Privy Council Appeal No. 49 *of* 1931.

The Corporation of the County of Lincoln - - - - *Appellants*

v.

The Corporation of the Village of Port Dalhousie - - - *Respondents*

FROM

THE APPELLATE DIVISION OF THE SUPREME COURT OF ONTARIO.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 23RD JULY, 1931.

Present at the Hearing:

THE LORD CHANCELLOR.
VISCOUNT DUNEDIN.
LORD HANWORTH.
LORD RUSSELL OF KILLOWEN.
LORD MACMILLAN.

[*Delivered by* LORD MACMILLAN.]

The urban municipality of Port Dalhousie, which is a village situated within the county of Lincoln in the province of Ontario and is not separated from the county for municipal purposes, is subject to an annual general levy by the council of the county for county road purposes. Of the amount, however, which in each year is raised by this rate in the village the corporation of the village is entitled to receive back 75 per cent. in the following year from the council of the county by way of remission or rebate, less the cost of certain repairs if incurred by the county. The sums so received back by the village corporation are earmarked in its hands for expenditure on streets in the village. This statutory right to a percentage rebate was for the first time conferred by Section 29 (5) of the Highway Improvement Act, 1926 (Statutes of Ontario, 16 Geo. V, ch. 15), since repealed, but re-enacted as Section 28 (5) of the Highway Improvement Act now in force, being ch. 54 of the Revised Statutes of Ontario, 1927

It appears that before 1926, when this right to a rebate was first conferred, the council of the county had incurred certain capital expenditure in connection with the county road system, and to enable it to meet this expenditure, so far as not covered by grants from the provincial government, had availed itself of its power to issue debentures. These debentures are still current, and the amount of the annual interest and sinking fund charges has been included by the county council in the sum for which it has levied the general annual rate for county road purposes, to which the village of Port Dalhousie is subject in common with the other towns and villages in the county. The question which these proceedings have been brought to determine is whether in fixing the sum on which the village corporation is entitled to its statutory rebate of 75 per cent., the council of the county is bound to include in such sum the amount raised by it in the village towards the interest and sinking fund charges in respect of these pre-1926 debentures.

The proceedings take the form of an action at the instance of the Corporation of the Village of Port Dalhousie against the Corporation of the County of Lincoln, claiming payment of the 75 per cent. rebate on the full amount of the sum raised in the village by the general annual rate for county road purposes in each of the years 1926, 1927 and 1928. Apparently the council of the county in each of the years 1927, 1928 and 1929 paid to the village corporation 75 per cent. of such portion of the sum raised in the village in each of the preceding years by the general annual rate as was applicable to the maintenance of the roads forming the county road system, but declined to pay any rebate in respect of such portion of the sum so raised as represented interest and sinking fund charges on the pre-1926 debentures. It is the justification of this declinature which is in issue.

Wright J., before whom the matter came in the first instance, held in effect that the village corporation was not entitled to any rebate in respect of that portion of the sums raised by the general annual rate which represented charges in respect of debenture debt incurred before the 1926 Act came into force. On appeal the First Divisional Court (Mulock C.J. and Hodgins, Middleton, Magee and Grant, JJ.A.) have declared that—

> "the plaintiff is entitled to recover from the defendant seventy-five per cent. of all moneys levied by the said plaintiff since the Highway Improvement Act 1926 came into force and remitted to the defendant county in respect of annual general rates made by the defendant for county road purposes, whether the defendant applied the amount so raised for constructing and improving the roads in the said county road system or to pay annual debt charges upon debentures issued by the said defendant for such purposes or for maintaining and superintending such roads or for such other expenditures properly chargeable to the said system."

Against this judgment, which decided the question at issue in favour of the village corporation, the council of the county has now appealed to H.M. in Council. Their Lordships, having heard the matter fully argued, are of opinion that the judgment appealed from is well-founded.

It is important to observe at the outset that the case came before the Courts on certain agreed or admitted facts. For the present purpose the most important of these admitted facts are contained in paragraphs 2, 3 and 4 of the plaintiff's statement of claim, which read as follows :—

> "2. Under the authority of the Highway Improvement Act and of certain of its own by-laws the defendant prior to the year 1926 established a county road system throughout the county of Lincoln.
>
> "3. That, apart from grants obtained from the province of Ontario, the cost of constructing, improving, maintaining and superintending the roads included in the said county road system and other expenditures properly chargeable to the said system are met and raised by the levy of an annual general rate upon all the municipalities, including the village of Port Dalhousie, in the said county of Lincoln.
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> "4. For the purpose of meeting the cost of constructing and improving the roads included in the said system, the defendant, under the authority of the said Act, has from time to time issued its debentures and the annual debt charges for principal and interest upon such debentures are included in and form part of the said annual general rate levied as aforesaid."

These paragraphs are expressly admitted in the statement of defence, and paragraph 4 in particular is in substance repeated in the agreed statement of facts on record, dated May 20th, 1930.

The documents included in the record show the procedure which was adopted. The year 1926 may be taken as an example. On June 15th, 1926, the council of the county enacted a by-law, No. 807 (or, in the language of English local government, passed a resolution) to raise the sum of $372,528·94 to carry on the business of the county for the year 1926. This by-law recited *inter alia* that it was necessary and expedient to raise the sum of $94,095·38 in order to pay the interest and sinking fund on debentures authorised to be issued for the construction of roads in the county under the provisions of certain county by-laws. On this recital the council of the county proceeded to enact :—

> "(4) That for the purposes of paying the interest which shall accrue on the debentures authorised to be raised for the construction of roads in the county under the provisions of [the by-laws mentioned] and of providing for the sinking fund for the payment of the principal of the said debentures at their maturity, there shall be raised, levied and collected by an equal rate of 5 mills on all the rateable property of the county over and above the cost of collection."
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> "(9) That the several rates imposed by this by-law shall be raised, levied and collected by the councils and officers of the local municipalities severally liable therefor and shall be paid over by the treasurers of the several municipalities to the treasurer of the county of Lincoln."

The schedule of assessments which is appended to and incorporated with the by-law contains an entry against the municipality of a sum of $3,081·89 under the head of county roads, being 5 mills on $616,377, the total assessment of the village. This sum of $3,081·89, their Lordships understand, represents the plaintiff's proportion of the interest and sinking fund charges on

the pre-1926 debentures, and it is in effect 75 per cent. of this sum that the plaintiff claims from the defendant. The sum levied for the maintenance (as distinguished from construction) of the roads in the county system is included in an item of $6,533·59 entered against the village under the head of general purposes, and the plaintiff has received repayment of 75 per cent. of the sum so included. The procedure in the two succeeding years was on similar lines.

Now it is admitted, as their Lordships have observed, that in 1926 the general annual rate levied on Port Dalhousie by the county for road purposes included the rate authorised by paragraph (4) of the by-law just quoted, and the same thing happened in 1927 and 1928 under corresponding by-laws. The duty of the county in 1927 under Section 29 (5) of the Highway Improvement Act of 1926, and in 1928 and 1929 under Section 28 (5) of the revised statute of 1927 was on or before the 1st day of April in each of the years 1927, 1928 and 1929 "to remit . . . in the case of a village 75 per centum of the amount raised by such rate [the general annual rate] in the previous year," less the cost of certain repairs if incurred. This duty to remit 75 per cent. plainly extends to the whole proceeds of the general annual rate. The statutes make no provision for excluding from the calculation any part of the sum raised by the general annual rate, and their Lordships can find no warrant in particular for excluding that part of the proceeds of the general annual rate which represents the contribution of the village to the interest and sinking fund charges on the county's debenture debt.

The learned Judge of first instance would himself, as appears from his judgment, have reached the conclusion that the plaintiff was entitled to succeed but for what he describes as "an insuperable obstacle" which he found in Subsection (6) of Section 28 of the revised statute of 1927 (which re-enacts Section 29 (6) of the 1926 Act). The subsection is as follows:—

> "(6) Subject to the provisions of subsection 5 the amount so repaid by the county shall be deemed to form part of the expenditure in carrying out a plan of highway improvement in the county for the purpose of ascertaining the amount of aid which may be granted to the county under this Act."

Under Section 17 of the revised statute of 1927, re-enacting previous similar legislation, the Minister of Public Works and Highways of the Province, where an approved plan of highway improvement under the Act is being carried out in a county, is empowered to direct payment to the county of 50 per cent., or such other proportion as may be authorised, of the expenditure of the county council in carrying out such plan, including the payments authorised by the Act to be made by the county to towns and villages, as contained in an annual statement required to be submitted to the Minister. Accordingly, so runs the argument, if the county has already under the last-mentioned provision received from the central authority 50 per cent. of the cost of its

scheme of road construction it will in effect be receiving a second grant for the same purpose if it is entitled to include in its annual statement qualifying for a grant from central funds the 75 per cent. of its interest and sinking fund charges on road construction debt which it remits by way of rebate under Section 28 (5). Their Lordships do not find in this consideration, assuming it to be well-founded, any justification for introducing a qualification which the legislature has not seen fit to make into the definite language of Section 28 (5). They agree with the view taken by Middleton J.A. when he says : " I cannot understand why a right plainly conferred upon the village should be taken from it because the right of the county with respect to a refund from the province is deemed to be unduly in ease of the county. The right of the village is not to be made in this way dependent upon the right of the county."

It was submitted by the appellant that the view of the matter which was taken by the Appellate Court and which also commends itself to their Lordships, offends in some way against the accepted principle that legislation is presumed not to be retrospective. It is true that the rebate principle introduced in 1926 involves indirectly some redistribution of the burden of the original cost of the work of road construction and it was said that as that work was agreed to on a particular basis of distribution of the cost it was inequitable to disturb that basis by subsequent legislation. This argument might appropriately have been addressed to the legislature when the rebate was under consideration, but it is not one which would justify a court of law in modifying the plain language of a statute, and in any case a redistribution of the burden of public charges, based presumably on considerations which have commended themselves to parliament, can scarcely be regarded as a legislative novelty or anomaly.

It remains to mention a point which is raised in the appellant's printed case and was argued before the Board, but of which there is no trace in the pleadings or in the judgments of the Court below. The point arises in this way. In Section 28 (5) of the revised statute the annual general levy for county road purposes to which urban municipalities are made subject is described as the annual general levy " under the by-law mentioned in Section 12." On turning to Section 12, the by-law there mentioned is found to be a by-law adopting a plan of county road improvement and establishing a county road system, and the section goes on to enact that the by-law shall provide for the levying of an annual general rate, the proceeds of which are to be applied to road construction and maintenance. The appellant now states in its case to this Board as the first reason why its appeal should be allowed—

> " Because the levies to raise the interest and sinking fund to pay the debentures for the construction of the roads in question were not made ' under the by-law mentioned in section 12,' all such levies were made under the Municipal Act as authorised by section 14, R.S.O., 1927, chapter 54."

In view of the agreement of parties as to the facts on which this case is to be decided, which include an admission by the county that the debentures in question were issued under the authority of the Highway Improvement Act and that the annual debt charges for principal and interest on these debentures have formed part of the annual general rate levied by the county for county road purposes, their Lordships do not consider that the appellant is now entitled to put forward this belated contention, upon which, moreover, their Lordships do not have the advantage of the views of the judges of the Court of Ontario, who are specially familiar with the provincial legislation. So far, however, as their Lordships have been able to examine the matter, the appellant's contention appears to be unfounded. The Highway Improvement Act of 1914 by Section 15 authorises the county council to pass by-laws *inter alia* to raise by debentures the sums necessary to meet the expenditures under the Act up to a specified limit. " This section," says Meredith C.J., " clearly authorises the imposition of a rate to meet the debentures " (*Village of Merriton* v. *County of Lincoln*, 1917, 41 O.L.R. 6, at p. 21). In point of fact, the county by-law No. 600, enacted in 1917 under the Highway Improvement Act of 1914, which by-law authorised the road construction work the expenditure on which is represented in part by the debentures in question, provides as follows :—

> " 5. Funds for the construction, improvement and maintenance of the roads and highways herein designated shall be raised by annual levy based upon the equalised assessments of the municipalities within the county . . . or by the issue of debentures from time to time or by other means authorised by the Municipal Act, the Highway Improvement Act or other statute of the province of Ontario in that regard, and the rate for the payment of such debentures issued for the aforesaid purposes or any rate levied under authority of or by reason of the said Highway Improvement Act shall be levied and collected upon the rateable property aforesaid. . . ."

This by-law remains in force, notwithstanding the repeal of the Act of 1914, by virtue of the Ontario Interpretation Act (R.S.O., 1927, ch. 1), which provides by Section 15 that where any Act is repealed and other provisions are substituted by way of amendment, revision or consolidation all " by-laws made under the repealed Act shall continue good and valid in so far as they are not inconsistent with the substituted Act or enactment until they are annulled and others made in their stead." Section 12 (7) of the 1927 Act itself contemplates that by-laws theretofore passed for the purpose of establishing a county road system will continue to be operative, for it provides for their amendment so as to bring them into conformity with the newly-enacted provisions.

It is accordingly clear that the levies for the debenture charges in question are made under and in virtue of this still subsisting by-law No. 600, under which the county road system was established and the roads constructed under the Highway Improvement Act of 1914, and whereby provision was also made

by virtue of that Act for meeting the consequent expenditure. The Municipal Act applies to the debentures only so far as it supplies a code of machinery for the issue and regulation of municipal debentures. (*See also* Section 14 of the Highway Improvement Act of 1927.)

The argument really goes to this, that it was incompetent to include the debenture charges in the sum to be raised by the annual general levy under the Act of 1927 (although they were so included in fact), inasmuch as that levy must be under the by-law mentioned in Section 12, and Section 12, it is said, contemplates by-laws to be passed after the enactment of the Act of 1927 and referable to expenditure incurred thereafter. This would apparently lead to the result, as their Lordships understood counsel for the appellant to admit, that the maintenance charges also on the roads constructed before 1926 would have to be excluded from the annual general levy for road purposes, a result which would upset the whole administration of the county road system. The true view would appear to be that, inasmuch as Section 12 of the Act of 1927 contemplates the existence and continuance of county road systems already established, so the annual general levy under the by-law mentioned in Section 12 extends to cover the charges in respect of expenditure already incurred under an existing and still operative by-law establishing a county road system. Their Lordships are satisfied, so far as they are able to judge from the somewhat incomplete analysis of the scheme of this legislation which was presented to them, that the point now sought to be taken by the appellant, even if admissible at this stage, proceeds on a misconception of the effect of the relevant statutes, and they do not pursue the matter further.

Their Lordships do not find it necessary to discuss certain subsidiary points which were raised relating to an agreement between the parties of January 30th, 1923, and to the special position of suburban roads. These topics are not adverted to in the judgments in the appellate division, and their Lordships are content to express their agreement with the manner in which they were disposed of by the Judge of first instance.

The result therefore is that their Lordships will humbly advise His Majesty that the appeal should be dismissed. The appellant will pay the respondent's costs of the appeal.

In the Privy Council.

THE CORPORATION OF THE COUNTY OF LINCOLN

v.

THE CORPORATION OF THE VILLAGE OF PORT DALHOUSIE.

DELIVERED BY LORD MACMILLAN.

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