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*June 8.
*June 19.

ALEXANDER DOBBS CARTWRIGHT AND RICHARD CONWAY CARTWRIGHT, EXECUTORS OF THE LAST WILL AND TESTAMENT AND CODICIL OF THE RIGHT HONOURABLE SIR RICHARD JOHN CARTWRIGHT, G.C.M.G., DECEASED (PLAINTIFFS) ..... APPELLANTS;

AND

THE CORPORATION OF THE CITY OF TORONTO (DEFENDANT) RESPONDENT.

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

Assessment and taxes—Sale of land for arrears—Purchase by municipality—Failure to give notice—Curative Act—Evidence—Discovery—Death of deponent—Use of deposition at trial.

By sec. 184(3) of the "Ontario Assessment Act" (R.S.O. [1897] ch. 224, where the sale of land for unpaid taxes is adjourned for want of a bid for the full amount of the arrears the municipality may purchase the land at such adjourned sale if its council, before the day thereof, has given notice of its intention to do so.

Held, affirming the judgment of the Appellate Division (29 Ont. L.R. 73) that failure to give such notice is cured by the provisions of 3 Edw. VII. ch. 86, sec. 8, and its amendment, 6 Edw. VII. ch. 99, sec. 8. *City of Toronto* v. *Russell* ([1908] A.C. 493) followed.

On the expiration of the time for redemption after sale all rights of the former owner are barred.

The depositions of a party to an action taken on discovery cannot, when the deponent has died in the interval be used against the opposite party unless the latter has first used it for his own purposes.

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*PRESENT:—Davies, Idington, Duff, Anglin and Brodeur JJ.

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APPEAL from a decision of the Appellate Division of the Supreme Court of Ontario(1), affirming the judgment at the trial in favour of the defendant.

The original plaintiff, Sir Richard Cartwright, brought action to have a sale of his land for unpaid taxes set aside as irregular for want of notice by the defendant's council of the city's intention to purchase and for other irregularities, or, if the sale was held valid, for a declaration that the defendant only held the land in trust for the plaintiff as security for the unpaid taxes. The defendant examined the plaintiff on discovery and at the trial, the plaintiff being dead and the action having been revived by his executors, the latter sought to use the deposition on the examination on discovery, but the trial judge refused to receive it.

Judgment was given for the defendant at the trial and affirmed by an appeal to the Appellate Division, which also held that the deposition was properly rejected.

George Bell K.C. for the appellants.

Geary K.C., and *Colquhoun* for the respondent.

DAVIES J.—I concur in the proposed judgment to dismiss this appeal. I think we are bound by the decision of the Judicial Committee of the Privy Council in the case of *City of Toronto* v. *Russell*(2), and that, in the face of that decision, it is not open to us to limit the curative effect of the remedial statute of 3 Edw. VII. ch. 86, sec. 8, amended by 6 Edw. VII. ch. 99, sec. 8.

(1) 29 Ont. L.R. 73. (2) [1908] A.C. 493.

On the question raised as to the admissibility in evidence of Sir Richard Cartwright's depositions on discovery, we were all of the opinion on the argument that those depositions were properly excluded by the trial judge.

IDINGTON J.—It may have been fairly arguable before the decision in the case of *City of Toronto* v. *Russell*(1), that the omission to give the notice required by the "Assessment Act," R.S.O. 1897, ch. 224, sec. 184(3), to be given by the municipality of its intention to purchase the land in question for the taxes in arrear did not fall within any of the many curative provisions of the validating Act, 3 Edw. VII. ch. 86, in question herein.

It might well have been argued with much force that the words

a failure or omission on the part of an official of the said city

was meant only to cover failure to give some routine notice or omission of such like duty prescribed by the statute to be observed by any of the city's officials and could not be extended so far as to cover an unusual step such as required in consequence of a determination which the council was enabled to take in the way of buying land offered for sale for taxes, but subject to the condition precedent to the power becoming operative of giving the special notice which the Act imposes.

The Judicial Committee of the Privy Council has, however, in said decision, put a construction upon that Act which, notwithstanding other facts and circumstances also relied upon in the decision, seems to me

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to preclude our giving effect to any such argument as suggested.

Their Lordships seem to have rested the judgment not only upon the peculiar facts and circumstances absent in this case, but also upon their construction of the statute.

And a later amendment to same curative provision seems to render any attempt to distinguish this case still more difficult.

The judgments in the courts below render it quite needless to say any more.

The point I have referred to is the only one which was not disposed of on the argument before us.

The appeal must be dismissed with costs.

DUFF J.—The appellant seeks to shew that the late Sir Richard Cartwright entered into an agreement with Mr. Biggar, then City Solicitor of Toronto, and for the purpose of proving this he offers in evidence certain statements in the examination of Sir Richard Cartwright for discovery. The principle upon which he relies is this: Where a witness has given evidence in the course of litigation, such evidence may be used in other litigation relating to the same subject matter between same parties if the witness have, in the meantime, died, provided the party against whom it is offered has had an opportunity of cross-examining the witness.

I think the rule has no application. The examination for discovery is in the nature of a cross-examination; but the rule relating to the admission of evidence given on such examination entitles the cross-examiner to proceed with the absolute assurance that no part of

the examination can be used against him, unless he on his part seeks to make use of it for his own purposes.

It is not a cross-examination with a view of testing and setting in a proper light the whole of the evidence of the party examined. It is an examination *alio intuitû*. I think it is not a cross-examination such as contemplated by the rule sought to be invoked.

On the merits of the case I think all the contentions advanced on behalf of the appellant are disposed of by the decision of the Privy Council in *City of Toronto* v. *Russell*(1). I see no reason to doubt that the passages of the judgment at page 501 form a part of the *ratio decidendi*. The effect of these passages, in my judgment, is to explode the notion which appears to have been founded on some decisions of this court, that statutes of this character are subject to some special canon of construction based, apparently, upon the presumption that all such statutes are *primâ facie* monstrous. The effect of the judgment of the Judicial Committee is that particular provisions in such statutes must be construed according to the usual rule, that is to say, with reasonable regard to the manifest object of them as disclosed by the enactment as a whole.

ANGLIN J.—On the questions raised as to the admissibility in evidence on behalf of the executors (now plaintiffs) of the depositions on discovery of the original plaintiff, the late Sir Richard Cartwright, and as to the obligation of the municipality to account to their former owners for any surplus proceeds realized on the re-sale of lands bought by it at tax

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sales, it was made sufficiently clear during the argument that the court is of opinion that the position taken on behalf of the appellants is not tenable.

The purposes for, and the conditions under which, evidence is taken on discovery make it impossible that such evidence should be admissible on behalf of the party giving it except as provided by Consolidated Rule 461. Such evidence is not within the proposition enunciated in Taylor on Evidence (9 ed.), para. 464, relied on by counsel for the appellants. It is also clearly distinguishable from evidence taken *de bene esse*.

The statute under which the municipality is authorized to buy in at tax sales (R.S.O. [1897] ch. 224, sec. 184(3)), empowers it to become a purchaser without any restriction upon its rights of ownership, except the obligation to sell within three (now seven) years. The effect of the purchase is to extinguish the personal obligation of the former owner for the arrears of taxes. If the municipality sells for less than the amount of taxes, it has no right to recover the deficiency; if it sells for more, the surplus belongs to it and it is under no obligation to account for it.

The only objection taken to the proceedings by which the municipality became purchaser that calls for consideration is the failure of the municipality or its officers to give to the owner the personal notice of the intention of the municipal council to purchase at the tax sale, which the Judicial Committee, concurring in the views expressed in the Ontario courts, held, in the *Russell Case*(1), at page 501, is required by sub-section 3 of section 184 of the "Assessment Act," ch. 224,

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R.S.O. 1897. In that case the same sale for taxes which is here attacked was dealt with, but in respect of another property. It is true that upon the special facts of that case their Lordships were of the opinion that the plaintiff had waived the notice of intention to buy, but they rest their judgment disposing adversely of his objection that such notice had not been given to him equally on the provisions of the curative Act, 3 Edw. VII. ch. 86, on which the respondent relies. Their Lordships' view of the effect of the statute, which they assign as a ground of their decision, cannot be treated as *obiter dictum*. *New South Wales Taxation Commissioners* v. *Palmer*(1), at page 184; *Membery* v. *Great Western Railway Co.*(2), at page 187. I agree with the learned judges of the Appellate Division of the Supreme Court of Ontario that the decision in the *Russell Case*(3) is conclusive on this point against the appellants. The statute, 3 Edw. VII. ch. 86, sec. 8, was so amended by 6 Edw. VII. ch. 99, sec. 8, that it extends to failure or omission by the city itself or the council to comply with the requirements of the assessment Acts, as well as failure or omission to do so by any official of the city. As amended, this legislation, given the effect required by the decision in the *Russell Case*(1), clearly covers the failure to give notice of which the appellants seek to take advantage, whether the default is ascribable to the municipality, its council or its officials.

BRODEUR J.—This is an action to impeach a tax sale made by the City of Toronto on the 10th of April,

(1) [1907] A.C. 179. (2) 14 App. Cas. 179.
(3) [1908] A.C. 493.

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1901, and for a declaration that the respondent, the City of Toronto, was holding the lands sold in trust for the owner.

The action was instituted in 1909 and was dismissed by the Supreme Court of Ontario in 1913. That judgment was confirmed by the Appellate Division of the Supreme Court.

Three questions have been submitted to us.

The first question is this: Can the evidence on discovery given by one of the parties be used in this case when the party dies ?

As a general rule a witness giving oral testimony under oath in a judicial proceeding in which the adverse litigant could cross-examine his evidence may be used in any subsequent suit between the same parties if the witness himself is incapable of being called. (Taylor on Evidence (9 ed.), para. 464.)

By the rules of court in the Province of Ontario a party to an action may be examined on discovery, but his evidence can be used only at the request of the opposite party. (Rules 431-460 and 461.)

Those rules are statutory and must be restricted to the provisions of the statute. The opposite party, according to those rules, is the only one who can use that evidence on discovery and at the request of the representative of the party put in evidence the examination on discovery given by that party cannot be received.

The second question is as to the effect of the remedial statute, passed by 3 Edw. VII. ch. 86, sec. 8, which validated the tax sales made during certain periods of time mentioned in the said Act and which periods of time included the tax sale in question in this sale.

The bearing of that statute was considered in the case of *City of Toronto* v. *Russell*(1), and it was decided by the Privy Council that those tax sales were validated and could not be impeached for the reason which is now contended by the appellant.

Besides, by a statute passed in 1906, 6 Edw. VII. ch. 99, sec. 8, the above legislation of 3 Edw. VII. ch. 86, was extended in order to make still more certain the validity of those tax sales.

As to the claim of the appellants that those tax sales are subject to redemption or that the city becomes purchaser in trust for the former owner, I do not see that the statute may be construed to cover such a contention.

The City of Toronto had been authorized to purchase the lands at those tax sales. A right of redemption exists for a certain period of time, but after that period of time the city becomes the absolute owner of the property and does not hold it subject to any trust.

The appeal should be dismissed with costs.

Solicitor for the appellants: *George Bell.*

Solicitor for the respondent: *William Johnston.*

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(1) [1908] A.C. 493.