

Albany road and the Weston road south, which had been accepted by the town corporation as public highways. The amended plan was filed on 19th October, 1897, as No. 1196.

In November, 1897, the plaintiffs in that action leased to defendant Smith certain portions of the east half of lot 36, containing 70 acres, with the right to remove gravel therefrom for twenty years. The portions leased included the Albany road and other streets and avenue. Smith assigned the lease to defendants the Gravel and Construction Company of Toronto.

Joseph Birney died 15th March, 1901, intestate, leaving plaintiff his sole heir and next of kin.

Plaintiff sued as owner of an undivided two-thirds interest in the gravel on those streets for damages for its removal.

A. B. Aylesworth, K. C., for plaintiff.

E. D. Armour, K.C., and R. B. Henderson, for defendants.

MACMAHON, J. (after setting out the facts as above):—The streets laid out on the plans, from which gravel was taken, were not public highways, as no lots had been sold to purchasers: In re Waldie and Burlington, 7 O. R. 192, 13 A.R. 104; Roche v. Ryan, 22 O.R. 107. And even had lots been sold fronting on the streets so as to constitute them public streets within the town, the town corporation would be free from any liability to keep them in repair unless they were established by by-law or assumed for public use by the corporation: R.S.O. ch. 223, sec. 607. The agreement between the town and the Birneys and Scarlett and the passing of the by-law by the town must, therefore, have been regarded in some way as an additional protection to the corporation beyond that afforded by the Act. Until the municipality had in some way, as by the expenditure of public moneys, assumed the streets for public use, the corporation would not own, and therefore would have no power to sell, sand or gravel from these streets under sec. 640, sub-sec. 7, of R.S.O. ch. 223.

The Albany road was a winding road through the east half of lot 36, and a conveyance was made of that part of the lot east of the Albany road, and another conveyance was made of that part to the west of the west side of that road, so that the road (which was never a public road) remained in the grantors, the Scarletts. Afterwards parts of what was known as the Albany road were included in the lots forming the subdivision of lots on plan 969, and a new street called Albany road was laid down on plan 1067. I fail to see how Albany road stood in any different position from the other