WILLIAM OSGOODE LANGDON (DEFENDANT) ..... } APPELLANT;

AND

HOLTYREX GOLD MINES LIMITED (PLAINTIFF) ..... } RESPONDENT;

AND

THE MUNICIPAL CORPORATION OF THE TOWNSHIP OF TISDALE, AND THE TREASURER OF THE MUNICIPAL CORPORATION OF THE TOWNSHIP OF TISDALE (DEFENDANTS) ..... } RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Assessment and Taxation—Sale of land for taxes—Action to set it aside—Assessment Act, R.S.O. 1927, c. 238—Failure of treasurer of municipality to give proper notice under s. 174, as amended in 1933, c. 2, s. 14—Applicability of s. 181 to bar right of action.

Land of the plaintiff in a township municipality in Ontario was, on February 28, 1934, sold for taxes which at the time of sale had been in arrear for more than three years. The sale was (as found) openly and fairly conducted. The treasurer of the municipality did not send the notice (as to fact and date of sale and right to redeem) required by s. 174 of the *Assessment Act*, R.S.O. 1927, c. 238, as amended by 23 Geo. V (1933), c. 2, s. 14, but gave notice as required before said amendment. The land was not redeemed within one year after the sale, and the official deed of the land was delivered to the purchaser. Plaintiff sued to have the tax sale set aside.

Sec. 181 of said Act provides: "If any part of the taxes for which any land has been sold * * * had at the time of the sale been in arrear for three years * * * and the land is not redeemed in one year after the sale, such sale, and the official deed to the purchaser (provided the sale was openly and fairly conducted) shall notwithstanding any neglect, omission or error of the municipality or of any agent or officer thereof in respect of imposing or levying the said taxes or in any proceedings subsequent thereto be final and binding * * *, it being intended by this Act that the owner of land shall be

* PRESENT:—Duff C.J. and Rinfret, Davis, Kerwin and Hudson JJ.

required to pay the taxes thereon within three years after the same are in arrear or redeem the land within one year after the sale thereof; and in default of the taxes being paid or the land being redeemed as aforesaid, the right to bring an action to set aside the said deed or to recover the said land shall be barred."

Held: The treasurer's neglect, omission or error in not giving the proper notice was that of an officer of the municipality within the contemplation of the words "agent or officer" in s. 181; and s. 181 applied to bar plaintiff's right to bring an action to set aside the deed or to recover the land. The sending of the notice required by s. 174 is not a condition precedent to the right of the proper officials to execute the deed.

Judgment of the Court of Appeal for Ontario, [1936] O.R. 409, reversed.

Cummings v. *Township of York,* 59 Ont. L.R. 350, and *Cruise* v. *Town of Riverside,* [1935] O.R. 151, discussed. This Court did not read those decisions as deciding that the treasurer when he gives or omits to give the notice after sale provided by s. 174 is not an officer of the municipality within s. 181, but if they intended to lay down that proposition, this Court could not accept them.

There is no element of forfeiture or confiscation in legislation enabling a municipality to realize upon its statutory lien given to secure payment of its taxes.

City of Toronto v. *Russell,* [1908] A.C. 493, at 501; *Cartwright* v. *City of Toronto,* 50 Can. S.C.R. 215, at 219, cited.

APPEAL by the defendant Langdon, the purchaser at the tax sale in question, from that part of the judgment in the Court of Appeal for Ontario (1) which held that the proceedings purporting, by reason of arrears of taxes due to the Municipal Corporation of the Township of Tisdale, to effect a sale of certain lands in the Township of Tisdale, in the Province of Ontario, were irregular and that the sale must be set aside.

The material facts of the case, for the purposes of the judgment of this Court now reported, are sufficiently set out therein, and are indicated in the above headnote. The appeal to this Court was allowed and the action dismissed with costs throughout.

Section 181 of the Ontario *Assessment Act,* R.S.O. 1927, c. 238, dealt with in the judgment now reported, is set out (in part) in the above headnote.

Wilfrid Heighington K.C. for the appellant.

J. J. Gray for the (plaintiff) respondent.

Peter White K.C. for the respondents the Municipal Corporation of the Township of Tisdale and the Treasurer thereof.

The judgment of the court was delivered by

(1) [1936] O.R. 409; [1936] 3 D.L.R. 194.

1937

LANGDON v. HOLTYREX GOLD MINES LTD.

Davis J.

DAVIS J.—This is an action to restrain the registration of a tax deed and to have the tax sale set aside. Mr. Justice Jeffrey, the learned trial judge, dismissed the action. He found as facts that the taxes for which the land had been sold had been at the time of sale in arrear for more than three years, that the sale had been "openly and fairly conducted," that the land had not been redeemed within one year after the sale and that the official deed of the land had been executed and delivered to the purchaser. These findings of fact were affirmed by the Court of Appeal.

Within sixty days from the day of the sale, the municipal treasurer should have sent by registered mail to the plaintiff as registered owner and to any incumbrancer a notice stating that the land had been sold for taxes, the date of the sale, and that the incumbrancer or owner was at liberty within one year from the day of sale, exclusive of the day of sale, to redeem the estate sold by paying to the treasurer the amount of the purchase money together with ten per centum added thereto and other petty charges, as provided by sec. 174 of the Ontario *Assessment Act* as amended by 23 Geo. V (1933), ch. 2, sec. 14. The sale was on February 28, 1934, and the treasurer, being unaware of this amendment to the statute, made in 1933, followed the provisions of sec. 174 of the statute which had stood unchanged for many years before the amendment, and gave notice as thereby provided, stating that the incumbrancer or owner was at liberty within thirty days from the date of the notice to redeem the estate sold by paying to the treasurer the amount of the purchase money together with fifteen per centum thereon added thereto and other petty charges. The learned trial judge came to the conclusion that sec. 181 of the *Assessment Act* applied to a case such as this and that notwithstanding the neglect, omission or error of the treasurer in not complying with the amended provisions of sec. 174, in default of the taxes being paid or the land being redeemed, the right to bring an action to set aside the deed or to recover the land had been barred. The Court of Appeal, on the other hand, did not think that the provisions of sec. 181 applied, and reversed the trial judge. That is the real point in this appeal. Other alleged irregularities and objections to the sale raised by the plaintiff were determined against the plaintiff by both courts below

and although pressed again upon this Court they are in their very nature such as will not induce this Court to consider an interference with the concurrent conclusions of the courts below in this respect.

We may observe at once that it is an entire misconception of the right of a municipality to enforce payment of its taxes by realizing its statutory lien upon the land to speak of that right in terms of either forfeiture or confiscation. There is no element of either in legislation which enables a municipality to realize upon a lien which the statute has given to the municipality to secure the payment of its taxes. The sole question here is whether or not the provisions of sec. 181 apply to the neglect, omission or error of the treasurer in not giving the notice required by sec. 174 as amended. The intention of the Legislature in enacting sec. 181 is expressly stated in the section to be

> that the owner of land shall be required to pay the taxes thereon within three years after the same are in arrear or redeem the land within one year after the sale thereof; and in default of the taxes being paid or the land being redeemed as aforesaid, the right to bring an action to set aside the said deed or to recover the said land shall be barred.

The Court of Appeal, however, felt bound to follow the decision of Logie J. in *Myers* v. *Cochrane* (1), affirmed with a variation by the Court of Appeal (2), where it was held that the sending of the notice required by sec. 174 is a condition precedent to the right of the proper officials to execute the deed. We cannot accept that proposition of law. Section 174 is not open to any such construction. No such sanction or penalty for non-performance is imposed by the section. A general provision imposing a penalty upon any treasurer, clerk or other officer who refuses or neglects to perform any duty required of him by the Act is provided by sec. 209.

Moreover, the Court of Appeal came to the conclusion that the neglect, omission or error on the part of the treasurer in this case was not covered by the provisions of sec. 181. That Court treated the treasurer as *persona designata* and denied that he was an agent or officer of the municipality within the meaning of sec. 181, relying on two

(1) (1925) 28 Ont. W.N. 165. (2) (1925) 29 Ont. W.N. 3.

1937

LANGDON v. HOLTYREX GOLD MINES LTD.

DAVIS J.

Ontario decisions—*Cummings* v. *Township of York* (1) and *Cruise* v. *The Town of Riverside* (2). In the former case, it was not open to the plaintiff to have the tax sale in question set aside because it had been validated and confirmed by statute; the plaintiff's claim was based upon the failure of the treasurer of the municipality to give the notice required by sec. 174 (then sec. 171) and was a claim for the amount he had been forced to pay to the purchaser at the tax sale in order to obtain a reconveyance of the property to him. Wright J. expressed the view that it was doubtful whether a municipal corporation would be liable for failure to observe or perform a statutory duty where the statute creating such duty does not either directly or by inference give a remedy to the person aggrieved through its non-performance, the cases appearing to him to establish that a municipal corporation is only liable for acts of non-feasance where the statute expressly gives a right of action. But the learned Judge put his conclusion that the action failed upon the ground that the treasurer in selling the land for taxes had acted solely in pursuance of the statutory duties imposed upon him by the provisions of the *Assessment Act* and had not acted as an agent for or on behalf of the defendant corporation and therefore the defendant corporation was not liable for any of the acts of its treasurer relating to the said tax sale. "While it is true," he said, that the defendant corporation appointed the treasurer, yet, so far as the duties of the latter under the Assessment Act are concerned, the same are defined by the statute and are not prescribed by the defendant corporation, so that, in that view, the treasurer is *persona designata* and in the performance of his duty is acting as such and not as servant or agent of the municipality.

Cruise v. *The Town of Riverside* (3) was an action brought by a purchaser of lands at a tax sale against the municipality to set aside the purchase and for the return of the purchase price paid by him. The plaintiff, who had purchased three different parcels of land which had been advertised for sale as one parcel, alleged that the treasurer had informed him that if the lands were sold together as one parcel they could only be redeemed as one parcel. The owner redeemed one of the three parcels and the plaintiff thereupon sought to rid himself of his purchase at the tax

(1) (1926) 59 Ont. L.R. 350. (2) [1935] O.R. 151.
(3) [1935] O.R. 151.

sale of the three parcels. The trial judge set aside the sale and directed the municipality to repay the purchase moneys upon the ground that each parcel of land should have been individually put up for sale and that the parcels could not be sold as one block. The defendant appealed and the appeal was allowed and the action dismissed without prejudice to any other action which the plaintiff might be advised to bring. It was said that the plaintiff had no right to recover the moneys unless and until the sale was set aside and, further, that the sale could not be set aside except in an action to which the treasurer was a party. Mr. Justice Riddell said,

> It must be clearly understood that the only point decided by us is that the plaintiff is not now entitled to maintain this action.

but he did say in the course of his judgment

> that the treasurer in selling was not the agent of the defendant, but was acting under his statutory duty and, consequently, the contract of purchase was not made with the defendant.

We do not read those decisions as deciding that the treasurer, when he gives or omits to give the notice after sale provided by sec. 174, is not an officer of the municipality within the meaning of sec. 181, but if those decisions intended to lay down any such proposition, we cannot accept them.

The sale of the land for taxes was here an accomplished fact and the execution and delivery of the deed of conveyance or transfer of the land became thereafter a corporate act of the municipality, even though specific officers are designated by the statute to execute the deed. By sec. 177 the deed shall be according to statutory form XI, or to the same effect, and the form provides for the seal of the municipality to be affixed. Notwithstanding that the treasurer through neglect, omission or error failed to give the notice after sale within the time and containing the statement required by sec. 174 as amended, the expressed intention and effect of sec. 181 is that the right of the former owner to bring an action to set aside the deed or to recover the land shall be barred where the owner has not paid the taxes on the land within three years after the same became in arrear or has failed to redeem the land within one year after the sale. The purpose of sec. 181 is very plain. While the treasurer in selling the land acted in pursuance of a statutory power vested in him, and in that sense may be

1937

LANGDON v. HOLTYREX GOLD MINES LTD.

Davis J.

regarded as *persona designata,* he did not cease to be, in any proper sense of the words "agent or officer" within the contemplation of sec. 181, an officer of the municipality.

In *City of Toronto* v. *Russell* (1), the Privy Council had occasion to consider the provision of a section of a remedial Act (sec. 8 of 3 Edw. VII, c. 86) passed to cure defects in tax sales which had taken place in the City of Toronto. The section read as follows:

> All sales of lands within the said city, up to and including the one held in the year 1902, and purporting to be made for arrears of taxes in respect of the lands so sold are hereby validated and confirmed, notwithstanding any irregularity in the assessment or other proceedings for imposition of any taxes so in arrear, or any failure to comply with the requirements of *The Consolidated Assessment Act, 1892,* or of *The Assessment Act* in regard to the manner in which any assessment roll, or collector's roll of the said city has been prepared, * * *

Their Lordships at p. 501 expressed their opinion

> that, since the main and obvious purpose and object of the Legislature in passing the Act 3 Edw. 7, c. 86, was to validate sales made for arrears of taxes in the carrying out of which the requirements of the different statutes as to the mode in which they should be conducted had not been observed, and to quiet the titles of those who had purchased at such sales, the statute should, where its words permit, be construed so as to effect that purpose and attain that object.

Their Lordships continued:

> The council can only act through its officers. The notice to be given by the council must be given by or through one of its officers. The omission to give it may therefore be fairly held to be "a failure or omission on the part of an official of the said city" to comply with the requirements of the *Consolidated Assessment Act, 1892,* and the *Assessment Act,* within the words of this statute.

In *Cartwright* v. *City of Toronto* (2), the present Chief Justice of this Court, in discussing the decision in *City of Toronto* v. *Russell* (1), said:

> 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 *prima 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.

We are all of opinion that the neglect, omission or error of the treasurer in this case comes within the provisions of sec. 181 and that the right to bring an action to set aside

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

(2) (1914) 50 Can. S.C.R. 215, at 219.

the tax deed in question or to recover the land is barred by the statute.

The appeal is allowed and the action dismissed with costs throughout.

Appeal allowed with costs.

Solicitors for the appellant: *Symons, Heighington & Shaver.*

Solicitor for the (plaintiff) respondent: *J. J. Gray.*

Solicitor for the (defendants) respondents: *Gauthier & Platus.*