

SUTHERLAND, J.

JULY 11TH, 1917.

\*VILLAGE OF MERRITTON v. COUNTY OF LINCOLN.

*Highway—Village Street—Assumption by By-law of County Corporation—Highway Improvement Act, R.S.O. 1914 ch. 40, secs. 4 (1), 5 (1), 12—Approval of By-law by Lieutenant-Governor in Council—Action to Set aside By-law.*

Action for a declaration that a by-law of the defendant county corporation of the 3rd February, 1917, being a by-law to adopt a plan for the improvement of highways throughout the county, under the provisions of the Highway Improvement Act and amendments thereto, was illegal, ultra vires, and invalid.

The action was tried without a jury at St. Catharines.

A. C. Kingstone, for the plaintiff corporation.

A. W. Marquis, for the defendant corporation.

SUTHERLAND, J., in a written judgment, said that the by-law purported to enact that certain roads mentioned in a schedule were assumed as county roads, to be improved and maintained under the provisions of the Act; and that one of the roads so mentioned, it was admitted, included a street within the corporate limits of the plaintiff corporation.

After quoting secs. 4 (1) and 5 (1) of the Act, R.S.O. 1914 ch. 40, the learned Judge said that, while sec. 4 (1) spoke of assuming highways in any municipality in the county, the remainder of the section expressly referred to townships only; and he was of opinion, looking at the whole Act (especially sec. 5 (1)), and dealing only with the question of the assumption of a highway by the county in connection with a plan for the improvement of highways, that townships only are intended to be referred to.

Section 12 of the Act is not to be construed to mean that, if the approval of the Lieutenant-Governor in Council is given to an invalid by-law, a plaintiff is estopped from contesting its validity in an action—particularly if no appropriate opportunity is afforded to the plaintiff to object to the approval being given.

Judgment for the plaintiff corporation setting aside the by-law in so far as it assumes the street of the plaintiff corporation, and restraining the defendant corporation from assessing or taxing the

\*This case and all others so marked to be reported in the Ontario Law Reports.