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*Mar. 16, 17.

*Nov. 17.

THE RURAL MUNICIPALITY OF CORNWALLIS (DEFENDANTS)..... } APPELLANTS;

AND

THE CANADIAN PACIFIC RAILWAY COMPANY (PLAINTIFFS)... } RESPONDENTS.

ON APPEAL FROM THE COURT OF QUEEN'S BENCH, MANITOBA.

Assessment and taxes—Lands of the C. P. Ry. Co.—Exemption from taxation until sold or occupied.

By the charter of the C. P. Ry. Co. the lands of the company in the North-West Territories, until they are either sold or occupied, are exempt from Dominion, provincial or municipal taxation for twenty years after the grant thereof from the crown.

Held, affirming the judgment of the court below, that lands which the company have agreed to sell and as to which the conditions of sale have not been fulfilled out are not lands "sold" under this charter.

Held, further, that the exemption attaches to lands allotted to the company before the patent is granted by the crown.

Lands which were in the N. W. T. when allotted to the company did not lose their exemption on becoming, afterwards, a part of the Province of Manitoba.

APPEAL from a decision of the Court of Queen's Bench (Man.) affirming the judgment for the plaintiffs at the trial.

The action in this case was brought against the Municipality of Cornwallis to recover the amounts paid for taxes on certain lands of the Canadian Pacific Railway Co. who had paid the same under protest claiming that said lands were exempt from taxation.

By the contract between the Government of Canada and the Canadian Pacific Railway Co., which was

*PRESENT :—Sir W. J. Ritchie C.J., and Strong, Fournier, Gwynne and Patterson JJ.

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I do not see any tenable ground for allowing interest to the plaintiffs from any date earlier than that of the certificate, viz., the 4th of February, 1886. It is apparently a hardship on the plaintiffs that it cannot be computed four years farther back, but under the contract, clause 57, the money was payable only upon the engineer's certificate, and, in the absence of an agreement to pay interest it cannot be claimed until the debtor is in default.

We cannot undertake to say who was to blame for the long delay in procuring the certificate. The enquiry would be irrelevant, because even if the delay were occasioned by any contrivance or act of the commissioners of which the plaintiffs could complain their remedy would be by way of damages for the wrong, and not as interest upon a debt which by the terms of their contract was not yet payable.

The appeal and cross-appeal both succeed and should be allowed with costs. The plaintiff has failed on some items the investigation of which in the court below must have involved a good deal of expense on both sides. It would therefore seem just that each party should bear his costs of *enquête*. In other respects the plaintiffs should have the general costs of the action, including the costs of the appeal to the Queen's Bench, but should pay the costs of the cross-appeal to that court. The costs of appeal to this court allowed to the plaintiffs are not to include any costs of printing the *enquête*.

Appeal and cross-appeal allowed with costs.

Solicitors for appellants: *W. & A. H. Cook.*

Solicitors for respondents: *Caron, Pentland & Stuart.*

ratified by Parliament, the company was to receive a subsidy of land in Manitoba and the North-West Territories, and sec. 16 of the contract provided that:

"The Canadian Pacific Railway, and all stations and station grounds, workshops, buildings, yards and other property, rolling stock and appurtenances required and used for the construction and working thereof, and the capital stock of the company, shall be for ever free from taxation by the Dominion, or by any province hereafter to be established or by any municipal corporation therein; and the lands of the company in the North-West Territories, until they are either sold or occupied, shall also be free from such taxation for twenty years after the grant thereof from the crown."

The lands taxed by the municipality were a part of the lands so allotted to the plaintiffs under the contract At the time they were allotted they were situated in the North-West Territories, but shortly afterwards the boundaries of the province of Manitoba were extended and these lands then became part of that province and were so when the said taxes were imposed.

At the time the taxes were imposed the plaintiffs were entitled to patents of the said lands from the crown but the patents had not been issued. The lands had not been sold by the company, nor were they occupied. The company had entered into agreements for sale in respect to each lot, but the purchase money had not been paid in any case and no conveyances had been executed.

The lands were assessed by the defendant municipality and sold for taxes. In order to redeem them within the time prescribed by law the plaintiffs paid the taxes and served upon the appellants at the time a protest claiming that the lands were exempt.

At the trial before Mr. Justice Bain judgment was given for the plaintiffs, and the decision was affirmed

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by the full court. The defendants appealed to the Supreme Court of Canada.

Christopher Robinson Q.C. and *Gormully* Q.C. for the appellants. The exemption from taxation does not attach to these lands until a grant issues from the crown. See *Vicksburg, &c., Railroad Co.* v. *Dennis* (1); *Yazoo & Mississippi Valley Railroad Co.* v. *Thomas* (2).

The lands were sold within the meaning of clause 16 of the contract. *London & Canadian Loan Co.* v. *Graham* (3); *Shaw* v. *Foster* (4); *The New York Indians* (5); *Ex parte Hillman* (6).

E. Blake Q.C. and *Tupper* Q.C. for the respondents.

Sir W. J. RITCHIE C.J.—There must have been a completed sale and the property must have passed out of the Canadian Pacific Railway Co. and vested in the purchaser before it could become liable to taxation. The lands never were sold and occupied; the conditions of the agreement for sale had not been carried out at the time the lands were taxed and the title and occupation, if any, continued in the Canadian Pacific Railway Co.; it was not the agreeing to sell that made the lands liable to taxation; to make them assessable the lands must be actually sold before a right to tax enures to the municipality. The terms of the agreement to sell may never be carried out; in fact in one instance the terms were not complied with, and the agreement was cancelled and none of the payments had been fully made at the date of the trial, and there was not, as the learned judge found, any occupation of the lands.

If the lands are not exempt till there is a grant from the crown I do not see that the defendants are in any

(1) 116 U. S. R. 665.
(2) 132 U. S. R. 174.
(3) 16 O. R. 329.
(4) L. R. 5 H. L. 349.
(5) 5 Wall. 761.
(6) 10 Ch. D. 622.

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better position because while the title was in the crown the lands were exempt from taxation as crown lands, and I think the contract with the government, approved and ratified by parliament, conferred on the Canadian Pacific Railway Co. such an interest in these lands as justified them preventing a deed or certificate passing calculated to damage and interfere with their rights.

I think, therefore, the lands were illegally taxed and sold, and respondents are entitled to recover the money paid to prevent the issue of a deed or certificate in pursuance of the illegal sale. The appeal should be dismissed.

STRONG J.—I am of opinion that this appeal should be dismissed for the reasons given by the learned Chief Justice of the court below.

FOURNIER and GWYNNE JJ. concurred in the appeal being dismissed.

PATTERSON J.—By clause 16 of the company's contract which has the force of an act of parliament, it is declared that the railway and all stations and station grounds, workshops, buildings, yards and other property, rolling stock and appurtenances required and used for the construction and working thereof, and the capital stock of the company, shall be for ever free from taxation by the Dominion or by any province established after the date of the contract; and that the lands of the company in the North-West Territories, until they are either sold or occupied, shall also be free from such taxation for twenty years after the grant thereof from the crown.

By section 125 of the British North America Act no

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lands or property belonging to Canada or any province shall be liable to taxation.

The grant of land agreed by the contract to be made to the company was, by clause 11, to be made in alternate sections of 640 acres each, extending back 24 miles deep on each side of the railway from Winnipeg to Jasper House, the company receiving the sections bearing uneven numbers. The exemption clause did not apply to the sections between Winnipeg and the western boundary of Manitoba which was the eastern boundary of the North-West Territories, but applied to all the rest of the land grant, Jasper House being within the North-West Territories. It is scarcely necessary to refer to the contention that when any part of the land ceased to answer the description of land in the North-West Territories, by reason of another name being given to it by an act of the parliament of Canada, it was taken out of the exemption The limits of Manitoba were extended over a portion of the lands, but those lands were still the same lands that the contract described. The contract continued to apply to them just as a contract with or devise to Mary Smith will hold good although by her marriage she becomes Mary Jones.

The lands remained the property of Canada after they came to form part of the province of Manitoba, and as such were not liable to taxation. In this respect lands belonging to Canada and lands belonging to a province are put on the same footing by section 125 of the British North America Act, which probably means that the Dominion shall not tax provincial lands nor shall a province tax Dominion lands, for the taxation of its own lands by either government would be an unprofitable proceeding.

By clause 9 (*b*) it was provided that

Upon the construction of any portion of the railway hereby con-

tracted for, not less than 20 miles in length, and the completion thereof so as to admit of the running of regular trains thereon, together with such equipment thereof as shall be required for the traffic thereon, the Government shall pay and grant to the company the money and land subsidies applicable thereto according to the division and appropriation thereof made as hereinbefore provided.

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The grant of the lands in question was not actually made until 1890. It is conceded that some years before that date the company had become entitled to the grant of them. Why the grant was delayed does not appear. The provision is that as soon as the conditions are fulfilled as to each twenty miles the Government shall grant the land subsidy applicable to that portion of the road.

Whether the twenty years' period of exemption from taxation under clause 16 should be reckoned from the date of the patent for each section granted, or from the time when the company became entitled to the grant and when it became the duty of the Government to make the grant, is a question which was not overlooked upon the argument but which does not now call for decision.

The contract is evidently framed with the idea that the lands shall be granted to the company as soon as the company becomes entitled to them, and without any contemplation of a debatable interval between the ownership of the crown, during which the land is not taxable, and the ownership of the company under the grant, and it does not countenance the rather ingenious contention of the appellants that the land might be taxable before patent issued though exempt after patent.

I have no doubt that the proper construction of clause 16 is that, unless sold or occupied, no part of the land subsidy in the North-West Territories shall be liable to taxation until after the specified period of exemption. The immunity from liability to be taxed, which

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the British North America Act secures to these North-West Territories lands while they are crown lands, is to continue for the twenty years with regard to such of the lands as remain the unoccupied lands of the Canadian Pacific Railway Co.

The lands now in question were never occupied. Were they sold within the meaning of clause 16 ?

It need not be said that lands actually conveyed by the company to a purchaser are sold and are outside of the exemption, and would so remain even if the company should happen to repurchase them unless repurchased for a purpose to which the perpetual exemption under the first part of clause 16 applied. That is one extreme in which the meaning of "sold" is not doubtful.

The other extreme is an agreement to sell such as exists with regard to the portions of land now in dispute.

On the part of the company it is urged that the term "sold" refers only to a sale completed by conveyance, while the contention on behalf the municipality is that the agreement to sell at once brings the land within the description of land sold, taking it out of the exemption and rendering it subject to the provincial legislation respecting taxation and sale for non-payment of taxes.

I do not think that either of these propositions can be maintained in its entirety. The existing provinces have their system of taxation, differing now and then in details but founded on the same principle, which also prevails generally in many of the states of the American Union. The term "taxation" as used in clause 16 of the contract is a very general term, and does not, by its own force, express or include the methods or incidents attendant on the working of the system in any particular province, nor does it imply

any limitation of the right of whatever province may be organised out of the North-West Territories to arrange its own system and to work it out by its own methods. At the same time the term must be understood to be used in view of the history of the taxation of lands in the provinces and of the ordinary incident of sale of the lands to realise arrears of taxes. The phrase "sold or occupied" seems to recognise the practice of some of the provinces, if not of all of them, of assessing land in the name of both owner and occupant, but which practice is not, during the twenty years, to be followed with regard to such of the North-West Territories lands as the company continues to own.

The system of assessment which now prevails in the province of Ontario took its present general form under legislation of the province of Canada in 1850 (1) and 1853 (2); but land had been taxable in Upper Canada as far back as 1820 whenever "held in fee simple or promise of a fee simple by Land Board Certificate, Order in Council or certificate of any Governor of Canada or by lease" (3). A list was furnished to the County Treasurer every year, beginning with the year 1820, from the Department of Crown Lands, showing what lands were "described as granted," what were ungranted, and clergy reserves, &c., leased (4); and all lands "described as granted" or leased were liable to taxation.

The taxes were made a charge on the lands but it was some years later before the summary process of sale was authorised (5). The effect of the sale under these earlier statutes was to vest the land in the purchaser in fee simple, and that title was held to

(1) 13 & 14 Vic. ch. 67.
(2) 16 Vic. ch. 182.
(3) 59 Geo. III ch. 7 s. 4.
(4) 59 Geo. III ch. 7 ss. 12, 13.
(5) 6 Geo. IV ch. 7.

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prevail against a patent subsequently issued granting the same land to the heir of the original nominee of the crown. *Ryckman* v. *Van Voltenburg* (1); *Charles* v. *Dulmage* (2).

It was enacted in 1853 (3) and it has continued to be the law of Ontario under the successive assessment acts of that province, that only the interest of the locatee or lessee of unpatented lands should be sold for taxes, and that the conveyance in pursuance of such sale should give the purchaser the same rights as the original locatee or lessee enjoyed.

These are examples of legislation by an old province, which are not unlikely to be followed by a new province, authorising the sale of an interest, be it the whole or less than the whole interest, in lands not yet patented. We must take cognisance of the fact that in the case of a new province embracing these North-West Territory lands such legislation is at least possible, dealing not with the interest of the crown, which would be out of the question unless the crown lands were ceded to the province, but with the interest of the settler upon crown lands, or of a purchaser who was not a settler.

Now I see no reason, either in the language of the clause 16 or in any considerations of policy, for holding that a purchaser from the company is to be better off than a purchaser from the crown, as he would be if his land or his interest in it could not be taxed until he took a conveyance from the company, while the purchaser from the crown would, under probable legislation, be unable to protect himself by showing that he had not yet obtained his patent. It would be against good policy to throw an undue share of the burden on the even-numbered sections. No

(1) 6 U. C. C. P. 385. (2) 14 U. C. Q. B. 585.
(3) 16 Vic. ch. 182 s. 56.

doubt the contract must be construed in view of the circumstances under which it was made and in furtherance of the public object for which the land subsidy was granted. But this is done when we recognise these lands as retaining during the twenty years the quality of crown lands in relation to the matter of taxation. For these reasons I do not assent to the proposition that the exemption from taxation is absolute until the lands are conveyed. I agree that the interest of the company is not liable to sale for taxes, and is not chargeable with taxes, but I think that a contract of the company by which an interest in land is given to a purchaser is, within the meaning of clause 16, a sale of the land.

It by no means follows that that is a sale which, as contended for by the municipality, does away with the exemption. The terms of the contract must be looked to. If the sale is conditional on payment of purchase money or on any thing else, and is to fail on non-performance of the condition so that the land reverts to the company as of its first estate, and not as purchaser under its own vendee, there is, after condition broken, no sale. A purchaser of the interest of the vendee at a sale for taxes would be, of course, in no better position than the defaulting tax-payer. He would have merely—to adopt the language of a statute to which I have referred—the same rights as the original vendee enjoyed.

This view is fatal to the claim of the municipality in this case, because the municipality has assumed to sell the corpus of the land itself and not merely the rights, if any rights there were, which existed under the agreements with the company.

These lands not being occupied I have made no allusion to considerations which would call for discussion in the case of occupied lands. It would be

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useless to enter upon such a discussion in the absence of an actual occupation the character of which would necessarily be an important matter.

On the other point respecting the right to maintain this action for money paid I merely say that I think the right is undisputable.

In my opinion we should dismiss the appeal.

Appeal dismissed with costs.

Solicitors for appellants: *Henderson & Matheson.*

Solicitors for respondents: *Macdonald, Tupper, [Phippen & Tupper.*