THE MUNICIPAL CORPORATION OF THE COUNTY OF LINCOLN AND THE MUNICIPAL CORPORATION OF THE TOWNSHIP OF NORTH GRIMSBY, (DEFENDANTS)..... APPELLANTS;

AND

THE MUNICIPAL CORPORATION OF THE TOWNSHIP OF SOUTH GRIMSBY (PLAINTIFF)..... RESPONDENT.

1921
*Nov. 10.
1922
*Feb. 7.

ON APPEAL FROM THE APPELLATE DIVISION OF THE SUPREME COURT OF ONTARIO

Statute—Application—45 V.C. 33 s. 8 (O)—Municipal Corporation—Maintenance of road—Exemption from rates—Change in character Highway system—Continuance of exemption—Highway Improvement Act, R.S.O. [1914] c. 40 s. 5 (1).

In 1882 the County of Lincoln owned the Queenston and Grimsby Road as county property but not as a "County road". In that year the Township of Grimsby in said county was divided into the municipalities of North and South Grimsby and the Act making the partition provided that South Grimsby should not be liable to pay any part of the cost of maintaining this road which was wholly in North Grimsby. In 1917 the county, as authorized by the Highways Improvement Act, passed a by-law for the assumption of main roads in order to form a system of county highways the Q. and G. Road being included. South Grimsby, being called upon to pay its share of the cost, brought action for a declaration that it was not liable for such payment so far as it related to the said road.

PRESENT:—Sir Louis Davies C.J. and Idington, Duff, Anglin and Mignault JJ.

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Held, reversing the Judgment of the Appellate Division (48 Ont. L.R. 211) that by the adoption of this system the character of the Q. and G. Road and the nature of the control over its maintenance was entirely changed and the exemption granted to South Grimsby in 1882 in respect to it no longer existed.

APPEAL from a decision of the Appellate Division of the Supreme Court of Ontario (1) reversing the judgment at the trial (2) in favour of the defendants.

The question for decision on the appeal is whether or not the exemption of the respondent from payment of rates for maintenance of the Queenston and Grimsby Road, granted by 45 Vict. c. 33 sec. 8, continued after the road became part of a system of county highways under the provisions of the Highways Improvement Act. The substance of the legislation and the municipal proceedings in respect to the road are given in the head-note.

Lynch-Staunton K.C. and *Marquis* for the appellants.

McBrayne K.C. for the respondent.

THE CHIEF JUSTICE—For the reasons stated by my brother Anglin I am of the opinion that this appeal must be allowed with costs and the judgment of the trial judge dismissing the action restored.

IDINGTON J.—The question raised herein is whether or not "The Highway Improvement Act" of Ontario, c. 40 R.S.O., 1914, can be effectively executed as provided therein in counties where prior equities have been created between municipalities in relation to any part of the roads system adopted in execution of the provisions of the said enactment.

(1) 49 Ont. L.R. 315. (2) 48 Ont. L.R. 211.

The powers given by said Act to county councils begin by the enactment contained in section 4 thereof which reads as follows:—

4.—(1) The council of any county may by by-law adopt a plan for the improvement of highways throughout the county by assuming highways in any municipality in the county in order to form or extend a system of county highways, designating the highways to be assumed and improved and intended to form or be added to such system; and in case it is impracticable to benefit all the townships in any county equitably by a system of county highways such plan may provide for compensation to any township which by reason of the location of such highways or of the unequal distribution of the expenditure thereon may not benefit proportionately by a grant of such specific amount or annual sum or both to be expended in the improvement of the highways of such township as when so expended will make such plan equitable for the whole county.

The appellant County of Lincoln adopted by its by-law no. 600 the said system covering a road mileage of one hundred and fifty-seven miles, or more, in all.

This by-law was passed by the council 3rd February, 1917, and that clearly by the consent of over two-thirds of the members of council, and hence under section 11 of the Act did not need to be submitted to the electors; and, as admitted by counsel at the trial, was assented to by the Minister of Public Works on the 26th March, 1917, which I presume means or implies the assent of the Lieutenant Governor in Council required by section 12 of the Act as preliminary to the right to receive the provincial aid proffered as an inducement to adopt such a system of county highways.

Indeed the plan adopted by the by-law to carry out the system under the provisions of the Act was the result of co-operation between the Department of Public Works, represented by its Minister and officials, of whom its chief engineer took the most active part, and the members of the council and some of the township councillors.

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Every effort seems to have been made to satisfy if possible all the municipalities and when entire satisfaction could not be produced that at least the scheme should be so equitable as to comply with the fundamental principle of the enactment.

Of course there will often be in any such case some one who cannot be satisfied unless getting more than he, or those he represents, is entitled to.

As part of the means of averting such an emergency the respondent was allotted five or six miles of new road more than it was entitled to under the plan and system in order to remove any ground of complaint such as now raised herein.

The above quoted section 4 of the Act is almost literally identical with that in the Act when first passed in 1907, but amendments had been made in almost every session intervening between that and 1917 to render the Act more clearly what it was designed to produce, *i.e.*, good roads of a kind hitherto unknown in the rural districts of the province, or indeed in many urban; and to bring home to everyone the great expense involved, far exceeding anything hitherto attempted, and thereby to justify the provincial authorities in offering millions for the promotion of the accomplishment of such an object.

I thus bring matters of common knowledge, as well as the many provisions of the Act, in accord with same line of thought, to bear upon the question of the interpretation and construction of the Act, for the reason, which I most respectfully submit, that the appellate court below seems to have overlooked such considerations, as if irrelevant, and adopted the idea that the projected system was, or had something in it which must be considered as rendering it, entirely subjective to what had gone before, instead of being, as I deem

it, an entirely new conception and enterprise founded thereon, designed to supersede, so far as applied, all else in the way of road making, and to finance the doing thereof, and fix or determine the obligations which would ensue, upon the adoption of the system by any municipal county council, imposing only one obligation and that was that it must be equitable.

The primary judges of what was to be found equitable were the two-thirds majority of the county council or the majority of the electors for the county entitled to vote on such a subject followed by the majority of the county council.

The antecedent relations of any municipality to another, springing out of impotent attempts to maintain a road in efficiency, was obviously to be forever discarded, when, where and so far as nothing new substituted therefor so long as no injustice suffered thereby.

I have read the evidence to see how the matter was dealt with by those considering the new system and the means of adopting it and am pleased to find that it seems to have been approached in a proper spirit.

Notwithstanding all that, instead of at once appealing to the court to restrain the carrying out of the said by-law and to quash it, if in fact founded upon something which had substantially discarded the equitable treatment enjoined by the section which I quote above, and is the key to all else therein, the respondent acquired most substantial benefits from the adoption of the system and refrained from taking such steps until after the appellant had incurred very heavy responsibilities and brought forward one year after another by-laws imposing the proper rates to meet such liabilities and only then, on the 19th of December, 1919, brings this action, having evidently meantime

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awaited the building of the new road within its own bounds as determined by the judgment of the county council to be an equitable basis for wiping out the past.

It is not often we meet with so unjust a demand deliberately made on the part of a municipal authority however much some of them may occasionally be wanting in due care.

The respondent rests upon the statute (of 1882) 45 Vict. c. 33 which created it, and which as between it and its junior North Grimsby in separating them, provided as follows:—

> Sec. 8. From and after the last Monday of December, one thousand eight hundred and eighty-two, any rate, tax, liability or expenditure whatsoever, which, but for the passing of this Act, would have been assessable, ratable and taxable against the said original Township of Grimsby in respect or on account of the road known as the Queenston and Grimsby Road, shall be assessed, rated and taxed against the said Township of North Grimsby, and shall be borne and paid by the said Township of North Grimsby solely, and the said Township of South Grimsby shall not thereafter be liable or be rated, assessed or taxed therefor.

This section only deals with

> any rate, tax, liability or expenditure whatsoever which but for the passing of this Act would have been assessable, ratable and taxable against the said original Township of Grimsby etc.,

clearly covering only that arising out of some obligation statutory or otherwise existent antecedent to the day next after the date named for no rate could be imposed upon something which had ceased to exist or, I submit, was conceivably possible by those legislating.

Yet the first Appellate Division of the Supreme Court of Ontario in effect holds that this provision is in force in relation to the matters involved herein under the new legislation enacted a quarter of a century later and in the absence of obligation of any kind ever having bound Grimsby as such, and declares as follows:—

1. This Court doth declare that the said Municipal Corporation of the Township of South Grimsby is not liable for any portion of the levy made on it by the Municipal Corporation of the County of Lincoln under by-law number 605 of the said Municipal Corporation of the County of Lincoln in so far as the said levy is made in respect of the Queenston and Grimsby road and doth adjudge the same accordingly.

2. And this Court doth further declare that the levy made by the said Municipal Corporation of the County of Lincoln against the Municipal Corporation of the Township of South Grimsby is, in so far as the said levy is made in respect of the Queenston and Grimsby road, illegal and void.

3. And this Court doth further declare that the said Municipal Corporation of the Township of South Grimsby shall not be assessed, rated or taxed by the said Municipal Corporation of the County of Lincoln for any portion of the cost of improvements of the Queenston and Grimsby road under the provisions of by-law number 600 of the said Municipal Corporation of the County of Lincoln and doth adjudge the same accordingly.

4. And this Court doth further declare that the Municipal Corporation of the Township of North Grimsby is liable to the Municipal Corporation of the County of Lincoln for all assessments, taxes or rates in respect of the said Queenstons and Grimsby road under the said by-law number 600 which have already been imposed or levied by the said Municipal Corporation of the County of Lincoln on the said Municipal Corporation of the Township of South Grimsby in respect of the said road and doth adjudge the same accordingly.

5. And this Court doth further declare that all assessments, taxes or rates which but for the statute 45 Victoria, chapter 33, Ontario, would be leviable against the said Municipal Corporation of the Township of South Grimsby by the Municipal Corporation of the County of Lincoln in respect of the Queenston and Grimsby road shall be levied against the Municipal Corporation of the Township of North Grimsby and doth adjudge the same accordingly.

6. And this Court doth further order and adjudge that the said Municipal Corporation of the County of Lincoln be and it is hereby perpetually restrained from assessing, levying or seeking to collect from the Municipal Corporation of the Township of South Grimsby any assessment, rate or tax in respect of the Queenston and Grimsby road under the provisions of said by-law number 600 of the said Municipal Corporation of the County of Lincoln.

To appreciate the rather sweeping character of the foregoing I must observe that the Queenston and Grimsby road in question extends from the western frontier of the County of Lincoln to Queenston on the Niagara River, and by no means in a straight line.

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By reason of the crooks and turns therein it may be thirty to thirty-five miles in length.

The length thereof through North Grimsby alone leaving out Grimsby Village, is, according to the scale given in the plan filed in evidence herein, not more than seven and a half miles.

The county appellant in order to carry out this new system and provide the necessary financial means of doing so, if considered as a county scheme, had no power save the levying upon the entire assessable property within its usual jurisdiction, and that (save in cases specially provided for in the way of exemption from the operation of this new system of which the respondent herein was not) was by the annual assessments made upon the whole ratable property, based upon the equalized assessment of each municipality for any year in question.

The only exceptional case of that kind under the new system was the case provided for in section 26 of the "Highway Improvement Act" which in the case therein provided for, enabled the county council, with the approval of the Minister of Public Works, to omit from assessment any township or townships through which the road did not pass, or it might assess any township through which the road did pass for a larger or smaller amount in order to equitably assess the costs on the council of any county in which a system of roads is established under said Act, or might, upon the application of a township council and with the approval of the Minister, levy a special rate upon the township for the construction, improvement or maintenance of the road within such township.

Herein is the only remedy given for the respondent if it supposed it was entitled to any special privilege under the Act. Yet it made no move in that direction

and I submit should not now by the means invoked herein obtain indirectly what it might have obtained directly if the county council was treating it inequitably. And a special means having thus been given it the courts have no power to step in and interfere on its behalf for substantially that which is referred to another tribunal.

The opportunity was open to it on the consideration of the by-law number 600.

The Township of North Grimsby brought the case from its point of view directly under the notice of the minister and evidently he was advised it had nothing to fear on that score.

The by-law number 605, mentioned in the first of the above quoted declarations of the appellate court below, was a by-law to raise $50,000 by way of loan for the purposes of construction.

It recited by-law number 600 and its adoption under the Highway Improvement Act and that by section 15 thereof and amendments thereto any county taking advantage of the said Act might pass by-laws to raise money on debentures payable in not more than thirty years as provided by the Municipal Act not exceeding three per centum of the equalized assessment of the county, and that by sub-section 1 of section 4, c. 16, 5 Geo. V.,

> money raised by the issue of debentures for road construction under authority of this Act shall be applied solely for that purpose, and shall not be used in paying any part of the current or other expenditure of the corporation, or for road repair or maintenance.

I respectfully submit that such an expenditure of money cannot fall within the purview or meaning of said section 8, above quoted and relied upon by the court below.

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Whatever the words in section 8 of the Act of 1882 may mean we are given the history of the road and its repair or maintenance was thenceforth all that the parties concerned in such legislation possibly had in view.

That item clearly was also excluded from the scope and purpose of this by-law No. 605 specifically dealt with by above judgment of the appellate court and the later county by-laws passed to raise further moneys for purposes of construction under the adoption of the new system.

In the first place all that said section 8 of the enactment of 1882 ever had relation to, was the seven or eight miles of the Queenston and Grimsby Road which fell within the bounds of North Grimsby and in no sense as to the remainder of a road under the same name.

And in the next place by-laws nos. 600, 605, and 620, related only to construction which related to or may have related to any part of the new system. And if purely construction in any case what was meant? Clearly not the mere repair of any part of the highway constructed after another fashion.

The parties hereto have not enlightened us as to the actual facts had in view at each step in the history of all that was in question herein, as they might usefully have done.

If, as I surmise, applying general knowledge to the whole of this new system, then the development between the passing of the Act in 1882, and the use since then of other motive powers to transportation, rendered the abandonment of such road making as had existed up to said date a necessity.

To speak of repair thereof had become an absurdity. Such repairs might be made as would answer an indictment and any other means of enforcing the obligation in contemplation by the parties concerned.

The development of the automobile and its use for travel or heavy traffic plainly demanded the construction of another kind of road than previously contemplated in 1882 and which obviously would surpass in its cost anything within the ambit of the obligation named in said Act.

To speak of the new construction needed and that which had existed as identically the same or the obligation resting upon any one to repair the old as identical with the new obligation to be undertaken to meet the modern requirements of traffic is, I most respectfully submit, quite untenable.

The tenure of the soil on which repair might be done or construction of something else needed, might remain the same, but, by the way, had not even that changed?

Are we to shut our eyes to the realities, and use but a name as a guide? I submit not.

Suppose transportation advanced a step further and its needs required the appropriation of the old road allowance to the radials to such an extent as to render the roadway useless for anything else and an Act of the legislature so approved and encouraged the county council that the radial practically occupied the same space and provided for the county assuming that new burden of building and running it, how would that little bit of an Act, such as section 8, look like as if still binding? Could it be pretended to have an operative effect such as applied by the Appellate Division to this scheme.

I put this extreme illustration, though perhaps it will not look so extreme thirty years hence, if some dreams are realized.

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From the present outlook it is not so extreme as if someone in 1882 had predicted all that has happened by reason of the automobile; and sought to assign that as within the contemplation of those concerned as it clearly never was.

I submit we must have regard not only to all that has arisen but also all that had fallen into decay and the need for something new and read the legislation bringing with it a new system and a new road in light thereof, and then there is no difficulty in holding that it has superseded the enactment of 1882 so far as relates to giving vitality and efficacy to all that is involved in allowing this appeal and maintaining the judgment of the learned trial judge herein.

Apart from all that, what right have we to assume that expenditure of the $80,000 and still larger sums under later by-laws was not properly made on the remaining part of the Queenston and Grimsby Road, yet the judgment appealed from stands as a barrier to collect such debentures.

Nor do I see any means directed by the judgment appealed from to be taken to separate the expenditures on the Queenston and Grimsby Road from all else in respect of the entire system in relation to which the assessment is made so far as down to and including 1918 is concerned under the heading of good roads debentures.

I repeat that the enactment relied upon for the said judgment in appeal related evidently to that part of that Queenston and Grimsby Road lying within the original Township of Grimsby.

The greater part of that road, so named, lies between Grimsby and the frontier town of Queenston, and forms part of the system as well as that within said original Grimsby township, and, I imagine, even whether looked at in accord with or despite the reasoning of

the judgment appealed from, should furnish grounds for assessment and levying of rates as to the other three-fourths of that road. Yet the express terms of the formal judgment appealed from stands as a barrier in the way of doing so and casts the burden to be borne by South Grimsby on North Grimsby.

The formal judgment well illustrates the dangers of taking a mere name as a guide instead of the actual realities contained in the legislative enactments of recent years descriptive of another creation known under the designation of a system and in relation to which there is no prohibition by statute or otherwise to which the name Queenston and Grimsby can be properly applied as a whole, though for the purposes of obeying the new legislation and identifying and tracing that which in a small part it comprehends, the name Queenston and Grimsby may have to be used.

I submit, most respectfully, that such names may be used without transgressing section 8 of 46 Victoria, c. 33.

And when we are dealing with the adoption of a system which in this instance is to cover one hundred and fifty-seven or more miles of road, of which at the utmost the mere name Queenston and Grimsby Road could only cover a fifth and at the true measure of its significance, if any at all, a twentieth part of the scheme or system as a whole.

And why should the mere name be so extensively applied? And again, when any significance it could have is reduced to such proportions, how can the old Act be invoked?

The truth seems to be, I repeat, that the new system or scheme was intentionally designed to supersede the old and ignore all therein so long as no actual injustice done of which, I repeat, the majority of the county council were to be primary judges.

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The only proper remedy against their transgression thereof was an appeal to the Minister of Public Works or a motion to quash which never was made.

The by-law is now unassailable. The scheme provided by the Act in question is not part of the Municipal Act and must be viewed in same light as if it had been entrusted to some other authority named by the Act and so carried out with all its consequences regardless of the Act of 1882 which had no relevancy to such a new enterprise.

And yet this declaration of right is maintained in face of the further fact that under the Provincial Highway Act of 1917, passed two months or so after the adoption by appellants of the new system, the road in question had been adopted by the province 15th August, 1918, or a year before this action brought. That legislation seems to have superseded entirely any such mere municipal theories of obligation as raised herein.

Any one who recalls the many phases through which the question of roads and building thereof has proceeded, from provincial back to provincial, should realize that there is no difficulty in finding that this new scheme or system is not to be determined by mere ordinary legislation, but by the salient fact that the appellant was a mere agent or trustee of the Government to act in clear supersession of all that had preceded it.

Much was said in argument relative to the bargaining with respondent through its then reeve and his authority on behalf of his council which tends to confusion of thought for in fact no such bargain can be relied upon further than as a means of realizing whether or not all due means were taken to enable the county council to determine whether what was proposed and done answered the equitable treatment required by the Act in adopting the new system.

In concluding, however, it seems clear that section 8 upon which so much reliance has been placed never was more than a precautionary measure having relation to the plan then observed between the county, then owner of the Queenston and Grimsby Road, and some of the municipalities through which it passed, for its maintenance. That was a more temporary expedient at its best and might have been abandoned at any time by those concerned.

The county, however, was, in 1885, by section 24 of the Municipal Amendment Act of that year, which reads as follows:

> 24. Section 565 of the said Act is hereby amended by adding thereto the following sub-section:
>
> (7) For abandoning or otherwise disposing of the whole or any portion of a toll road owned by a county, whether situated wholly within the county or partly within the county and partly within an adjoining county or counties, and on the passing of any such by-law the clerk shall forthwith forward a certified copy thereof to the local municipality or municipalities through or along which any portion of said abandoned road shall run or border upon,

enabled to abandon the whole road.

That amendment was again amended by the section 566 of the Municipal Act in the Revised Statutes of Ontario of 1887, adding a proviso requiring the approval of the Lieutenant Governor in Council.

And that in turn amended in 1890 by the Municipal Amendment Act of that year, as follows:—

> 32. Sub-section 7 of section 566 of the said Act is amended by inserting after the word "toll" in the second line thereof, the words "or any other".

Again that was amended in 1893 so as to require the assent of the municipalities affected.

Clearly the municipalities through which the road ran were alone supposed to be affected.

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Again by 3 & 4 Geo. V., c. 448, now appearing in the Revised Statutes of Ontario, 1914, c. 192, sec. 448, it was again amended as follows:—

448.—(1) The council of any county may by by-law abandon the whole or any part of a toll road owned by the corporation of the county or of any other road owned by it, whether the road is situate wholly within the county or partly within it and partly within an adjoining county.

(2) Forthwith after the passing of the by-law the clerk shall transmit by registered post to the clerk of every local municipality through or along or on the border of which the road runs a copy of the by-law certified under his hand and the seal of the corporation to be a true copy.

(3) The by-law shall not take effect unless or until it is approved by the Municipal Board, nor shall it take effect as to the part of the road lying within or along or on the border of a local municipality whose council does not by by-law consent to the by-law.

(4) From and after the taking effect of the by-law the council of a municipality within which any part of the road so abandoned lies shall have jurisdiction over that part of it which lies within the municipality, and where any part of a road so abandoned lies between or on the border of two or more local municipalities the councils of such municipalities shall have joint jurisdiction over that part of it.

(5) Nothing in this section shall extend or apply to a bridge which under the provisions of this Act is to be maintained wholly or partly by the corporation of the county.

What occurs to me reading these many amendments as part of the story is how the respondent seems to have been completely ignored and the meaning it seeks to attach to section 8 never occurred to anybody concerned in this legislation.

During the early period there was absolutely nothing but the will of the County of Lincoln appellant that need be observed.

In later years some regard was had to the possibility of how such abandonment might affect the general public.

On such a tenuous thread, in the last analysis, does the contention of respondent and the judgment appealed from now hang; that is, the non-observance by the county of its powers of abandonment in a due and orderly manner before proceeding to adopt the new system.

I have no hestitation in repeating my opinion that such like threads were all swept away and respectfully submit that they should not be considered as any obstacle in the way of the will of the legislature enacting the legislation giving effect to the new system and that of the Lieutenant Governor in Council approving of what has been done in the issue of the debentures now questioned herein.

By no means do I wish to ignore the force of the argument of the appellants' counsel that the respondent should be held estopped by its course of conduct from asserting its present pretensions.

I have thought it wiser to present my argument in the way of a close adherence to the basic principle of the equitable considerations which the enactment renders imperative.

The principle upon which estoppel rests may be but another mode of expressing the same idea. And I incline to think the estoppel argument may well answer the right to have at this stage any such declaratory judgment as appealed from.

And I may add that so far as relates to by-law no. 605 and others passed for raising money for construction, very drastic remedies were given by the enactment of 5 Geo. V, c. 16, sec. 4.

The appeal should be allowed with costs here and in the Appellate Division and the judgment of the trial judge restored.

DUFF J.—I do not dissent from the opinion of the majority. Not without a great deal of doubt, on the whole I think the preferable view is that the situation created by the Highway Act of 1914 and the

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responsibilities arising under that Act are not within the contemplation of the special Act of 1882; and that liability in respect of the rates in question is not within the classes of liabilities dealt with by section 8 of the last named enactment.

ANGLIN J.—I am, with very great respect, of the opinion that this appeal should be allowed and the judgment of the learned trial judge dismissing the action restored.

The rates in question are imposed by the County of Lincoln for the reconstruction of the highway, formerly known as the Queenston and Grimsby Macadamized Road, as part of "a system of county highways" created and provided for by a by-law of the county municipality duly enacted and ratified under the Highway Improvement Act R.S.O. [1914] c. 40. They are rates imposed under the authority of s. 15 of that Act and are not, as I think, rates, taxes, liabilities or expenditures contemplated by, or within the purview of, the exemption in favour of the respondent township conferred by section 8 of 45 V., c. 33. The road dealt with by that exemption provision was not "a county road" in the ordinary sense of that term as used in the Municipal Act, but a road which belonged to the County of Lincoln. Its history is detailed in *Lincoln* v *St. Catharines* (1). So long as it remained such a road to be kept up by the county council like other property owned by the county, the exemption provision of 45 Vict., c. 33 applied to all expenditure for its construction, renewal or upkeep. But when the County Council determined that it should become part of a system of highways under the Highway

(1) 21 Ont. App. R. 370.

Improvement Act and enacted the requisite by-law its character was entirely changed. It became subject to the regulations of the Public Works Department with respect to the construction and repair of highways (sec. 6) under the supervision of an engineer or other competent person as county road superintendent (s. 7). Liability to contribute to the cost of its reconstruction and upkeep as a highway under that system must be determined by the provisions of that Act. As put by the learned Chief Justice of Ontario in *Village of Merritton* v. *County of Lincoln* (1).

> the liability to contribute to the cost of the improvement of the road under the Highway Improvement Act is, in my view, a very different one from that with which the special Act deals: it is not a liability in connection with the assumption of the road as a "county work," but a liability arising out of the provisions of the Highway Improvement Act, by reason of the road being made a part of a system of county roads for which that Act provides.
>
> Section 15 of the Highway Improvement Act authorizes a county to pass by-laws to raise by debentures the sums necessary to meet the expenditures on highways under the Act not exceeding two per centum of the equalized assessment of the county, or to provide the money out of county funds or by an annual county rate in the manner authorized by the Municipal Act.
>
> This section clearly authorizes the imposition of a rate to meet the debentures or an annual county rate to be imposed upon all the ratable property in the county, and is, I think, in no way in conflict with the special Act, for these expenditures are not a liability or expenditure connected with the assumption of the road by the appellant, but an entirely different liability or expenditure, incurred for the purposes of the Highway Improvement Act.

With profound respect, the distinction which the Appellate Division Court suggests between the case now before us and the *Merritton Case* (1) seems to me to be more apparent than real. The learned Chief Justice says:

(1) 41 Ont. L.R. 6.

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I am of the opinion that this case is not governed by *Merritton* v. *Lincoln* (1) and that the principle of that case is not applicable.

In that case, the liability from which certain municipalities were relieved was

"any liability or expenditure connected with the assumption by the Corporation of the County of Lincoln of the Queenston and Grimsby Road as a county road" and the *ratio decidendi* was that the liability under the Highway Improvement Act was not a liability connected with the assumption of the road as a county road but a different liability arising out of the provisions of that Act.

What by the statute relieving the appellant it was relieved from was:

"any rate, tax, liability or expenditure whatsoever which but for the passing of this Act would have been assessable, ratable and taxable against the township of Grimsby in respect, or on account of the road known as The Queenston and Grimsby Road."

This language is of the most comprehensive character and not as in the Act under consideration in *Merritton* v. *Lincoln* (1) limited to liability connected with the assumption of the road as a county road.

But in the Merritton judgment I find this passage:

> It may be assumed for the purpose of the case at bar, that the special Act relieved the exempted municipalities not only from the cost of acquiring the road but also from the expenditure for its upkeep, but it does not follow from that that they are relieved from the expenditure to be made upon it because it is made part of the good roads system of the county and, in my opinion, they are not relieved from it.

When the exempting statute in question in the *Merritton Case* (1) 26 V. c. 13 is examined we find in the preamble that maintenance of the Queenston and Grimsby Road was one of the things against which relief was sought by the local municipalities then petitioning and that the legislature deemed it expedient to grant the prayer of the petition. It would therefore seem to have been quite properly assumed by the Appellate Divisional Court in the *Merritton Case* (1) that the exemption granted extended to the expenditure for the upkeep of the road as part of that connected with (that is resulting from) its assumption. I agree in the conclusion reached in the *Merritton Case* (1) and

(1) 41 Ont. L.R. 6.

think the learned trial judge in the present case was justified in applying the principle of that decision, as he did, and that his judgment, therefore, should not have been interfered with.

Moreover, under section 26 of the Highway Improvement Act, provision is made in the case of the assumption by the County Council of a main or leading road, such as the Queenston and Grimsby Road was, as a county road for the total or partial exemption, with the approval of the Minister, from assessment for the cost of such road of any township which is not served by it equally with the other municipalities in the county. By section 12 approval of the by-law establishing the county system of highways by the Lieutenant Governor-in-Council is required and provision is made for hearing any dissatisfied township council. If South Grimsby thought itself equitably entitled to have the exemption provided for by 45 V. c. 33, extended to its liability for the reconstruction and upkeep of what had been the Queenston & Grimsby Road after it was made part of the county system of highways, its recourse was to ask the county council for relief under section 26 of the statute and, if refused, to apply to the Lieutenant Governor-in-Council to withhold his approval of the by-law establishing the system until the county council should have made what the Lieutenant Governor-in-Council should deem a fair and equitable provision in its favour under section 26. Not having taken that course, it cannot in my opinion now successfully invoke section 8 of the 45 Vict. c. 33 as entitling it to refuse to pay its proportionate share of the cost of construction and upkeep of the county system of highways under the Highway Improvement Act.

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It appears from the evidence, however, that the exemption of South Grimsby provided for by the statute of 1882 was brought to the attention of the county council when it was considering the by-law for the formation of a system of county highways and was considered by it to entitle the Township of South Grimsby to specially favourable treatment in regard to the mileage of highways to be brought under the system so as to make the plan and the distribution of expenditure under it equitable in regard to that township as contemplated by section 4, rather than to an exemption, total or partial, from assessment under section 26, which, so far as the evidence discloses, was not claimed on its behalf. I am not at all satisfied that South Grimsby was entitled to ask for "compensation" under the provisions of subsection 1 of section 4 of the Highway Improvement Act. It did not fail to "benefit proportionately" either "by reason of the location of (the) highways" to be taken into the system or "of the unequal distribution of the expenditure thereon"—which are the only grounds of claim for equitable compensation mentioned in the section. The county council, however, seems to have been disposed to treat South Grimsby with absolute fairness and accordingly included in the "system of county highways," by way of making such "compensation" to it, five miles of highway in excess of the proportion to which it would have been entitled, with the result that it has benefited by the provincial contribution of 40% of the cost of constructing such additional five miles of highway provided for by the statute (5 Geo. V. c. 16, s. 5) and by the amounts assessed therefor on the other municipalities.

MIGNAULT J.—The question to be decided in this case is whether the respondent can set up, against a by-law and a levy made by the appellant under the Highway Improvement Act (R.S.O. c 40) an exemption from taxation in respect of the Queenston and Grimsby Road granted in 1882 to the respondent.

The statute giving this exemption is 45 Vict., ch. 33 (Ontario), which divided the Township of Grimsby into two municipalities, respectively called North Grimsby and South Grimsby. Inasmuch as the Queenston and Grimsby Road crosses the northern portion of the Township of Grimsby only, section 8 of this statute provided as follows:

> From and after the said last Monday of December, one thousand eight hundred and eighty-two, any rate, tax, liability or expenditure whatsoever, which, but for the passing of this Act, would have been assessable, ratable and taxable against the said original Township of Grimsby, in respect or on account of the road known as the Queenston and Grimsby Road, shall be assessed, rated and taxed against the said Township of North Grimsby, and shall be borne and paid by the said Township of North Grimsby solely, and the said Township of South Grimsby shall not thereafter be liable or be rated, assessed or taxed therefor.

In 1907, the Ontario Legislature adopted an Act for the improvement of public highways, called the Highway Improvement Act, which, as subsequently amended, is now chapter 40 of the Revised Statutes of 1914. Section 4 of this statute (I quote from the revision) empowers the council of any county to adopt by by-law a plan for the improvement of highways throughout the county by assuming highways in any municipality in the county in order to form or extend a system of county highways. And in case it is impracticable to benefit all the townships in any county equitably by a system of county highways, such plan may provide for compensation to any township, which by reason of the location of such highways

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or of unequal distribution of the expenditure thereon may not benefit proportionately, by a grant of such specific amount or annual sum to be expended in the improvement of the highways of such township as will make the plan adopted equitable for the whole county.

The statute provides for the carrying out of the purposes of the legislature, the improvement of public highways, and gives the county council power to issue debentures or to raise money by an annual county rate in the manner authorized by the Municipal Act. Section 26 contains a provision somewhat on the lines of the latter portion of section 4 empowering the county council, with the approval of the Minister of Public Works, to omit from assessment any township through which the road assumed as a county road does not pass, or to assess the townships through which it does pass, for a larger or smaller amount, in order to equitably assess the cost.

As I have stated, the question now is whether as against the scheme authorized, by R.S.O. chapter 40, and liability for assessment thereunder, the Township of South Grimsby can claim the benefit of the exemption from taxation for the Queenston and Grimsby Road enacted in 1882.

It is explained that this road is part of the public highway from Hamilton to the Niagara River, and the improvement of a highway of this character would naturally come under such a scheme of improvement as chapter 40 establishes. The history of the Queenston and Grimsby Road may be found in the report of the case of *County of Lincoln* v. *City of St. Catharines* (1).

(1) 21 Ont. App. R. 370.

It was originally constructed by the provincial government and subsequently taken over by a joint stock road company from which the county council purchased it in 1860. In *The Queen* v. *Corporation of Louth* (1), it was decided that the county corporation held this road, not as a county road belonging to the county within the meaning of the statute, but as the assignee of the road company. Some of the local municipalities in the county of Lincoln through which the road did not pass obtained legislation relieving them from any liability for expenditure connected with its assumption by the county as a county road and charging therewith, among other municipalities, the Township of Grimsby. When the latter township was divided in 1882 by the statute above referred to, South Grimsby was exempted from any rate, tax, liability or expenditure whatsoever, which, but for the passing of the statute, would have been assessable, ratable and taxable against the original Township of Grimsby in respect or on account of the Queenston and Grimsby Road, and it was declared that North Grimsby alone should bear this liability.

In *Village of Merritton* v. *County of Lincoln* (2) the Highway Improvement Act (R.S.C. ch. 40) was considered, and the Appellate Divisional Court held that assuming the statute 26 Vict. ch. 13 (one of the Acts relieving some local municipalities from liability or expenditure in connection with the assumption by the County of Lincoln of the Queenston and Grimsby Road as a county road), relieved the exempted municipalities from the expenditure for the upkeep of this road, they were not thereby exempted from liability

(1) [1863] 13 U.C.C.P. 615. (2) 41 Ont. L.R. 6.

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for the expenditure to be made upon it in consequence of it being made part of the good roads system of the county. This decision gave to the Highway Improvement Act full effect, irrespective of the exemption from taxation of certain local municipalities by special statutes, such as the one relied on by the township of South Grimsby in the present case.

Although the statute 26 Vict. ch. 13, considered in the *Merritton Case* (1) is not in identically the same terms as section 8 of 45 Vict. ch. 33, still its general effect is similar, so that the reasons given by the Appellate Divisional Court in that case should also apply here. But looking at the two statutes only, the Highway Improvement Act and the special Act relied on by South Grimsby, my opinion is that the exemption clause of the latter would not stand in the way of the County of Lincoln in proceeding under the former statute.

The decision in the English Court of Appeal in *Sion College* v. *London Corporation* (2), seems to me in point. There the appellants relied on a statute of George III providing that certain lands in the City of London reclaimed from the River Thames, should vest in the adjoining owners "free from all taxes and assessments whatsoever". The City of London Sewers Act, 1848, subsequently authorized the collection of a consolidated rate, some of the objects to which this rate was to be applied being of a kind for which rates were made at the time of the passing of the Act of George III, the others being new. It was held that the exemption applied only to then existing taxes and assessments or others substituted for them,

(1) 41 Ont. L.R. 6.

(2) [1901] 1 Q.B. 617.

and that the consolidated rate, although it included some purposes for which rates were made when the exemption was created, was substantially a new assessment, and was therefore not within the exemption.

I would allow the appeal with costs here and in the Appellate Division and restore the judgment of the learned trial judge.

Appeal allowed with costs.

Solicitors for the Appellants, County of Lincoln: *Marquis & Pepler.*

Solicitor for the Appellant, North Grimsby: *G. B. McConachie.*

Solicitors for the respondents: *McBrayne & Brandon.*