Solicitor for the appellant, *N. L. R. Griffin.*

Solicitors for the respondent, *Dowling, Tayler, Macdonald & Walker.*

J. B.

H. C. OF A. 1928.

DYER v. LUCKETT.

[HIGH COURT OF AUSTRALIA.]

KELLY AND OTHERS . . . . . APPELLANTS;
PLAINTIFFS,

AND

THE COUNCIL OF THE MUNICIPALITY OF WILLOUGHBY . . . . . RESPONDENT.
DEFENDANT,

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

H. C. OF A. 1928.

SYDNEY, *Aug.* 9, 10, 23.

Knox C.J., Isaacs, Higgins, Gavan Duffy and Starke JJ.

Local Government—Rates—Ratable land becoming not ratable—Refund of portion of rates paid—Time of operation of statute—Local Government Act 1919 (*N.S.W.*) (*No.* 41 *of* 1919), *secs.* 132 (1) (*h*), 139 (7), (9)—*Local Government* (*Amendment*) *Act* 1927 (*N.S.W.*) (*No.* 33 *of* 1927), *sec.* 7 (*h*).

By sec. 139 of the *Local Government Act* 1919 (N.S.W.), as amended by sec. 7 (*h*) of the *Local Government* (*Amendment*) *Act* 1927, it is provided that "(9) where land which was ratable becomes not ratable, part of the rate payable thereon proportionate to the period of the year during which the land is not ratable shall be refunded by the council."

Certain land which had been ratable and rated in 1927 prior to the passing of the amending Act, which came into force on 21st March 1927, became not ratable by virtue of par. (*h*) of sec. 7 of that Act.

Held, that the appellant ratepayers, who had paid the rate for the year 1927, were entitled to a refund of a proportionate part of the rate for that year as from 21st March 1927.

Decision of the Supreme Court of New South Wales (Full Court): *Kelly* v. *Council of Municipality of Willoughby*, (1928) 28 S.R. (N.S.W.) 213, reversed.

H. C. OF A. 1928.

KELLY v. WILLOUGHBY COUNCIL.

APPEAL from the Supreme Court of New South Wales.

In an action brought by the Most Reverend Dr. Kelly and others against the Council of the Municipality of Willoughby a special case for the determination of the Supreme Court was stated on behalf of the parties, which was substantially as follows :—

1. The defendant herein is a corporation duly incorporated under the *Local Government Act* 1919 and the Acts amending the same.

2. On 1st January 1927 the plaintiffs were the persons ratable within the provisions of the *Local Government Act* 1919 and the Acts amending the same in respect of certain lands, all situated within the area of the defendant Council and all covered by assessments Nos. 1141, 2106, 2107, 336 and 337.

3. On 4th January 1927 the defendant Council duly made and levied a general rate on all ratable land within its area. Rate notices covering the above-mentioned assessments were duly served on the plaintiffs by the defendant Council as the persons ratable in respect of the said lands referred to in par. 2 hereof.

4. The plaintiffs paid the rates levied by the said notices on 10th November 1927.

5. The lands referred to in the said assessment No. 1141 comprise lands used as a presbytery in connection with a church. The lands referred to in the other assessments comprise lands used for schools certified under the *Public Instruction (Amendment) Act* 1916 and playgrounds belonging to or used in connection with such schools.

6. On 21st March 1927 the *Local Government Act* 1919 was amended by the *Local Government Amending Act* No. 33 of 1927, and for the purpose of this special case it is admitted that by the said amending Act the said lands became non-ratable.

7. The rates on the said lands amount to £57 18s. 7d. in all, and the proportion of the same payable in respect of that part of the year subsequent to 21st March 1927 amounts to £45 4s. 7d. in all.

8. The plaintiffs contend that, as the said lands became not ratable on 21st March 1927, they are entitled to a refund of the said sum of £45 4s. 7d.; the defendant Council contends that the plaintiffs are not entitled to any such refund.

9. The question for the decision of the Court is as follows :

Whether the plaintiffs are entitled to a refund by the defendant Council of that part of the rate paid by the plaintiffs as

aforesaid proportionate to the period of the year during which the lands referred to in par. 2 hereof are not ratable.

10. If this question is answered in the affirmative judgment is to be entered for the plaintiffs in the sum of £45 4s. 7d., with costs on the highest scale; if this question is answered in the negative judgment is to be entered for the defendant Council with costs on the highest scale.

The case was heard by the Full Court of the Supreme Court, which ordered that judgment be entered for the defendant with costs: *Kelly* v. *Council of Municipality of Willoughby* (1).

From that judgment the plaintiffs now, by special leave, appealed to the High Court.

Other material facts are stated in the judgments hereunder.

Browne K.C. (with him *E. W. Street*), for the appellants. The amending Act of 1927 inserted into sec. 132 (1) of the Act of 1919 a new paragraph (*h*), as a result of which the appellants' land became not ratable immediately on the coming into operation of the later Act. By virtue of sec. 139 (9) (which was a new sub-section introduced into sec. 139 of the Act of 1919 by sec. 7 (*h*) of the Act of 1927) the taxpayer became, immediately on the non-ratability of the land, entitled to a refund of the portion of the rates paid for the current year in respect of what had become a non-ratable period of that year. No question can properly arise here as to whether the Act is retrospective or prospective in its operation: on the plain meaning of the language used therein the relevant statutory provisions have an immediate operation on the date of the coming into operation of the Act of 1927—namely, on 21st March 1927. [Counsel referred to *George Hudson Ltd.* v. *Australian Timber Workers' Union* (2).]

Lamb K.C. (with him *Rundell Miles*), for the respondent. If the ordinary canons of construction of statutes are applied it is obvious that sub-sec. 9 of sec. 139 of the *Local Government Act* 1919, as inserted by the amending Act No. 33 of 1927, was intended to apply to a state of things coming into existence after the passing

(1) (1928) 28 S.R. (N.S.W.) 213. (2) (1923) 32 C.L.R. 413, at p. 433.

H. C. OF A. 1928.

KELLY v. WILLOUGHBY COUNCIL.

of the latter Act. The ratability of land depends upon the user of land at the date when the rate is struck. If the contention of the appellants were correct, it would mean that the Act has a retrospective operation inasmuch as it would mean that councils would be called upon to refund moneys which, at the time of the striking of the rate, they were legally entitled to. The Legislature must be taken not to have intended to upset financial arrangements previously and properly made, and, as it would be unfair to place councils in the unforeseen position of having to refund moneys the new sub-section should be construed to apply only to land which becomes non-ratable after the passing of the amending Act. The word *becomes* connotes the future, and not the present, as would be the meaning if the appellants' contention is correct. The sub-section should be read " where after the passing of this Act land which was ratable becomes not ratable " &c. Sub-sec. 9 was intended to apply to the converse of the position contemplated in sub-sec. 7, and was meant to be applied after the passing of the amending Act of 1927. It clearly does not apply any further than that, and therefore does not apply to the present case; the object of the sub-section was to make the ratable land referred to not ratable as from the end of the council's current financial year. If the operation of the sub-section is confined to cases where a change of occupation or user is made after the passing of the amending Act —as in the case where land admitted to be ratable is sold to a school or church on a date subsequent to 21st March 1927—then a clear effect is given to the sub-section, and the meaning is, to some extent, retrospective. That being so, a doubt must arise as to whether the sub-section applies also to exemptions under sec. 132. Here the canon of construction must be followed which lays it down that a larger retrospective power ought not to be given to a section than it was plainly the intention of the Legislature to give. [Counsel referred to *Wilson* v. *Moss* (1); *Gardner* v. *Lucas* (2); *In re Pullborough School Board Election*; *Bourke* v. *Nutt* (3); *In re Athlumney*; *Ex parte Wilson* (4); *West* v. *Gwynne* (5); *Craies on Statute Law*, 3rd ed., pp. 324, 327.]

(1) (1909) 8 C.L.R. 146.
(2) (1878) 3 App. Cas. 582, at pp. 601-604.
(3) (1894) 1 Q.B. 725, at p. 737.
(4) (1898) 2 Q.B. 547, at p. 551.
(5) (1911) 2 Ch. 1.

[ISAACS J. referred to *Sydney Municipal Council* v. *Troy* (1).]

If the principle established in secs. 8 (1) and 9 (1) (*e*) of the *Local Government Act* 1919 be applied to the construction of sub-sec. 9 of sec. 139, then it must result in a prospective operation only.

Cur. adv. vult.

Aug. 23.

The following written judgments were delivered :—

KNOX C.J. The appellants were on 1st January 1927 and still are the owners of certain lands which were ratable for the year 1927 under sec. 132 of the *Local Government Act* 1919. By the *Local Government* (*Amendment*) *Act* 1927, which became law on 21st March of that year, certain amendments were introduced into sec. 132 of the Act of 1919 which had the effect of excluding these lands from the category of ratable lands. By the same amending Act (No. 33 of 1927), sec. 139 of the *Local Government Act* 1919 was amended by the introduction of a sub-section in the words following : "(9) Where land which was ratable becomes not ratable, part of the rate paid thereon proportionate to the period of the year during which the land is not ratable shall be refunded by the council." On 4th January 1927 the respondent Council made a general rate on all ratable land within its area, and in November 1927 the appellants paid the rate so levied in respect of the lands above mentioned. The appellants having sued the respondent for a refund of a part of the rate so paid proportionate to the period between 21st March and 31st December 1927, a special case was stated for the opinion of the Supreme Court on the question whether they were entitled to the refund claimed. The Supreme Court held that they were not so entitled ; and this appeal is brought by special leave from that decision.

The question turns on the meaning to be given to the words of the sub-section above set out. It is clear that that enactment was introduced in order to put the ratepayer in the same position with regard to land which became non-ratable in the course of a given calendar year as the council occupied under the Act of 1919 in respect of land which became ratable in the course of a similar period.

(1) (1927) A.C. 706 ; 27 S.R. (N.S.W.) 308.

H. C. OF A. 1928. KELLY v. WILLOUGHBY COUNCIL. Knox C.J

Before the amendment Act of 1927 if land which was non-ratable on 1st January in a given year became ratable during that year the council could recover in respect of that land a proportionate part of the rate made in respect of ratable lands for that year, but there was no provision for a similar adjustment in favour of the ratepayer in respect of land which having been ratable on 1st January became non-ratable during the year. The object of the provision made by the amending Act was to remedy this inequality of treatment, and, in this view, there is no reason for restricting its operation or for limiting the effect of the words used. In my opinion the words of the sub-section construed according to their ordinary meaning cover the facts of this case. I think the plain meaning of the words used is that in every case in which land was at the time of making the rate for a given year ratable for that year and such land during the same year and after the amending Act came into force became non-ratable the ratepayer should be entitled to a refund of a proportionate part of the rate paid by him in respect thereof. In the present case the land in question was ratable on 1st January 1927 and became non-ratable immediately after the amending Act became law. As I understood the argument for the respondent, it was not disputed that if the transfer of this land from one category to the other had been caused by a change in its use during 1927 at any time after 21st March of that year the case would have been within the operation of the new sub-section introduced into sec. 139 by the amending Act, and the ratepayer would have been entitled to a refund. I can find nothing in the words used by Parliament to indicate that the result should be different where, as in this case, the cause of the land becoming non-ratable after the passing of the amending Act was a change in the law and not a change in the use of the land. The question is not whether the words of the amending Act should be construed as having a retrospective effect, but whether on the facts of this case the land in question had been ratable, and became non-ratable, after the amending Act became law. If it did, it is, in my opinion, within the plain words of the sub-section construed according to their natural meaning.

I think the appeal should be allowed, the judgment of the Supreme Court discharged and judgment entered for the plaintiffs for £45 4s. 7d. with costs on the highest scale of the proceedings in the Supreme Court and the costs of this appeal.

My brother *Gavan Duffy* wishes me to say that he has some doubt as to the meaning of sec. 139 (9) of the *Local Governmen* . . but on the whole agrees that the appeal should be allowed.

ISAACS J. In my opinion the question in the special case should be answered in the affirmative and, consequently, judgment should be entered for the appellants as agreed.

The rule as to retrospectivity of statutes has not, as I read the legislation, any application to the case. The amending Act looks only to the future. It is, with great deference, not correct to say that the Act made the land not ratable, except in the sense that the Act makes at any moment any land ratable or not ratable. The land was put to a certain use both before and after the passing of the 1927 Act, including the moment of its passing. The Act does not identify any specific land as ratable or not ratable. It creates classes, namely, ratable and not ratable, and states (*inter alia*) that a given use will place land in the one class or the other. Before the 1927 Act the use to which this land was put brought it into the ratable class; *after* the Act, and *only after* the Act, that use placed it in the non-ratable class. Consequently, the land falls precisely within the words "becomes not ratable." Then, does it also answer the description "land which was ratable"? The respondent maintained it does not, because that phrase, too, it is said, should be confined to the period after the commencement of the Act. Even viewing the matter with the utmost technicality it is plain that only *after* the Act is passed and has commenced to operate, that is, after the Governor has affixed his signature, does the change take place by which the land is by force of law, but by reason of its use, *transferred from one class to the other*. The point of time is practically imperceptible, but it is legally conceivable and real. We have to envisage the Act as coming into operation, and then, and *then only*, does the land cease to be "ratable" and become "not ratable." Even technically, I think the point fails, assuming

H. C. OF A. 1928.

KELLY v. WILLOUGHBY COUNCIL.

Isaacs J.

even the interpretation suggested. But then a reason of financial import was advanced and pressed by Mr. *Lamb* with force. As the Act stands, however, I think it cannot succeed. He said that Parliament cannot be taken to have intended to embarrass municipalities by taking from them money on which they had reckoned and which cannot be otherwise provided in respect of that year. Therefore he suggested that the operation of sub-sec. 9 of sec. 139, as introduced by the new Act, should not take effect until 1928. But that would do utter violence to the words of sub-sec. 9 in any possible interpretation. For instance, if this land had not been used in connection with a church until after the passing of the Act, and then—say, a week after its commencement—the land had been brought within the terms of the new par. (*h*) of sec. 132, so as to be at once non-ratable, how could the new par. 9 of sec. 139 fail to apply? The reason given, therefore, cannot stand. There is no other reason that can take its place.

So much for criticism of the objections. I think, however, I should state affirmatively why I think on a broad and proper reading of the enactments, the appellants are in the right.

The provision made by the new sub-sec. 9 of sec. 139 is not an independent and isolated piece of legislation. It is made a continuation of sec. 139, and, therefore, to be understood as a further declaration of Parliament on the subject matter of that section. We must, therefore, read it as part of one united section, and where it uses terms identical with the previous terms of that section the same meaning should be given them. Now, sec. 139 provides, to begin with, for a yearly rate to be made and levied. It is made for a calendar year—1st January to 31st December. The council declares the amount, and then the Act operates. It operates on prescribed facts—that is, land as it is used in fact. Passing over immaterial parts of the section, I come to sub-sec. 7. That says that "where land which was not ratable has become ratable" it is to bear a rate proportionate to the portion of "the year" during which it is ratable. Sub-sec. 8 says: "Where land which was ratable" has not been valued, then certain results are to follow, resulting in ratability. Now, the new sec. 9 takes up the identical phraseology. It says: "Where land which was ratable becomes

not ratable, part of the rate paid thereon proportionate to the period of *the year* during which the land is not ratable, shall be refunded by the council." Obviously, "the year" means the calendar year in which the land "becomes not ratable." This, in my opinion, is the key to the whole position. It gives the same meaning to the same phraseology in sub-secs. 7 and 8; it completes the scheme only partially constructed by sec. 139 as it previously stood, and it works justice. If land becoming ratable during portion of the rate year is justly brought into liability for the portion when its use makes it ratable, is it not equally just that land, the use of which takes it out of the ratable class during the year, should cease to be liable during that portion of the year? And if it has for convenience' sake paid in advance as for a whole year, what more equitable than to obtain a refund? Why that is not to be applied to the current year in which the Act was passed, I do not understand. The words of the amendment when read in conjunction with the section into which they are inserted, seem to me to preclude all application of the retrospective rule.

The appeal should, therefore, be allowed.

HIGGINS J. The question here is as to the effect of sec. 139 (9) of the *Local Government Act* of 1919, a sub-section inserted by an amending Act, No. 33 of 1927 (sec. 7): "When land which was ratable becomes not ratable, part of the rate paid thereon proportionate to the period of the year during which the land is not ratable shall be refunded by the council." The amending Act came into operation on 21st March 1927; and until that date the lands here in question were ratable (lands used for presbytery and for certified schools with playgrounds) under sec. 132 of the principal Act; but by the amending Act they became not ratable from its date. It is argued for the municipal Council that this new sub-sec. 9 applies merely to lands which became not ratable after 21st March 1927 and not to lands which became not ratable by the amending Act itself; and numerous cases have been cited which show that provisions taking away vested rights are to be presumed to apply only to future conditions—future to the amending Act—and not to past conditions. This argument seems to me not only to exaggerate

H. C. OF A. 1928.

KELLY v. WILLOUGHBY COUNCIL.

Higgins J

the strength of the presumption, but to be wholly inapplicable to the position in this case. Sec. 132, as amended by the Act of 1927, makes these lands not ratable as from 21st March 1927; and sec. 139, as amended by the Act of 1927, merely provides the process for giving effect to the new condition of non-ratability—the council has to refund so much of the rate paid as has been wrongly paid for the balance of the year.

The rate is treated by the Act very like a rent. It is made and levied for one year, 1st January to 31st December (sec. 139 (1)). But as between successors, the rate is considered as accruing from day to day, and is apportionable in respect of time accordingly (sec. 148 (3)); and sec. 145 (4) and sec. 164 (2)). If the landlord exact the full rent for the year from a tenant who holds from 1st January to 21st March the proportionate part for the rest of the year ought to be repaid somehow to the tenant; and if the council exact the full rate for the year from the ratepayer holding from 1st January to 21st March, and if on 21st March the land becomes not ratable the council is simply directed to return the part of the rate proportioned to the balance of the year. Sec. 139 (9) does not take away any vested right of the council, but sec. 132 (*h*), as amended, takes away expressly the council's right to the rate as from 21st March, and sec. 139 (9) compels the council to refund that to which it has no right.

But it is urged that sec. 139 (9) applies merely to such a case as that of land becoming non-ratable by a change of circumstances—say, land used for a hospital (and therefore not ratable) becoming no longer used for a hospital (and therefore ratable). Probably the words of sec. 139 (9) would cover such a case; but why should we limit the words to such an application? There is nothing that I can find in the amending Act dealing with the case of a change in circumstances; but there is in the Act a deliberate increase to the category of non-ratable lands; why should we not treat sec. 139 (9) as referring to this increase in non-ratable lands? The objection on the ground of retrospective action having failed, there is no conceivable reason for not treating sec. 139 (9) as merely providing what is to be done to give effect to the express provision that from 21st March onwards this land is not ratable.

I may add that if the respondent's contention is correct the over-payment by the ratepayers in respect of the balance of the year can never be remedied ; and that the express provision against the land being ratable as from 21st March becomes nugatory. The Legislature might as well have enacted that the land becomes not ratable as from 31st December.

I am of opinion that the appeal must be allowed.

STARKE J. In my opinion also the appeal should be allowed.

The section the Court is called upon to interpret is the complement of sec. 139 (7), and is a provision for removing what is regarded as an injustice. It explicitly provides for the refund of rates lawfully levied and paid. It is argued that the benefit of the Act must be confined to cases in which land becomes not ratable after the passing of the Act. The Act, however, operates from 21st March 1927, and therefore upon the general rate made and levied by the Council on 4th January 1927. The case, therefore, falls within the precise words of the Act as regards this rate. The lands were ratable at the time of the making of the rate : they became not ratable on the passing of the Act, and by force of the Act. And in my opinion, the section explicitly provides in such case that part of the rate paid on the lands proportionate to the period of the year during which the land was not ratable shall be refunded.

Appeal allowed. Judgment of Supreme Court discharged and judgment entered for appellants for £45 4s. 7d. Costs in High Court and Supreme Court to be paid by respondents on highest scale.

Solicitor for the appellants, *T. J. Purcell.*

Solicitor for the respondent, *A. R. Bluett.*

J. B.