

1969
 *Feb. 26, 27
 Mar. 31

THE CORPORATION OF THE TOWN
 OF TRENTON (*Defendant*)

APPELLANT;

AND

B. W. POWERS & SON LIMITED
 (*Plaintiff*)

RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Real property—Subdivision plan showing certain lands as public highways—Whether properties dedicated to public use and titles vested in municipality—Whether maker of plan owned properties in question at time plan prepared—Whether ad medium filum rule applied—The Beds of Navigable Waters Act, R.S.O. 1960, c. 32, s. 1.

A judgment at trial granted a declaration that the respondent company was the owner of certain lands and ordered the appellant municipality to pay damages for trespass. An appeal from the said judgment was dismissed by the Court of Appeal and the municipality then appealed further to this Court. The appellant contended that the two pieces of property in question had been dedicated to the public use and were public highways, the titles of which were vested in it. The respondent's defence was that there was never any dedication of either piece of property by an individual or corporation who had title to do so.

A subdivision plan of the Village of Trenton (as the municipality was then) prepared for one H on March 15, 1864, and registered on August 9, 1865, showed an unnamed street as a public highway as well as all of Ontario Street even though at that time the disputed area of Ontario Street was completely under water. By virtue of the force of certain statutory enactments the unnamed street and the disputed area of Ontario Street would have become public streets unless H did not own either piece of property at the time the plan was prepared.

Held: The appeal should be dismissed.

The unnamed street had been conveyed to an individual by H in 1850, long before his plan was registered. In the case of Ontario Street, H's title depended upon whether the *ad medium filum* rule applied. The appellant's argument that the rule did apply was foreclosed by s. 1 of *The Beds of Navigable Waters Act*, R.S.O. 1960, c. 32, which provides that where land bordering on a navigable body of water "has been heretofore or is hereafter granted by the Crown", the bed does not pass in the absence of an express grant of it. The root of title to that portion of Ontario Street shown to be under water on H's plan was a Crown grant of a 70-acre water lot made in 1876. In 1901 both properties had come into the ownership of the respondent's predecessor in title.

*PRESENT: Cartwright C.J. and Judson, Ritchie, Hall and Spence JJ.

APPEAL from a judgment of the Court of Appeal for Ontario¹, affirming a judgment of Landreville J. Appeal dismissed.

John Sopinka, for the defendant, appellant.

S. G. M. Grange, Q.C., and *J. W. V. Stephens*, for the plaintiff, respondent.

1969
TOWN OF
TRENTON
v.
B. W.
POWERS
& SON LTD.
—

The judgment of the Court was delivered by

JUDSON J.:—This is an appeal from a unanimous judgment of the Court of Appeal¹ affirming a judgment at trial which granted a declaration that the respondent was the owner of certain lands and ordered the appellants to pay damages for trespass.

Two pieces of property in the Town of Trenton are the subject of this appeal. One consists of a portion of Ontario Street, which runs in an easterly direction from Foundry Street (which is a north-south street) to a point where it meets the other piece known as the unnamed street (hereafter referred to as Street X), which runs north, at an angle to the west, until it meets Sidney Street. Both pieces are located on the respondent's premises, and coal sheds and oil storage tanks occupy a considerable part of the Ontario Street extension, while part of Street X is covered by a community centre, the land for the centre being conveyed to the appellant by the respondent in 1956.

The appellant contends that these two pieces of property have been dedicated to the public use and are public highways, the titles of which are vested in it. The respondent's defence is that there was never any dedication of either piece of property by an individual or corporation who had title so to do. The Court of Appeal, after a detailed consideration of the instruments, plans and related documents submitted in argument, came to the conclusion that this was so and I agree.

Laskin J.A. thought the appellant's claim initially depended upon the first subdivision plan of the Village of Trenton (as it was then) prepared for one Sheldon Hawley on March 15, 1864, and registered on August 9, 1865. This showed Street X as a public highway as well as all of

¹ [1967] 2 O.R. 432, 64 D.L.R. (2d) 1.

1969
TOWN OF
TRENTON
v.
B. W.
POWERS
& SON LTD.
—
Judson J.
—

Ontario Street even though at that time the disputed area of Ontario Street was completely under water. And by virtue of the force of certain statutory enactments, Street X and the disputed area of Ontario Street would have become public streets unless Hawley did not own either piece of property at the time the plan was prepared. In his view it was clear that Hawley did not own either at the crucial time. Some fourteen years earlier, in 1850, he had made a grant of land, which included Street X, to one Allan Gilmour. This property, as a result of a consolidation of various properties in 1901, ended up in the hands of Gilmour & Co. Ltd., which is the predecessor in title of the respondent. This was a complete answer to the appellant's arguments based upon estoppel and s. 86(5) of *The Registry Act* as enacted by 1964 (Ont.), c. 102, s. 22, and its forerunners. In respect of the third argument in connection with Street X, that as there was some indication in some of the instruments or documents that Lot 37A included Street X, then it passed to the appellants under the tax arrears certificate respecting Lot 37A, dated September 20, 1937, it failed as the earliest instruments as well as the more recent indicated that these were considered to be two separate pieces of property. A misdescription was not enough to found a claim of title and that is all that had occurred here.

In the case of Ontario Street, Hawley's title depended upon whether the *ad medium filum* rule applied. In the opinion of Laskin J.A., it did not. He was disposed to hold that the *ad medium filum* rule did not apply to navigable rivers (of which the Trent is one) in Ontario. I agree with him. However, he did not rely upon this ground as he held that the appellant's argument was foreclosed by s. 1 of *The Beds of Navigable Waters Act*, R.S.O. 1960, c. 32, which was clearly retroactive and applicable. Thus the respondent's title to the disputed area of Ontario Street which can be directly traced from a grant made by the Crown to one John Gilmour on April 1, 1876, and recorded April 18, 1876, of a 70-acre water lot which included the disputed area and which ended up in the hands of Gilmour & Co. Ltd., in the consolidation of 1901, stood unaffected by the claim of the appellant.

This was really sufficient to dispose of the appeal. To summarize: Hawley had conveyed Street X long before his

plan was registered; the root of title to that portion of Ontario Street shown to be under water on Hawley's plan is the Crown grant of the 70-acre water lot made in 1876. In 1901 both properties came into the ownership of Gilmour & Co. Ltd., the predecessor in title of B. W. Powers & Son Limited, the respondent.

1969
TOWN OF
TRENTON
v.
B. W.
POWERS
& SON LTD.
Judson J.

I would dismiss the appeal with costs.

Appeal dismissed with costs.

Solicitors for the defendant, appellant: Fasken & Calvin, Toronto.

Solicitors for the plaintiff, respondent: McMillan, Binch, Berry, Dunn, Corrigan & Howland, Toronto.
