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A. C. NORFOLK SUING ON BEHALF OF HIMSELF AND ALL OTHER RATEPAYERS OF THE TOWN OF BRAMPTON (PLAINTIFF) ..... APPELLANT;

*June 4.
*Oct. 13.

AND

J. G. ROBERTS AND OTHERS (DEFENDANTS) ..... RESPONDENTS.

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

Municipal corporation—Undertaking with ratepayer—Non-collection of taxes—Discretion.

Held, per Idington and Anglin JJ.—Where there is no statutory prohibition thereof it is not illegal for a municipality, in the *bonâ fide* exercise of its discretion, and to carry out an undertaking with a ratepayer, to refrain from collecting the taxes levied on the latter's property over and above a fixed annual sum stipulated for.

Held, per Duff and Brodeur JJ.—A ratepayer has no status *in curiâ* to compel the corporation to collect the balance of taxes so allowed to remain unpaid each year.

Judgment of the Appellate Division (28 Ont. L.R. 593) affirmed.

APPEAL from a decision of an Appellate Division of the Supreme Court of Ontario (1), reversing the judgment for the plaintiff at the trial and dismissing his action.

The action was brought by the appellant on behalf of all ratepayers of the Town of Brampton to compel

*PRESENT:—Sir Charles Fitzpatrick C.J. and Idington, Duff, Anglin and Brodeur JJ.

(1) 28 Ont. L.R. 593.

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the municipality to collect arrears of taxes from the Dale estate, florists in said town. The facts are stated by Mr. Justice Latchford in giving judgment at the trial as follows:—

The plaintiff adopted the suggestion of the Divisional Court, on appeal from the judgment of Sutherland J., and elected to add, and did add, the Municipal Corporation of the Town of Brampton as defendants. The case thereupon came before me for trial upon the issue whether the municipality rightly or wrongly abstained from collecting certain arrears of water rates which the plaintiff contends it was their duty to have collected from the defendants, the executors of the Dale estate, during the period between 1903 and 1910, when the water system of the town passed into the control of commissioners elected under the "Municipal Water Works Act."

On May 30th, 1901, the executor of the Dale estate, as a result of a conference with a committee of the municipal council, made a proposition in writing offering fifty dollars per year for water service instead of the thirty-two dollars then paid, if the town corporation would at their own expense place a four-inch main and hydrant in Vodden Street, and would agree that the rate of fifty dollars would not be exceeded in the future, even should the premises be extended.

An alternative proposition was also submitted, as follows:—

"On the understanding that the present rate of $32 be increased to $40 per year, and will not be increased now nor in the future, we will do the excavating and filling in and furnish the necessary four-inch iron pipe; you to make the connection, lay the pipe, fur-

nish the hydrant and all else necessary excepting the pipe."

The Water, Fire and Light Committee of the corporation considered the letter, and on June 3rd, reported to the council in favour of the adoption of the second proposition, excepting the clause "nor in the future"; and on the same day the council adopted the report as amended.

The municipality thus agreed that in consideration of the carrying out by the estate of the proposed work, the rates be not now increased above forty dollars a year.

It is not suggested that this was not a proper contract on the part of the town under the law as it stood at the time.

The Dale estate expended nearly one thousand dollars in putting in the main on Vodden Street and other mains, some or all of which were afterwards tapped by the corporation to supply water to householders. The estate also paid the forty dollars a year to the town.

By-law No. 272 came into effect on September 30th, 1903, and imposed a heavy burden upon greenhouses. The fame which Mr. Dale had won for the roses and other commercial flowers produced at Brampton continued to increase after his death under the capable management of the business by his executor, Mr. T. W. Duggan, and it became necessary greatly to extend the area under glass. When Mr. Duggan learned that the town had in contemplation the imposition of the rates subsequently fixed by By-law No. 272, $11.12 for the first thousand feet of glass and $1.25 for each additional thousand feet—he wrote

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reviewing the arrangement of 1901, pointing out the importance, growth and advantages of the industry, and asking for a fixed rate. He suggested at the same time that if any legal difficulties prevented such an arrangement the matter should be submitted to the ratepayers.

A legal difficulty had arisen owing to the definition of the word "bonus" by the "Consolidated Municipal Act of 1903," which came into force on the 27th of June. The supplying of water at rates less than those charged to other persons in the municipality was declared to be included in the word "bonus," section 591(*a*), sub-section(*e*); and the granting of a bonus was prohibited unless the assent of the electors should be obtained. Section 591, sub-section (12*a*).

There were other greenhouses in Brampton besides those of the Dale estate; and all became subject to the rate imposed by the by-law of the 30th September. By a resolution of the municipal council passed on December 21st, 1903, the collector of water rates was instructed "not to collect from the Dale estate in excess of fifty dollars for the past quarter (except such sums as may be charged for private dwellings) and that the balance of the charge for the current quarter, and future charges, be deferred so as to conform to the by-law passed by this council."

The charge on the greenhouses of the Dale estate, at the rates imposed by the by-law for the quarter referred to, was $111.22, based on an area of 348,000 feet.

How the matter stood in the following year is well stated in a letter which Mr. Duggan addressed to the council on November 7th, 1904.

"You will remember," he says, "that the matter of our water rate was up last year. Up to that time we had been paying forty dollars per annum in terms of a verbal agreement made with the council when our large extensions were being entered into. After the new by-law of last year our premises were rated at a very much higher figure. The matter was subsequently inquired into by the council, and a recommendation was made by the committee of an increase from forty dollars to two hundred dollars per annum, net, in addition to the rating for the house. I consented to this compromise; but owing to some technicalities which were in the way, the council were unable to make the arrangement for more than the balance of the year ending December, 1903. It was intended, however, that no more than that rate should be charged us, but I do not think that the necessary means have been taken to put it in proper shape. Up to the last quarter of this year we were asked to pay only the fifty dollars per quarter, as arranged for; but for the last quarter we have had a much larger bill rendered us, with an item for alleged arrears, which, of course, practically do not exist, but we presume that they appear because of the matter not having been properly disposed of."

The letter closed with a request for an interview. Nothing definite appears to have resulted from the interview, if indeed it was had. But it is clear that no effort was for some years made to collect more than the fifty dollars a quarter, or to dispose of the arrears that had been accumulating upon the collector's roll.

On April 3rd, 1906, the council adopted a report of the Water, Fire and Light Committee instructing

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the collector "not to collect any arrears over fifty dollars per quarter from the Dale estate for water used in their greenhouses"; and instructing the clerk "not to place any amount on the rate book in excess of fifty dollars per quarter."

Between 1903 and 1906 additional greenhouses had been erected, but no change in the area of glass was recorded in the collector's books.

At a meeting of the council held on April 2nd, 1906, a report of the Water, Fire and Light Committee was adopted, recommending that the collector be instructed not to collect any arrears over fifty dollars a quarter from the Dale estate for water used in the greenhouses, and that the clerk be instructed not to place any amount on the rate book in excess of $50 a quarter. Thereafter, up to the end of 1909, a charge of but fifty dollars per quarter was entered and collected. The area of the glass assessable was continued upon the roll at 348,000 feet, though in fact new greenhouses had been added every year.

On these facts His Lordship held that the municipality was entitled to collect from the Dale estate all the taxes assessable in the past exceeding the amounts paid each year and ordered judgment to be entered accordingly. His judgment was reversed by the Appellate Division and the appellant's action dismissed.

W. N. Tilley for the appellant. The municipal council is trustee for the town and subject to the jurisdiction of the court. *Paterson* v. *Bowes*(1); *City of Toronto* v. *Bowes*(2).

(1) 4 Gr. 170.

(2) 4 Gr. 489; 6 Gr. 1; 11 Moo. P.C. 463.

The water rates imposed on the consumers must be uniform. *Attorney-General for Canada* v. *City of Toronto*(1); *City of Hamilton* v. *Hamilton Brewing Association*(2), and a discriminatory by-law passed by the council would be quashed. *In re Bate and City of Ottawa*(3); *In re Morton and City of St. Thomas* (4); *In re Campbell and Village of Lanark*(5).

Armour K.C. for the respondents. The action of the appellant is not maintainable. *Sharp v. San Paullo Railway Co.*(6); *Slattery* v. *Naylor*(7); *Parsons* v. *City of London*(8).

In the circumstances the measure of relief could be only a declaration for the future. See *Pringle* v. *City of Stratford*(9).

THE CHIEF JUSTICE.—I agree with Mr. Justice Idington.

IDINGTON J.—The appellant suing on behalf of himself and all other ratepayers of the Town of Brampton obtained as result of the trial a declaratory judgment that two of the respondents, executors of the Dale estate, were and are indebted to the corporation of the Town of Brampton, another respondent, in the sum of $1,591.72 for water rates which the town corporation was entitled to collect but wrongfully abstained from collecting. This judgment has been reversed by the Court of Appeal and hence this appeal.

(1) 23 Can. S.C.R. 514.
(2) 38 Can. S.C.R. 239.
(3) 23 U.C.C.P. 32.
(4) 6 Ont. App. R. 323.
(5) 20 Ont. App. R. 372.
(6) 8 Ch. App. 597.
(7) 13 App. Cas. 446.
(8) 25 Ont. L.R. 172.
(9) 20 Ont. L.R. 246, at p. 260.

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The executors of the Dale estate had applied in 1901 to the council of said town, possessed of a water-works system, to extend its mains so as to give the property of the estate a more efficient service. The council could not see its way to so extending its mains at the expense of the municipality and accepted the following alternative proposition:—

> On the understanding that the present rate of $32 be increased to $40 per year, and will not be increased now nor in the future, we will do the excavating and filling in and furnish the necessary four-inch iron pipe; you to make the connection, lay the pipe, furnish the hydrant and all else necessary excepting the pipe.

after striking out the words "nor in the future" therein.

The executors of the estate acting upon the faith of this, expended at least a thousand dollars in extension of said mains upon the street of the town referred to in the proposition, and the town council, I infer, collected the rate so fixed therein, for a year or more.

But in September, 1903, a by-law was passed by the council fixing a general rate which if considered operative as against the Dale estate would have wrought a gross injustice.

The legislation of that year had prohibited exemption or commutation of water rates by way of bonus. And the parties concerned seemed to imagine there was no other way out of the difficulty than to agree to collect a rate of fifty dollars a quarter and leave the balance uncollected.

Why this sort of method was resorted to would puzzle any one inexperienced in the ways of municipal management. On the whole it is well done, but on too many occasions lapses not unlike this will happen.

The main on Vodden Street on which the estate

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had expended the thousand dollars, had no doubt become the property of the town and there was nothing in the amendment to the law restricting bonus concessions, which prevented the council from doing justice by compensating the estate for this expenditure by way of an allowance in its rates.

Of course it could not have gone beyond that discharge of what was a plain obvious duty of common honesty in the premises; and under pretext thereof fix a permanent rate.

The striking out of the words "nor in the future" in the original proposition raised no barrier to this being done, but only left the matter in a loose, unbusinesslike condition to be dealt with by future councils of the town.

The situation thus created has continued for years, but nothing so far as I can see has intervened to prevent the council from doing in substance that which that body could have done and, if I may be permitted to say so, ought to have done in the first place.

I cannot think that the law ever contemplated that the council of a municipality is bound to take a dishonest advantage of any one in its dealings.

And such certainly would be the effect of its enforcing the judgment pronounced at the trial.

The rates uncollected would not, so far as I can see, if interest is to be allowed on the original expenditure by the estate, exceed the money so expended.

At all events a compromise of that kind is clearly within the honest judgment that the council might properly exercise without exceeding its powers.

If the matter had been in substance a resort to a dishonest subterfuge to defeat the provisions of the

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law relative to giving of a bonus, then I assume the courts would be bound in a properly constituted suit to enforce the law.

This case does not give occasion for a consideration of the delimitation of the powers of the court in this regard at the suit of a ratepayer.

However, I am disposed to think that if the ratepayers were more alert in asserting their undoubted rights and invoking the aid of the court to keep councils within the path of law and duty, we would perhaps have better municipal government.

It seems to me that the proceedings of the successive councils of Brampton acting in this matter have conducted their business in such an irregular manner as to invite litigation, and if it were not that the settled jurisprudence of this court forbids interference in mere matters of costs, I should have felt disposed to modify in that regard the judgment appealed from.

The appeal must be dismissed with costs.

DUFF J.—I concur in the view of the Court of Appeal that the appellant had no status to maintain the action. I think the appeal should be dismissed with costs.

ANGLIN J.—If the plaintiff had succeeded in establishing that what the municipal council did was within the "bonus" prohibitions of the "Municipal Act" and therefore an illegal disposition or abandonment of the property of the municipality, as a ratepayer he might have successfully maintained his action. But it is reasonably clear that nothing of that kind has

been attempted. The council of the defendant corporation merely recognized a moral, if not a legal, obligation incurred towards its co-defendants by its predecessors, and, in consideration of those co-defendants having given to the municipality what it deemed substantially of equivalent value, determined, acting within its discretion, to adhere to an understanding with them for a commutation of water rates somewhat indefinite, but deemed by it sufficient to impose an obligation. Over the exercise of such discretion by a municipal corporation the courts do not assert control or right of supervision.

Neither in the general "Municipal Act" nor in the special Act (41 Vict. ch. 26 (Ont.)) do I find anything which renders the action of the municipal corporation illegal or *ultra vires*.

The Statute of Limitations probably also affords a defence to so much of the plaintiff's claim as represents arrears due more than six years prior to the addition of the municipal corporation as a party after the judgment of the Divisional Court rendered in November, 1911.

As to the alleged arrears of $190.20 for the year 1909, it would appear from the account rendered by the municipal corporation to the Dale estate (exhibit 15), that on the 30th of October, 1909, $53.34 was accepted as payment in full of water rates for that year presumably in pursuance of the understanding above referred to, and that there were no such arrears.

I would dismiss the appeal with costs.

BRODEUR J.—It is one of those actions which could be instituted by the corporation and the corporation

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alone, and if it is found that the council does not properly exercise its functions and fulfil its duties, it is for the ratepayers to make a change and put in persons who will fulfil their duties according to what the majority of the ratepayers think best.

The judgment of the court below should be confirmed with costs.

Appeal dismissed with costs.

Solicitor for the appellant: *B. F. Justin.*

Solicitor for the respondents: *T. J. Blain.*