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 *Nov. 24.
 1942
 *Mar. 3.

THE COMMISSIONER OF AGRICUL-
 TURAL LOANS OF THE PROVINCE } APPELLANT;
 OF ONTARIO (PLAINTIFF)..... }

AND

PEGGY MORROW IRWIN (DEFENDANT) . . RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Contract—Agreement to purchase land from tax sale purchaser—Stipulation that the agreement be void if the land be redeemed from tax sale—Redemption by party to the agreement—Question as to latter's right to avail himself of said stipulation under circumstances of the case and on construction of the agreement.

Appellant held a mortgage on farm land, on which there was a prior charge for an annuity to M., which became about \$6,000 in arrears. There was also default on the mortgage and on taxes. The land was sold to respondent at a tax sale for \$1,299.10. Appellant and M. had each a statutory right to redeem the land from the tax sale within one year. If appellant redeemed, that would leave M.'s claim in priority. Appellant agreed with respondent to buy the land from her for \$3,000, paying \$200 deposit, and to pay the balance on his getting title. Clause 7 of the agreement stipulated that, in the event of the land being redeemed from the tax sale, the agreement should have no effect and respondent would repay the \$200. Later M. threatened to redeem; so appellant obtained for \$3,000 a release of M.'s interest; and then redeemed. He sued respondent for repayment of said \$200. Respondent denied liability and counter-claimed for the balance payable under said agreement (after giving credit for sums received as deposit and on redemption).

Held (Kerwin J. dissenting), affirming judgment of the Court of Appeal for Ontario ([1940] O.R. 489): Appellant's action should be dismissed and respondent's counter-claim allowed. Appellant could not by his own act bring about the event of redemption and claim the advantage thereof under said stipulation in his agreement with respondent, the agreement not specifically giving him such a right.

Per Kerwin J., dissenting: Appellant's object in entering into his agreement with respondent was to protect himself so far as possible from further loss in case M. did not redeem. The recitals therein showed that both appellant and respondent were aware that the land could be redeemed; and that the agreement to sell and purchase was subject to that right in whomsoever it might rest. Said clause 7 of the agreement provided for the event of the land being redeemed and had the same effect as if it were agreed that either party could, upon notice, determine the contract.

APPEAL by the plaintiff from the judgment of the Court of Appeal for Ontario (1) reversing the judgment of Rose C.J.H.C. at trial (2).

(1) [1940] O.R. 489; [1940] 4 D.L.R. 338. (2) [1940] O.R. 489, at 489-493.

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

The plaintiff held a mortgage on certain farm land. There was a prior charge on the land for an annuity to one Jemima Might for \$60 monthly, which annuity became about \$6,000 in arrears. The mortgagor defaulted on the annuity, the mortgage and the taxes. Pursuant to provisions of *The Assessment Act*, R.S.O. 1937, c. 272, the land was put up at a tax sale and thereon sold to defendant, on June 22, 1938, for \$1,299.10. Under said Act the plaintiff and the said annuitant had each a right to redeem the land from the tax sale within one year therefrom, upon payment of said sum of \$1,299.10 plus 10 per cent. thereof. If plaintiff redeemed, that would leave the annuitant's claim in priority. Plaintiff entered into an agreement with defendant, dated August 22, 1938 (set out in full in the judgment of Kerwin J. *infra*), by which plaintiff agreed to purchase the land from defendant for \$3,000, of which \$200 was paid as a deposit, the balance to be paid upon receipt and registration of a tax deed and of a deed from defendant to plaintiff; and it was stipulated that if it should happen and in the event that the land was redeemed from the tax sale, the agreement should be null and void and of no effect and in such case defendant agreed to repay to plaintiff any sum received by defendant under the agreement. Subsequently the annuitant threatened to redeem; so plaintiff obtained for \$3,000 a release of her interest, and then redeemed. He sued defendant for repayment of said \$200 paid as a deposit. Defendant denied liability and counter-claimed for \$1,370.99, being the purchase price named in said agreement of August 22, 1938, less sums received by defendant (the deposit and what she received as redemption price). Rose, C.J.H.C., allowed plaintiff's claim and dismissed defendant's counter-claim. His judgment was reversed (Riddell J.A. dissenting) by the Court of Appeal for Ontario, which dismissed plaintiff's action and gave judgment to defendant on her counter-claim. McTague J.A., writing for the majority of the Court, held that plaintiff could not by his own act bring about the event of redemption and claim the advantage thereof under said stipulation in the agreement of August 22, 1938, the agreement not specifically giving him such a right.

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Leave to appeal to the Supreme Court of Canada was granted to plaintiff by the Court of Appeal for Ontario.

John J. Robinette for the appellant.

J. S. Duggan for the respondent.

The Chief Justice and Rinfret and Taschereau JJ. were of the opinion that the appeal should be dismissed with costs, for the reasons stated by McTague J.A. in the Court of Appeal.

Davis J. would dismiss the appeal with costs.

KERWIN J. (dissenting).—The determination of this appeal depends upon the proper construction of a written agreement between the parties, dated August 22nd, 1938, but it is first necessary to state certain events that transpired prior to its execution.

The Agricultural Development Board, the predecessor of the appellant, The Commissioner of Agricultural Loans of the Province of Ontario, was the first mortgagee of the lands in the Township of Toronto in the County of Peel, described in the agreement, but this mortgage was subject to a prior claim to an annuity of one Jemima Might. The mortgagor defaulted in the payments due by him on this annuity, on the mortgage and on the taxes payable on the lands to the Township of Toronto. On June 22nd, 1938, pursuant to the provisions of *The Assessment Act*, R.S.O. 1937, chapter 272, the Township Treasurer sold the lands for arrears of taxes to the respondent, Mrs. Irwin, for \$1,299.10. In accordance with the Act, the appellant and Jemima Might had a statutory right to redeem the lands from the tax sale within one year from the date of the sale upon the payment of this sum together with an additional ten per centum thereof. If the appellant redeemed, Jemima Might would have priority over the appellant's mortgage with respect to the arrears of her annuity which amounted at that time to about \$6,000. If Jemima Might redeemed, she would have priority over the appellant's mortgage for those arrears together with the amount paid by her for redemption.

It was under these circumstances that the agreement in question was entered into. It reads as follows:—

This Agreement made in Triplicate this 22nd day of August, 1938,

BETWEEN:

PEGGY MORROW IRWIN, of the City of Toronto in the County of York, hereinafter called the Vendor

Of the First Part;

AND

THE COMMISSIONER OF AGRICULTURAL LOANS, hereinafter called the Commissioner,

Of the Second Part:

Whereas the lands hereinafter described were, on the 22nd day of June, 1938, sold for taxes by the Treasurer of the Township of Toronto, pursuant to the provisions of the Assessment Act, R.S.O. 1937, Ch. 272.

And whereas at the said sale the Vendor purchased the said lands.

And whereas the Commissioner is desirous of purchasing the said hereinafter described lands from the Vendor, provided the same are not redeemed within the time limited as provided in the Assessment Act.

And whereas the Vendor has agreed to sell and convey the said lands to the Commissioner at and for the price and sum hereinafter mentioned, provided the same are not redeemed from the said tax sale.

Now therefore this Agreement witnesseth that in consideration of the terms and conditions herein contained and in consideration of the sum of Three Thousand (\$3,000) Dollars to be paid by the Commissioner to the Vendor (the receipt of \$200 of which is hereby by him acknowledged) the parties hereto do hereby covenant and agree as follows:—

1. The Vendor hereby agrees to sell and the Commissioner hereby agrees to purchase *All and Singular* that certain parcel or tract of land and premises, situate, lying and being in the Township of Toronto, in the County of Peel and Province of Ontario, and being composed of lot Number Seven (7) in the First Concession West of Hurontario Street, in the said Township of Toronto, containing by admeasurement two hundred (200) acres, be the same more or less, *saving and excepting* therefrom the West half of the West half of the said Lot Seven (7), containing fifty (50) acres more or less.

2. The Commissioner hereby agrees, upon receipt and registration of a Tax Deed in proper form duly executed in accordance with the provisions of the Assessment Act R.S.O. 1937, Ch. 272, and upon receipt and registration of a deed in proper form from the Vendor to the Commissioner, to pay the Vendor the balance of the aforementioned sum of money.

3. The Vendor hereby sets over, transfers and assigns to the Commissioner the Treasurer's Certificate of Sale obtained at the aforementioned tax sale and all the right, title and interest of the Vendor therein and of in and to the said lands.

4. The Vendor hereby sets over, transfers and assigns to the Commissioner all the rights, claims and demands of the Vendor to and for a Tax Deed from the said Township and the officials of the said Township and hereby irrevocably nominates, constitutes and appoints the Commissioner his true and lawful attorney to obtain the same.

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5. The Vendor hereby covenants and agrees with the Commissioner that he has not at any time heretofore and will not at any time hereafter do, commit, execute or knowingly or wilfully suffer any act, deed, matter or thing whatsoever, whereby or by means whereof the said lands and premises hereby sold and intended to be conveyed to the Commissioner or any part or parcel thereof are, is or shall or may be in anywise impeached, charged, affected or encumbered in title, estate or otherwise howsoever.

6. The Vendor hereby covenants and agrees with the Commissioner that he will at his request execute and deliver to the Commissioner a deed in proper form of the said lands and premises.

7. The parties hereto mutually covenant and agree that if it should happen and in the event that the said lands are redeemed from the hereinbefore-mentioned Tax Sale under and by virtue of the provisions of the Assessment Act, then and in that event, this agreement shall be null and void and of no effect, and in such case the Vendor covenants and agrees to repay to the Commissioner without interest, any sum or sums of money received by him hereunder.

This Agreement is to enure to the benefit of and be binding upon the respective heirs, executors, administrators, successors and assigns of the parties hereto.

In witness whereof the parties hereto have hereunto set their hands and seals.

The object of the appellant entering into this arrangement was to protect himself, so far as possible, from any further loss in case Jemima Might did not redeem. After the execution of the agreement, Jemima Might for the first time began to assert her rights and through her solicitor approached the appellant and threatened to redeem the lands. As a result, the appellant paid her \$3,000 and took a quit claim deed from her and one from the mortgagor. On June 13th, 1939, the appellant redeemed and the respondent received from the Township Treasurer the amount she paid at the tax sale, with the additional ten per centum. The appellant thereupon demanded the return of the \$200 paid under the agreement. This being refused, an action was brought, in which the respondent counter-claimed for \$1,370.99, being the balance due under the contract after giving credit for the amount received by her from the Township Treasurer, and, in the alternative, for damages for the same amount. The appellant succeeded at the trial before the Chief Justice of the High Court but failed in the Court of Appeal, Riddell J.A. dissenting.

The appeal should succeed. The third and fourth recitals in the agreement of August, 1938, show that both parties were aware that the lands could be redeemed under the provisions of the *Assessment Act*, and that the agreement to sell and purchase subsequently appearing in the document was subject to that right in whomsoever it might rest. The seventh clause of the agreement provides for the event of the lands being redeemed and has the same effect as if it were agreed that either party could, upon notice, determine the contract.

On that construction of the agreement, the decision in *New Zealand Shipping Company v. Société des Ateliers et Chantiers de France* (1) need not be considered. There is no difficulty in the exact point that was there decided, but certain passages in some of the speeches of the peers have given rise to differences of opinion, as appears from the judgments of the Chief Justice of the High Court, and of the members of the Court of Appeal in this case, and of Russell J., as he then was, in *In re Meyrick's Settlement* (2). Taking the view I do, however, of the agreement, it is unnecessary to discuss these differences or the questions raised by the appellant that the respondent, having no title, could not counter-claim for specific performance, and had suffered no damage.

The appeal should be allowed and the judgment at the trial restored. The appellant is entitled to his costs of the appeal to the Court of Appeal on the Supreme Court scale. In accordance with the order of the Court of Appeal granting leave to appeal, there will be no costs of the appeal to this Court to either party.

Appeal dismissed with costs.

Solicitor for the appellant: *John F. Perrett.*

Solicitor for the respondent: *J. B. O'Brien.*

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(1) [1919] A.C. 1.

(2) [1921] 1 Ch. 311.