held by individual—Whether dedication by plan as public highway—The Land Titles Act, R.S.O. 1950, c. 197.

A parcel of land containing 64 1/4 acres was divided into two parcels of 54 1/4 and 10 acres respectively. The land in dispute here was a 100-foot square in the 10-acre parcel. In 1886, a plan was registered under *The Land Titles Act* subdividing the 54 1/4-acre parcel; and, although the 10-acre parcel was not included, the plan showed the square coloured in the same way as other roads and squares. The square was included in the plan in error because the owner of the 54 1/4-acre parcel was not the owner of the 10-acre parcel. In 1932, by permission of the defendant municipality, a war memorial was erected on the square by the Canadian Legion. The plaintiffs, who held paper title to the square, sued for a declaration that they were owners of the land. The defendant claimed uninterrupted exclusive possession for 50 years or more and dedication and counterclaimed for a declaration that the land free from any claim was its property. The trial judge maintained the action and dismissed the counterclaim. This judgment was reversed by the Court of Appeal on the ground that there had been dedication at common law as part of a highway and acceptance of the offer. The plaintiffs appealed to this Court.

Held (Cartwright and Martland JJ. dissenting): The plaintiffs were entitled to a declaration that they were the registered owners of the land in question subject to a dedication for the purpose of the war memorial now erected thereon.

Per Rand, Abbott and Judson JJ.: There was no basis for any claim to a possessory title.

There was no dedication in 1886 under the statute by reason of the plan. There had been no common law dedication and the municipality could not claim title through the statutory effect of the plan. The root of the plaintiffs' title was a grant under a power of sale contained in a mortgage covering the whole of the 10-acre parcel without excepting the square. There was no imperfection in the registered title and, until 1932, nothing happened to impair the rights of the plaintiffs' predecessors in title. The memorial could not have been erected without the acquiescence of the title holders. The interest held by the public since 1932 could be characterized as a dedication of the land for the limited purpose of erecting and maintaining a war memorial; but it could not be held that there was a transfer of the legal title in fee. If and when the memorial ceases

*PRESENT: Rand, Cartwright, Abbott, Martland and Judson JJ.

to remain on the square, the land will stand free of the burden. There was no acceptance in 1932 of a continuing offer of dedication of the square as part of the highway made in 1886.

Per Cartwright and Martland JJ., dissenting: Until 1932, nothing had happened that impaired the rights of the predecessors in title of the plaintiffs to the square. Where the question raised is whether land has been dedicated for a particular purpose, there is no reason, in principle, why both the intention to dedicate and its purpose may not be inferred from open and unobstructed user by the public for the particular purpose for a substantial time; but, in the present case, the evidence was insufficient to establish an *animus dedicandi* on the part of the registered owners in 1932, or at any time subsequent thereto. The judgment at trial should be restored except in so far as it awarded costs as between solicitor and client.

APPEAL from a judgment of the Court of Appeal for Ontario[1], reversing a judgment of Wilson J. Appeal allowed, Cartwright and Martland JJ. dissenting.

W. J. Anderson and *P. Webb,* for the plaintiffs, appellants.

P. J. Bolsby, Q.C., and *B. J. MacKinnon,* for the defendant, respondent.

The judgment of Rand, Abbott and Judson JJ. was delivered by

RAND J.:—This action arises out of a dispute over the ownership of land in the Village of Long Branch. The land is 100 feet square and is situated at the southeast corner of the intersection of Park Road and Long Branch Avenue. The plaintiffs sued for a declaration that they were owners of the land. The defendant municipality claimed title free from any adverse claim of the plaintiffs on two grounds, (*a*) uninterrupted exclusive possession for fifty years or more, and (*b*) dedication of the land as part of a highway.

There is no basis for any claim to a possessory title on the part of the municipality, and the question is solely one of dedication.

In 1886 the owners of adjoining property comprising 54¼ acres put their property under *The Land Titles Act* subdivided as shown on a plan M-9 on which the disputed square was coloured in brown in the same way as other roads and squares. Both the trial judge and the Court

[1] [1957] O.W.N. 278, 9 D.L.R. (2d) 417.

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of Appeal[1] have found that the square was included in plan M-9 in error because the owner of the 54¼-acre parcel was not the owner of the square at the time. That land was the northwest corner of a larger 10-acre parcel. The owner who filed the plan on the 54¼acre parcel was only the mortgagee of the 10-acre parcel and had no right to include the parcel in the plan; and the description by metes and bounds which accompanied the plan and on which it was based did not include the square. There was therefore no dedication of the disputed land in 1886 under the statute by reason of plan M-9 or through sales of lots by reference to it.

The municipality says that there was also a like dedication by plan M-9 of a 30-foot strip of land along the westerly boundary of the 10-acre parcel as part of Long Branch Avenue, and that the title in fee of the disputed land is in the same condition as that of the strip. The appellant, admitting that the 30-foot strip has, at some time, become committed to street purposes, does not dispute an interest in it in the municipality; but as the description of the 54¼ acres on which the plan was based did not include the strip a similar question of dedication arises.

That dedication is indicated by the record of the Registry Office for 1883. On October 4 of that year a grant of the 10-acre lot from Eastwood, as owner of lot 9, which embraced both the 54¼ and the 10-acre portions, to Lennox was registered and the description beginning with "by admeasurement 10 acres more or less" accords with that on which the appellants rely. But in a mortgage back to Eastwood by Lennox registered on the same day the description declares the lot to be "by admeasurement 9½ acres more or less" and the northern boundary to the west and the western boundary to the south, instead of running first a distance, as in the grant, of 10 chains and 13 links to the center of lot 9 and thence southerly following the center line, is stated to run "9 chains and 63 links to the E. limit of a right-of-way (66 feet wide) thence S. 16 degrees E. along the E. limit of said right-of-way parallel with the E. limit of Lot 9". The width of

[1] [1957] O.W.N. 278, 9 D.L.R. (2d) 417.

Long Branch Avenue on plan M-9 is shown as 60 feet throughout. The footage of the northern boundary in the grant is 668.58 and on the mortgage 635.58; adding 3 feet to the latter to conform to a 60-foot right-of-way gives the same distance, less 30 feet for one-half of the right-of-way, as in the grant. The width of the 9½-acre lot as shown on plan M-9 is 529 feet plus the width of the square, evidencing a discrepancy between the two original measurements of 6½ feet which may be explained by the double line on the eastern side of the plan running the entire length of lot 9. The 66-foot right-of-way along the center line of lot 9 is specifically excepted from an order or certificate made by the High Court dated December 10, 1884, and registered on January 2, 1885. In view of this it is patent that there had been a common law dedication and that the municipality cannot claim title to the strip or the disputed land through the statutory effect of plan M-9.

After the filing of that plan, the 10-acre parcel was dealt with in its title aspect as a whole, including the disputed square. The root of the plaintiffs' title is a grant under a power of sale contained in a mortgage which covered all of the 10-acre parcel and made no exception either of the strip or the square. There is no imperfection in the plaintiffs' registered title, and until the year 1932, as the Court of Appeal[1] held, nothing had happened that impaired the rights of the plaintiffs' predecessors in title.

In the summer of that year, however, under a purported permission of the municipality, a war memorial was constructed on the square; the ground around the memorial was improved, lawns and paths were put in and shrubbery was planted along the boundaries. There is no evidence that the owner was, at any time, consulted, although the land still formed part of the 10-acre parcel, and it may be that in 1932 there was a vague notion that the municipality was the owner of it. The registered owner had died in January 1932 and his widow, the executrix and sole beneficiary of his will, probated on July 23, survived him only until December following. It is most improbable that this memorial could have been constructed without

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the acquiescence of the widow or continued without that of her successors in title. In 1947, when the 10-acre parcel was conveyed, there was excluded from the sale "that portion of the said lands which has been appropriated for and established as a war memorial square."

Whatever interest the municipality now possesses in the square must have arisen from what was done in 1932. I would characterize that as a dedication of the land for a limited purpose, namely, the erection and maintenance of a war memorial; but that event furnishes no ground on which it can be held that there was a transfer of the legal title in fee. The ownership of the fee remains in the appellants, subject to the right of the public to enter upon the land and to the right to maintain the memorial. If, through the exercise of power conferred by law, the memorial is removed from the land or ceases permanently to exist, the object and duration of the dedication will have come to an end and the land will stand freed of the burden.

The Court of Appeal has held that there was an acceptance in 1932 of a continuing offer of dedication of the square as part of the highway made in 1886, a holding with which, in the circumstances, I am unable to agree. I can find no evidence that the square was ever used as or ever formed part of the highway, or that over such a period of years with its many changes of ownership, it could possibly be said that the offer continued. The dedication must be held to have taken place wholly in 1932 and to have been for the specific and limited purpose mentioned.

The principle determining the nature of the interest created by dedication is analogous to that of other modes of creating public interests, as, for example, where land is conveyed to a municipal body for the purpose of a market place; the user for that object cannot be changed except by legislation; and if by authorized action its use as a market is abandoned, the beneficial interest revives in the original actor or his successors. The question has

arisen in a number of cases in Ontario, such as *Guelph v. The Canada Company*[1], *Hamilton v. Morrison*[2], instances of market places, and *In re Peck v. Galt*[3]. In this last a square dedicated "to remain always free from any erection or obstruction" excluded the power of the town to close and to dispose of it to the trustees of a church.

In *Re Lorne Park Road*[4], the Appellate Division, speaking through Clute J.A., at p. 59 referred to 13 Cyc. 444 (IV.A.):

> The doctrine expounded in the early English cases was applied to highways, but was gradually extended to all kinds of public easement, such as squares, parks, wharves, etc., . . .

and to p. 448:

> The full applicability of the doctrine of dedication to parks and public squares and commons is now generally recognised, and where land is dedicated for a public square without any specific designation of the uses to which it can be put, it will be presumed to have been dedicated to such appropriate uses as would under user and custom be deemed to have been fairly in contemplation at the time of the dedication.

These references were not strictly necessary to the judgment but they are in harmony with previous authorities in the province and the extension given to parks, etc., is universally established in the United States. In a late decision, *In re Ellenborough Park*[5], the Court of Appeal in England has affirmed the judgment of Danckwerts J., holding that a right to the "full enjoyment" of a pleasure ground may exist as an easement appurtenant to neighbouring dwelling houses. This is an analogous and striking extension of private right behind which public interests of similar genre have never been allowed to lag. By s. 427 of *The Municipal Act*, R.S.O. 1950, c. 243, the soil of every highway is vested in the municipal corporations having jurisdiction over the highway but by subs. (2) in cases of dedication the vesting is subject to any rights in the soil reserved by the person who laid out or dedicated the highway.

I would, therefore, allow the appeal, set aside the judgments of the Court of Appeal and the trial court and declare the registered title of the square to be in the plaintiffs subject to the dedication for the purpose mentioned.

[1] (1854) 4 Grant 632.
[2] (1868) 18 U.C.C.P. 228.
[3] (1881) 46 U.C.Q.B. 211.
[4] (1914) 33 O.L.R. 51.
[5] (1955) 3 W.L.R. 892, (1956) Ch. 131, 159.

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I would allow the plaintiffs their costs of the action and in this Court, but there should be no costs to either party in the Court of Appeal.

The judgment of Cartwright and Martland JJ. was delivered by

CARTWRIGHT J. (*dissenting*):—The relevant facts out of which this appeal arises are set out in the reasons of my brother Rand. I agree with his conclusion that until the year 1932 nothing had happened that impaired the rights of the predecessors in title of the appellants to the lands in question, and I am in general agreement with all that he says as to the applicable law.

It has long been accepted as the law of Ontario that an owner of land may dedicate it to the public as an open square. In 1854, in *Guelph v. The Canada Company*[1], Spragge V.C. referring, with approval, to the judgment of Chancellor Walworth in *Watertown v. Cowan*[2], says:

> After alluding to cases, then recently decided, as "settling the principle that where the owners of certain property have laid it out into lots, with streets and avenues intersecting the same, and have sold their lots with reference to such plan, it is too late for them to resume a general and unlimited control over the property *thus dedicated to the public* as streets, so as to deprive their grantees of the benefit they may acquire by having such streets kept open." He adds, "And this principle is equally applicable to the case of a similar dedication of lands in a city or village to be used as an open square or public walk."

In *Peck v. Galt*[3], Osler J. after finding that a property known as Queen's Square had been "actually and intentionally dedicated for the use of the public, by the owner of the soil, either as a public square or a market square", went on, at p. 218, to state the principle:

> Whether the dedication arises from the acts of the owner, or by express grant, or contract, the corporation, if they accept it at all, must do so on the terms imposed, or for the purpose indicated by the donor.

In most, if not all, of the cases referred to during the argument in which land has been found to have been dedicated to the public for use as a square for a particular purpose the intention to dedicate and the purpose have been found in a plan with appropriate notations or in a written instrument or in both; but I see no reason, in principle, why both the intention and the purpose may

[1] 4 Gr. 632.

[2] 4 Paige 510.

[3] (1881) 46 U.C.Q.B. 211.

not, in a proper case, be inferred from open and unobstructed user by the public for the particular purpose for a substantial time.

In *Cornwall v. McNairn*[1], Lebel J., as he then was, examines a number of cases including *Bailey et al. v. The City of Victoria*[2], and succinctly and accurately states the law, at p. 482, as follows:

> The question whether there has been a dedication in law is a question of fact, and in order to establish such a dedication two things must be proved: (1) an intention to dedicate on the part of the owner; and (2) an acceptance by the public.

In the case at bar I find the evidence insufficient to establish an *animus dedicandi* on the part of the registered owner or owners in the year 1932 or at any time subsequent thereto.

The learned trial judge summed up his findings on this branch of the matter as follows:

> I find against the contention that there has been dedication by a registered owner at any time. Certainly there was no dedication when Plan M-9 was filed and I think the evidence of what has occurred since does not establish dedication.

It should be pointed out that the pleadings did not raise the question of a dedication in or about 1932 for the purposes of a war memorial square. The respondent asserted a dedication by the filing of plan M-9 in 1886 resulting in the square becoming part of a public highway and so being vested in the respondent. It may be that if the issue had been squarely raised the evidence would have been directed with greater particularity to what occurred in 1932.

Commencing with the year 1932 the paper title is as follows. At the beginning of that year Samuel Wright was the registered owner of the parcel of land containing 10 acres more or less of which the square formed the northwesterly part. He died on January 17, 1932. Probate of his will was granted on July 23, 1932, to Dorothy Wright, his sole beneficiary. She died intestate on December 5, 1932. Letters of administration of her estate were granted on May 13, 1933, to Stanley Douglas, who in November 1942 conveyed the whole parcel to Samuel T. Wright and Harold R. Wright. In the same month Harold R. Wright

[1] (1946) O.R. 837.

[2] (1920) 60 S.C.R. 38.

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conveyed to Samuel T. Wright and by deed dated April 8, 1946, the latter conveyed to the appellants. All of these instruments convey the whole parcel of 10 acres more or less including the square. By deed dated July 22, 1948, the appellants conveyed to Tony Chubak all the lands described in the conveyances above mentioned except the square of which, consequently, they remain the registered owners.

The deed to Chubak was made pursuant to an agreement of sale which described the lands sold as being those:

> described in a conveyance from Samuel T. Wright to William Howard Wright and Percy Maginnis dated April 8th, 1946, and registered as Instrument No. 4825 in Book D, Village of Long Branch on the 10th April 1946, excepting therefrom that portion of the said lands which has been appropriated for and established as a War Memorial Square: the said Lands comprising approximately nine and one-half acres . . .

The words just quoted do not appear in the deed to Chubak. In it the lands conveyed are described by metes and bounds so as to exclude the square.

The evidence as to what occurred in 1932 is that the representatives of Branch 101 of The Canadian Legion approached officials of the respondent seeking a site for the erection of a war memorial and obtained permission from them to erect it on the square in question. I think that the proper inference from all the evidence bearing on the point is that everyone who thought about the matter at all at that time was under the impression that the respondent had the right to permit the square to be used in any way in which it thought fit. The work done by the Legion and the respondent and the user of the square by the public were, in my opinion, in pursuance of a licence or permission given by the respondent under the mistaken belief that it had the right to give it. This evidence negatives the inference of the existence of an *animus dedicandi* on the part of the owners of the fee which otherwise might well have been drawn from their tacit acquiescence in all that was done. In other words, while in the absence of explanation the open and unobstructed user by the public for a substantial time raises the inference of an offer to dedicate by the owner of the fee, that inference is destroyed when it is shown that the offer to dedicate was made by some one other than the owner.

The failure of the owners to object and the words in the agreement with Chubak, quoted above, are explainable on the basis that the mistaken belief of the respondent was shared by the owners.

For the above reasons I have reached the conclusion that there is no sufficient proof of an intention to dedicate on the part of the owner or owners and that the appeal succeeds.

The learned trial judge ordered the defendant to pay the plaintiff's costs of the action and counterclaim upon a solicitor and client basis. On the argument before us counsel for the appellants stated in answer to a question from the Court that in the event of the appeal succeeding he would ask for costs on a party and party basis only. This makes it unnecessary to determine whether there is any jurisdiction to make such an order as was made but I incline to the view that there is not. In *Patton v. Toronto General Trusts Corporation*[1], Lord Blanesburgh said at p. 639:

> As for an order directing the appellant to pay any costs of the executors as between solicitor and client, their Lordships know of no principle upon which such an order could have been supported. As against an opposite party executors are no more entitled to solicitor and client costs than is an individual litigant.

In the course of the argument the question was raised from the bench as to whether the Attorney-General was not a necessary party to the action as framed and reference was made to the judgment of Schroeder J., as he then was, in *Williams and Wilson Ltd. v. Toronto*[2]. However, all counsel appeared to unite in urging the Court to decide the questions raised as between the parties who are before it. In so doing I wish to make it clear that I do not imply any doubt as to the accuracy of what was decided by Schroeder J. in the case just mentioned.

I would allow the appeal with costs throughout and restore the judgment of the learned trial judge subject only to the provision that paragraph 3 of his formal judgment should be varied to read:

> 3. And this Court doth Further order that the Defendant do pay to the Plaintiffs their costs of this action and of the counterclaim forthwith after taxation thereof.

[1] (1939) A.C. 629.

[2] (1946) O.R. 309 at pp. 323 to 328.

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Appeal allowed, Cartwright *and* Martland JJ. *dissenting.*

Solicitors for the plaintiffs, appellants: Parkinson, Gardiner, Roberts, Anderson & Conlin, Toronto.

Solicitor for the defendant, respondent: P. J. Bolsby, Toronto.

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*PRESENT: Taschereau, Cartwright, Fauteux, Abbott and Martland JJ.