

## ASSESSMENT CASES.

IN THE THIRD DIVISION COURT OF THE COUNTY OF  
ELGIN.

IN THE MATTER OF THE APPEAL OF HEPBURN AND JOHNSTON FROM  
THE DECISION OF THE COURT OF REVISION OF THE MUNICIPALITY  
OF THE VILLAGE OF ST. THOMAS.

*Lease of Road—how assessable—where assessable*

The gravel road in the County of Elgin forming part of the London and Port Stanley Road, was granted by the Crown to the municipal corporation of the County of Elgin, and by that corporation leased for a term of years to the appellants, who were not residents of the village of St. Thomas.

*Held*, 1. That the interest of the appellants in the road being a chattel interest could only be assessed as personal property. 2. That as the appellants did not reside in the village of St. Thomas, they could not be assessed by the Municipal Council of that Village in respect to their interest in the road.

(June 4, 1860.)

The gravel road in the County of Elgin, forming part of the London and Port Stanley Road, formerly a Provincial work, was granted by the Crown to the municipal corporation of the County of Elgin under the statute authorising the transfer of public provincial roads vested in Her Majesty under the control of the commissioners of public works, 13 & 14 Vic., cap. 15, continued by secs. 4 & 5, cap. 85 Con. Stat. of Can., p. 937.

The municipal council leased this road to the appellants for a term of years.

The municipality of the village of St. Thomas—through which village about a mile of this road passes—assessed that portion of it as real property, to Messrs. Hepburn and Johnston the lessees, with a view to make them pay taxes for it as such.

They appealed to the Court of Revision against this assessment as illegal, and failing to get redress there, they appealed to the judge of the county court of Elgin.

It was admitted that there was no toll-gate, or other place of business of the appellants connected with the road situated within the municipality of St. Thomas, and that both appellants reside in the township of Yarmouth, and not within the village of St. Thomas.

*Becher, Q. C.*, for the appellants, objected to the assessment: 1. That the gravel road is a "public road and way," and as such is specially exempted by the 6 sub. sec., Con. Stat. U. C., cap. 55, page 651. 2. That the road, though leased, is "property belonging to a county" as exempted in the 7 sub-section. That the leasing of the road is in effect but a leasing of the tolls, which the county receives by way of rent, the property in the road remaining in them, and the tenant being *de jure* their collector. 4. That if it be argued that the road is a highway (see Con. Stat. U. C., p. 612) in the face of the above, then it is vested in the crown, and the council, or Messrs. Hepburn and Johnston have a mere easement in it, and it is exempted in the 1st sub-section; and besides as to them it is not real property. But the first reason given is sufficient without going further; the road is *de facto* and *de jure* a public road, (see the use of that term page 613 Con. Stat. U. C., and in other acts) its transfer to the council does not alter this, nor does its letting by the council.

The only legal way that taxation can reach this road is by assessment of the income derived from it by its lessees, and the learned judge to whom the appeal is made will, I doubt not, strike out the assessment as regards real property altogether.

In reply to this the Reeve of St. Thomas put in the following paper, prepared by his counsel, Mr. Hamilton.

In regard to the opinion of Mr. Becher as to the illegality of the assessment declared on the portion of the London and Port Stanley Road passing through St. Thomas:

1. The municipality of St. Thomas say, that the said portion of the said London and Port Stanley gravelled road is not "a public road and way," within the meaning of the 6th sub-sec. of sec. 9, Con. Stat. U. C., cap. 55, page 651, forasmuch as the same is held by Messrs. Hepburn and Johnston by virtue of an indenture equivalent to a deed, and which said indenture binds the county council of Elgin to make the said parties a clear deed so soon as they have power to do so, if required: and further, that the said road is held by the said Hepburn and Johnston for their own benefit, they receiving payment from the public for the use thereof.

2. In consequence of the said indenture from the said county council to the said Hepburn and Johnston, which the Court of Revision consider equal to a deed, the said portion of the said road is the private property of the said Hepburn and Johnston to all intents and purposes, the said indenture not being a lease of the tolls as argued by Mr. Becher, and the property in the said road being thereby to all intents and purposes vested in the said Hepburn and Johnston, it cannot be exempted from taxation under the sections quoted.

3. In answer to the third objection, the Crown has transferred all interest in said road, as a road, to the County Council of Middlesex, the County of Middlesex to the County of Elgin, the County of Elgin to Mr. Hepburn, Mr. Johnston deriving his interest from Mr. Hepburn; Messrs. Hepburn and Johnston deriving all gain and profit from travel on the said road, and not being mere collectors of tolls, ought not to be exempt from taxation on the said property, as it is clearly of the nature of real property. Further, the road was disposed of by tender. (See memorandum in possession of clerk of County Council of Elgin.) That notices for the said tenders were published in the *St. Thomas' Dispatch* and were for tenders for purchase, and not for lease of the said London and Port Stanley gravelled road, and bear date 4th Dec., 1856, and 22nd January, 1857.

HUGHES, Co. J.—I am satisfied, as my impression was at the first day of the hearing in this court, that the appellants' interest in the property assessed is taxable, but I had not then made up my mind in what way it was so, nor that it was assessable in the municipality of St. Thomas.

After hearing the parties, and reading the arguments that have been, by consent, mutually placed in writing before me, and considering and comparing the facts and arguments with the law regulating assessments, I find that the property of the appellants in the road in question, is only a chattel interest, being a term of years, and as such assessable only as personal property.

The interest of the appellants cannot be regarded as real estate, inasmuch as the title, or fee simple in the road, is vested in the municipal corporation of the county; and the appellants hold only a chattel interest under that corporation, which might be made subject to seizure and sale under an execution against goods and chattels.

Supposing the county council had no interest in it, it is extremely doubtful to my mind whether the 6th sub-section does not exempt it from taxation, because it is a public road and way within the meaning of the 22nd Vic. chap. 64, sec. 313.

The property of the county is also expressly exempted by the 7th sub-section whether occupied for the purpose thereof or unoccupied; here it is occupied by their tenants, or by persons to whom they have granted an easement in it, and as such road it cannot be legally assessed.

The question then comes, would I order the roll to be amended by changing the assessment from real to personal property, and order it to be assessed at the income it yields to the appellants, or otherwise? I am satisfied I should not, because I cannot order the roll to be amended in a manner different from what the assessors ought to have originally made it. By the 19th section, I find that the assessors are required to prepare an assessment roll, in which they are to set down "the names and surnames in full, if the same can be ascertained, of all taxable persons resident in the municipality who have taxable property therein, and of all non-resident freeholders who have either in person or in writing required the assessors to enter their names and the land owned by them on the roll."

Now according to this provision, a man should be assessed for personal property in the municipality where he lives; and by the 20th section, land is to be assessed in the municipality where it lies, so that the appellants, who reside out of St. Thomas in the township municipality of Yarmouth, should be assessed for their chattel interest in this road in the latter municipality only, and the law does not justify the assessing of parties who reside out of the municipality, upon personal property they may possess within it, as it does upon real property, because the words authorising the assessors to act limits them to taxable persons resident in the municipality, who have taxable property therein.