

WALTER L. HACKETT (DEFENDANT) APPELLANT;

1928

*Mar. 7.
*April 24.

AND

THE MUNICIPAL CORPORATION OF THE TOWNSHIP OF COLCHESTER SOUTH (PLAINTIFF)	}	RESPONDENT.
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ON APPEAL FROM THE APPELLATE DIVISION OF THE SUPREME
COURT OF ONTARIO

*Limitation of actions—Action by municipality for possession of land—
Municipality's title under Crown grant in trust for public wharf—
Statute of Limitations set up as extinguishing municipality's title—
Application of statute—Evidence failing to establish dispossession.*

Defendant claimed title to land by possession, and that plaintiff municipality's title was extinguished by force of the *Statute of Limitations*. The land was part of a tract granted to the municipality by Crown grant, to hold in trust for a public wharf and public purposes connected therewith.

Held that, on the evidence, the decision of the Appellate Division, Ont. (61 Ont. L.R. 77), that defendant had failed satisfactorily to establish dispossession, should be sustained.

Semble, the land granted to the municipality was by the terms of the grant dedicated to a public use, which was accepted by the public, and this dedication gave rise to rights of enjoyment by the public, which rights were not, nor was the municipality's title which was given for the purpose of supporting and protecting them, capable of being nullified, in consequence of adverse possession, by force of the *Statute of Limitations*.

APPEAL by the defendant from the judgment of the Appellate Division of the Supreme Court of Ontario (1) which (reversing the judgment of Ross, Co. C.J., Acting Judge of the County Court of the County of Essex) held that the plaintiff municipality was entitled to possession of the land in question. The land was part of a tract granted to the plaintiff municipality by Crown grant dated 12th January, 1869, to hold in trust for a public wharf and public purposes connected therewith. The defendant claimed that the municipality's title was extinguished by force of the *Statute of Limitations*. The appeal to this Court was dismissed with costs.

*PRESENT:—Anglin C.J.C. and Duff, Newcombe, Rinfret and Lamont JJ.

(1) (1927) 61 Ont. L.R. 77.

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S. Denison K.C. and *Bernard Furlong* for the appellant.

F. K. Jasperson for the respondent.

The judgment of the court was delivered by

DUFF J.—I have come to the conclusion that this appeal must be dismissed. The land, the possession of which is in dispute, is part of a tract granted to the respondent municipality by Crown grant, dated the 12th of January, 1869. The habendum is in these words,

To have and to hold to the said Corporation of the Township of Colchester and their successors in office forever in trust for a Public Wharf and Public purposes connected therewith.

The appellant's case is that he is in possession of this piece of land from which his predecessors dispossessed the respondent municipality more than ten years before the action was brought, during which period, he, or his predecessors in interest, have been in possession, and that the title of the municipality is consequently extinguished by virtue of the *Statute of Limitations*. I have been very much impressed by the force of the reasons given by Mr. Justice Hodgins (1) in support of his suggestion that the lands which were the subject of the grant to the municipality were thereby dedicated to a public use, a dedication which was accepted by the public (of this acceptance there is abundant evidence) and that this dedication gave rise to rights of enjoyment by the public, closely analogous to the rights of the public in respect of a public highway, and that such rights are not, nor is a title such as that of the municipality, given for the purpose of supporting and protecting them, capable of being nullified, in consequence of adverse possession, by the provisions of the *Statute of Limitations* upon which the appellant founds his case. I think there is a great deal to be said for that view. And I venture to add this to what Mr. Justice Hodgins has said in support of it. The appellant can only succeed upon the hypothesis that the municipality has lost its title. If that be so, it follows that, as concerns the piece of land in question, the object of the trust has necessarily failed. It would seem, again, to follow, on ordinary principles, that a resulting trust has arisen in favour of the Crown. The equity of the Crown, of

which the appellant had notice, it might be forcibly argued on the authority of *In re Nisbet and Potts' Contract* (1), is not affected by the *Statute of Limitations*, because, independently of the exceptional position of the Crown, the appellant cannot maintain the position of a purchaser for value without notice. And, once more, it would follow, if this be so, that only the bare legal title is extinguished, and whatever possession the appellant may have, is held by him subject to the equitable estate of the Crown. It is difficult to think of so impotent a conclusion as one contemplated by the statute.

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Mr. Denison suggests that all property given for charitable purposes is really trust property, and that the title of the property so held is not exempt from the *Statute of Limitations*. As to this, it should be noticed that here we are only concerned with property which is granted by the Crown to a public body subject to an express trust to permit the public to enjoy in it rights of physical user, as in a highway.

I do not think, however, that it is strictly necessary to express a decided opinion on this point. The Appellate Division (2) has held that, having regard, *inter alia*, to the fact that the land was the property of the municipality, and in the same enclosure and held under the same title as an adjoining area from which the municipality was never dispossessed, the appellant has failed satisfactorily to establish dispossession from the piece in dispute. There is no doubt that, as to the critical years 1915 and 1916, the evidence is vague, and in some respects quite unsatisfactory. On the whole, I am not convinced that the Appellate Division has taken an erroneous view.

The appeal should be dismissed with costs.

Appeal dismissed with costs.

Solicitors for the appellant: *Furling, Furlong, Awrey, Whyte & St. Aubin.*

Solicitors for the respondent: *Rodd, Wigle & Whiteside.*

(1) [1906] 1 Ch. 386.

(2) 61 Ont. L.R. 77.