

Township of Huntley v Township of March

[1909] O.J. No. 470

Also reported at:

14 O.W.R. 1033

1 O.W.N. 190

Ontario Court of Appeal Moss C.J.O., Osler, Garrow, Maclaren and Meredith J.A.

November 22, 1909.

(21 paras.)

Drains — Township Lots — Engineer's Report under Drainage Act — Portion of Cost Assessed to other Townships — Appeal to Drainage Referee — Engineers Report Varied — Appeal to Court of Appeal.

Township of March initiated proceedings for the purpose of draining certain lots. The engineer made a report under the Drainage Act assessing the townships of Huntley and Goulbourne for a portion of the cost. Both townships appealed to the Drainage Referee on a large number of grounds. The Referee allowed the appeal of Goulbourne to the extent of \$77.79, but dismissed the appeal of Huntley. Huntley appealed direct to the Court of Appeal. Held, that the finding of the Drainage Referee should be confirmed and the appeal dismissed.

1 The appeal to the Court of Appeal was heard by MOSS C.J.O., OSLER, GARROW, MACLAREN and MEREDITH J.J.A.

2 E.D. Armour, K.C., and W.J. Kidd (Ottawa), for appellant.

3 F.B. Proctor (Ottawa), and A.H. Armstrong (Ottawa), for respondent.

4 GARROW J.A.:— Appeal by the township of Huntley against the judgment of a drainage referee confirming (with a variation) the report and assessment of an engineer made under the provisions of sec. 3 of the Municipal Drainage Act. The proceedings were begun by a petition to the township council of the township of March, praying that in order to drain a described area in that township the Carp River, commencing in the township of Nepean, flows northerly through the townships of Goulbourne, March, Huntley and Flynn, and finally empties into the Ottawa River, might be deepened and improved.

5 The petition was referred by the council to Mr. John Harrison Moore, C.E., who accordingly prepared a report, plans, specifications, and an assessment of the lands in the townships of Nepean, Goulbourne, March and Huntley, and in the villages of Spotsville and Carp, which in his opinion would be beautified by the proposed work.

6 The report, &c., having been duly served upon the several municipalities, the townships of Goulbourne and Huntley appealed to the Drainage Referee, who, after a hearing lasting several days, and a personal inspection, dismissed the appeal of the township of Huntley and in part allowed the other appeal.

7 The township of Huntley again appeals to this Court.

8 The River Carp is a rather small stream, scarcely up to the ordinary "river" standard. Originating in swamps it sluggishly proceeds between low and ill-defined banks through the upper townships of Nepean, Goulbourne, and March, until it reaches the township of Huntley, where the banks gradually improve until at the point of outlet in the proposed scheme they are well-defined and of sufficient height to contain its waters except in time of freshet. The fall is very slight in the part of the stream proposed to be improved - 1.13 per mile. At one time the bed appears to have been considerably lower than it now is since several witnesses deposed to the cultivation of and crops taken from lands near the banks which would now, owing to the increased water, be impossible. Various reasons are suggested for the change, all no doubt contributing in some degree to the result, such as obstructions from bridges and logs, trampling by cattle, silt deposited by drains, and from smaller streams having their outlets in the river. But whatever the cause, the fact seems to be well established that the river as it is with its slight fall is no longer efficient to carry away and dispose of the waters which by nature and artificially by means of drains come to it, without backing up and overflowing and thereby causing injury to the low lands up stream in Huntley and March. The drainage area to the east in the township of Huntley is very narrow, and of little consequence, but to the west the land slopes for several miles towards the river which is the natural outlet for the drainage of the last-mentioned area either directly, or by means of several smaller streams or watercourses which passing through the area empty into the river. These streams the evidence shews have sufficient fall and current to carry to the river the drainage waters which by means of the various drains which have been constructed along their several courses fall into them and no difficulty arises until the river is reached.

9 Acting upon the impression that the drainage directly and through the medium of these streams is not carried to a sufficient or satisfactory outlet, the engineer assessed the lands in the last-mentioned area using these streams for their immediate outlet, for outlet liability, while other low lands in the township were also assessed for benefit.

10 The real difficulty in the case grows out of the circumstances of the lands so assessed for outlet, the contention being that as they are comparatively high lands, they have already a sufficient outlet and do not need and will not use the proposed new outlet.

11 The area assessed for outlet in the township of Huntley is certainly large, although the assessment, because extended over so large an area, is individually small. But the mere size of the area is of little consequence in considering whether or not the assessment is one which might lawfully be made. Drainage water must go not merely to an outlet by means of which it satisfactorily escapes from the lands which are being drained, but to a "sufficient outlet" which as defined in sec. 2, sub-sec. 10, means the "safe discharge of water at a point where it will do no injury to lands and roads." And sec. 3, sub-sec. 4, as it now stands, shews that it is not sufficient in order to escape from liability simply to shew that the first discharge was into a "swale ravine, creek or water course." See *Young v.*

Tucker, 26 A. R. 162; Orford v. Howard, 27 A. R. 223; McGillivray v. Lochiel, 8 O.W.R. 446, and Re Elma v. Wallace, 2 O.W.R.

12 There must of course, as pointed out by the learned Referee, appear to be a reasonable connection between the source of the injurious water, and the outlet in question, and if such connection is established the legal right to assess under the statute, however large the area, seems to follow.

13 The question therefore is largely one of fact, and is to be passed upon in the first instance by the engineer, necessarily an expert, and who using his expert skill and experience. determines not only how the proposed work is to be done, but also what lands will benefit by it, and should therefore be assessed for its cost. His conclusions may of course be called in question by an appeal, but in my opinion his results ought not to be disturbed unless it is satisfactorily proved that they are either erroneous in fact or that he proceeded illegally. Mr. Moore is, as appears by the evidence, a man of experience; no one questions his skill or good faith. He spent over three months by himself and his assistants in doing his work. And that it was done with great, and I think I might even venture to say with unusual, care, appears from the very elaborate plans which were produced, shewing in minute detail the whole drainage area.

14 He found as a fact that these so-called high lands which drain directly into the lateral streams contribute a substantial part to the injury complained of, that the river is therefore in its present condition not a sufficient outlet for the drainage which comes to it from such lands as well as from the other lands also entitled to drain into it, and he therefore, as I think he might, assessed them for the proposed improved outlet.

15 Several engineers were called and many questions were asked and answered of a critical nature as to other matters, but so far as I can see no one was asked to review Mr. Moore's conclusion upon the point now under consideration, although one (Mr. Wilkie I think), did speak of the banks of some of these lateral streams as well defined, a quite immaterial matter, since it is not the banks but the water flowing between which does the injury. It was suggested in the argument rather than proved that the engineer had in the outlet assessments had regard to other than waters made to flow artificially. This he denied, as he also denied a similar suggestion that he had overlooked the provisions of the statutes as to volume and speed contained in sec. 3, sub-sec. 5.

16 In my opinion no illegality of any kind appears in the procedure of the engineer. And there is nothing in the evidence to justify disturbing his assessments for outlet or otherwise in the township of Huntley.

17 There may of course be individual lots over assessed or under assessed, or which should not have been assessed at all. These, however, are all questions for the Court of Revision.

18 There were several other objections discussed before us such as the alternative outlet as it is called, and the alleged insufficiency of the proposed outlet, owing to its proximity to a bridge which somewhat narrows the stream below the outlet.

19 The suggested alternative outlet by sending waters out of the River Carp, which apparently properly belong to it, into a ravine and thence over a precipice, has something of the heroic in it, but it would probably have the prosaic result of producing a crop of

lawsuits for damages for the illegal diversion, while the gain over the present plan is far from clear.

20 The objection as to the effect of the bridge upon the outlet loses much if not all of its point when it is remembered that the proposed scheme is not intended to provide for the time of freshets, and that except at such a time the bridge, according to the fair result of all the expert evidence, will not back water enough to injuriously affect the proposed outlet.

21 The appeal should be dismissed with costs.

March v. Huntley

March v. Goulbourn

[1910] O.J. No. 482

Also reported at:

17 O.W.R. 731

**Ontario Drainage Court
Drainage Referee Henderson**

December 14, 1910.

(14 paras.)

Drains — Assessment for Outlet — Engineer's Report under Municipal Drainage Act — Drainage Area — Benefit — Portion of Cost Assessed to Other Townships — Liability of Subservient Townships to Pay Interest — Expiration of Four Months — Date from which Interest should be Calculated — Municipal Drainage Act, s. 66 — Costs.

After delivery of the judgment of Court of Appeal (14 O.W.R. 1033, 1 O.W.N. 190), the question arose as to the liability of the subservient townships to pay interest on the amounts payable by them by way of contribution to the expenses of the drainage scheme. HENDERSON, REFEREE, held, that, under s. 66 of the Ont. Municipal Drainage Act, no sum was payable by the subservient townships until the expiration of four months from date of judgment of Court of Appeal, and interest should be computed only from that date.

Elizabethtown v. Augusta, 2 O.L.R. 4; 2 Cl. & Sc. Dr. Cas. 370, 378; 32 S.C.R. 295 distinguished. Toronto Rv. Co. v. Toronto, [1906] A.C. 117; 75 L.J.P.C. 36, approved. In view of the fact that the question was practically without precedent, costs allowed on County Court scale without any set off.

1 A.H. Armstrong, Esq., for the township of March.

2 W.J. Kidd, K.C., for the township of Huntley.

3 L.A. Smith, Esq., for the township of Goulbourn.

4 DRAINAGE REFEREE HENDERSON:-- These two matters were heard together. They arise out of the drainage scheme which was dealt with by the judgment of the Court of Appeal in the case of Huntley v. March, reported in 14 O.W.R. 1033, the question being as to the liability of the subservient townships to pay interest on the amounts payable by them by way of contribution to the expenses of the drainage scheme, and in the event of there being liability to pay interest, as to the date from which the interest is to be computed.

5 The litigation between the parties covered a considerable period of time, and was finally determined by the judgment of the Court of Appeal on November 22nd, 1909. The first question for determination is whether, upon a proper interpretation of section 66 of

the Municipal Drainage Act, the amounts called for by the report as varied by the Referee became payable at the expiration of four months from the original service of the report, or whether that period of time should run from the judgment of the Court of Appeal.

6 The phraseology of the section is not particularly happy, but in view of the fact that the only amount payable is "the sum that may be named in the report ... or in the event of an appeal from the report, the sum that may be determined by the Referee or the Court of Appeal," I am forced to the conclusion that in this case, where there was an appeal carried to the Court of Appeal, no sum can be said to have become payable until at the expiration of four months from the date of the judgment of the Court of Appeal. In other words, I read the Act as meaning that the paying municipality is intended to have a period of four months within which to pass its by-law, settle its assessments and provide funds by debenture or otherwise. If I am right in this conclusion, it follows that each of the defendant townships became indebted to the plaintiff township in a certain sum on the 22nd day of March, 1910, and the respective amounts which were respectively paid at later dates should, strictly speaking, have been paid on that date. The principal of these amounts were actually paid, and the question remaining to be determined is as to whether or not the plaintiff township is entitled to recover interest upon them from the date upon which they became due.

7 Mr. Armstrong relies particularly upon the result of the case of *Elizabethtown v. Augusta* as reported at page 370 of the second volume of *Clarke & Scully's Drainage Cases*, and because of the fact that interest was allowed in that case from the expiration of the four months from the date of the service of the report, he thinks that the same order should be made here, and that the section of the Act should be interpreted so as to require the making of such an order. In that case there was an outstanding dispute from the beginning as to the liability of the defendant township in the whole. There was no question of equalization of assessments as between the municipalities and the question as to the propriety of allowing interest or as to the date from which interest should be allowed is not anywhere discussed in the course of the judgment. I have read the whole case carefully, and I cannot find that it is of any assistance except in so far as it lays down the principle, at the page which I have mentioned. that wherever there is a statutory duty or obligation to pay money, such as we have here, an action will lie for its recovery, unless the statute contains some provision to the contrary.

8 The points argued by Mr. Kidd appear to me to be fully covered by the case of *Toronto Railway v. Toronto City*, [1906] A.C. 117; 75 L.J.P.C. 36, to which I will refer later.

9 Mr. Smith raises two somewhat ingenious contentions. The first is that where an action is brought under a statute creating a special liability in which the subject of interest is ignored, the general rule is that interest is not recoverable. (See *Am. & Eng. Ency.* vol. 16, p. 997). But the reason for that rule which follows Mr. Smith's citation shews that it is intended to apply in cases where the particular statute prescribes and limits a measure of damages, inferentially excluding a recovery of interest as damages. Here the interest, if payable at all, is not payable as damages, but as interest upon a debt, and the rule to which Mr. Smith refers cannot apply. The other point is taken from the same volume of the encyclopedia at 1034, and it is that where the creditor accepts the principal money without interest, even though at the time he claims a right to interest and expresses a

determination to assert it, his acceptance has the effect of extinguishing a further claim to interest. Here again, it will be seen that this is intended to apply to a case where there is a liability for interest as damages, and I cannot understand any principle upon which the same rule could be applied to a claim for interest on a debt. See *McKay v. Fee*, 20 U.C.R. 268.

10 There being a debt payable by statute upon an ascertained date, the second branch of section 51 of the Judicature Act applies. As pointed out by the late Mr. Justice Street in the *Toronto Railway* case, that branch of the section is very loosely expressed, but the interpretation placed upon it by the Judicial Committee in that case seems to leave no difficulty as to its application to the facts of this case. Their Lordships say that the effect of this enactment is that in all cases where, in the opinion of the Court, the payment of a just debt is being improperly withheld, and it seems to be fair and equitable that the party in default should make compensation by payment of interest, it is incumbent upon the Court to allow interest for such time and at such rate as the Court may think right. This is what the Court assumes that it would be usual for a jury to do.

11 Applying this simple rule to this case, we have the fact that the debt became payable on the 22nd March, 1910. It is a matter of coincidence that the plaintiff township completed its own by-law and issued its debentures just twelve days before that time, and that the contract had been let a week before that date. It was and is fair and equitable that all parties should be placed upon the same basis as to their financial affairs, in so far as the statute will permit. It is true that the plaintiff township had incurred liabilities and paid out considerable sums of money before that time, but in the final statement of accounts they will be allowed to charge against the scheme such reasonable amounts for interest as they were compelled to pay on their outlays prior to the sale of their debentures. All parties were therefore in the same position at the expiration of the four months period, except possibly as to the few days which had elapsed since the sale of the debentures of the plaintiff township. On that date their share of the money was on deposit in a savings bank bearing interest at the rate of three per cent. per annum. Had the other townships paid their moneys these would have been similarly placed on deposit at similar interest. I have therefore concluded that a fair and equitable order is that the defendant townships should make compensation by payment of interest at the rate of three per cent. per annum from March 22nd, 1910, until the respective dates on which their respective amounts were actually paid, and an order may issue accordingly when the proper calculation has been made. As to this the parties may apply later if they cannot agree upon amounts.

12 In arriving at this conclusion, I do not overlook the fact that there were delays and difficulties encountered by the defendant townships as disclosed by the affidavits filed, of such a nature that in one sense they cannot very well be held blameable because of any intentional delay. This must be their misfortune, because the period is fixed by statute and it is a period as to the reasonableness of which I have nothing to do.

13 The judgment will be for the plaintiffs in each case for the amount computed as aforesaid. In view of the fact that the matter is practically without any precedent, I think that it is fair that costs should follow on the scale of the County Court without any set off, and that all amounts payable should be properly chargeable by each party as against its

own interest in the drainage scheme. Excess costs of all parties as between solicitor and client, should be properly chargeable against the share of each in the drainage work.

14 The plaintiff will affix to these reasons \$4 in stamps as for one day's trial, and will pay to the clerk of the County Court \$4 as his fee under the statute.