1942
*June 18, 19, 22.
*Oct. 6.

THE CORPORATION OF THE TOWNSHIP OF TISDALE, P. H. MURPHY AND B. W. LANG (DEFENDANTS) ..... APPELLANTS;

AND

ALLAN G. CAVANA AND WILLIAM GRIFFITH BINGHAM (EXECUTOR OF THE ESTATE OF HORACE A. BINGHAM, DECEASED) (PLAINTIFFS) ..... RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

*Assessment and taxation—Mines and minerals—Owner of mineral land transfering surface rights—Non-assessability of his mining rights thereafter—Invalidity of subsequent tax sale in so far as purporting to affect mining rights—The Assessment Act, R.S.O., 1927, c. 238, ss. 40 (4) (5) (10), 181; R.S.O., 1937, c 272, ss. 14 (1), 15 (1)—The Conveyancing and Law of Property Act, R.S.O., 1927, c. 137, ss. 15, 16, 17.*

C., the owner of certain mineral land in Ontario, transferred to F. on December 30, 1930, by transfer registered on February 12, 1931, the surface rights thereof, and thus, according to certificate of ownership issued under the Ontario *Land Titles Act*, became the owner in fee simple with an absolute title, of only the mines, minerals and mining rights of said land. The defendant township in 1939 purported to sell the land for taxes, and C. brought action attacking such sale in so far as it purported to affect his interest in the land.

*Held:* (1) A settlement in an action brought in December, 1931, was, so far as C. was concerned, a settlement for all taxes for 1930 and 1931, and no lien for any taxes for those years against his interest in the land then remained; and in the subsequent years in question C. was not, nor were his mining rights, in fact assessed.

(2) After the severance of estates created by said transfer to F., C.'s mining rights—being ownership of the ores, mines and minerals, and such right of access for the purpose of winning them as is incidental to a grant of ores, mines and minerals—were not assessable. *The Assessment Act*, R.S.O., 1927, c. 238, s. 40 (4) (5) (10) (the word "minerals", in the enactment in s. 40 (4) that "the minerals in, on or under such land shall not be assessable", held synonymous with "mining rights"); *The Conveyancing and Law of Property Act*, R.S.O., 1927, c. 137, ss. 15, 16, 17; *Bucke* v. *Macrae Mining Co. Ltd.*, [1927] S.C.R. 403, particularly referred to.

As to ss. 14 (1) and 15 (1) of *The Assessment Act*, R.S.O., 1937, c. 272—The right of access was appurtenant to the minerals and, like the latter, was exempt from assessment.

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

There being no taxes on C.'s mining rights in arrears for any period for which they could be sold, s. 181 of *The Assessment Act*, R.S.O., 1927, c. 238, had no application.

Judgment of the Court of Appeal for Ontario, [1942] O.R. 31, affirming judgment of Roach J. (*ibid*) which (*inter alia*) declared that the tax sale in question, in so far as it included or purported to include C.'s estate or interest in the land, was illegal and void, affirmed.

APPEAL by the defendants from the judgment of the Court of Appeal for Ontario (1) dismissing their appeal from the judgment of Roach J. (2) which (*inter alia*) declared that a certain tax sale of land in question, in so far as it included or purported to include the estates or interests of the plaintiffs in the land, was illegal and void.

The plaintiff Cavana had been, prior to December 30, 1930, the owner of the land in question, which was mineral land, and on that date, by transfer registered on February 12, 1931, he transferred the surface rights thereof to one Ferguson. The tax sale in question by the defendant Township of Tisdale took place in 1939. The plaintiff Bingham was the owner of a certain lease dated June 1, 1934, from Cavana of the mines, minerals and mining rights of the land. The defendant Murphy was the treasurer of the Township. The defendant Lang was the purchaser at the tax sale in question.

The material facts of the case are sufficiently set out in the reasons for judgment of this Court now reported and in the reasons for judgments below (1) (2). The appeal to this Court was dismissed with costs.

*H. E. Manning K.C.* and *T. R. Langdon* for the appellants.

*R. L. Kellock K.C.* for the respondents.

The judgment of the Court was delivered by

KERWIN J.—This action is concerned with a tax sale held by the Township of Tisdale in the Province of Ontario in the year 1939. In 1909, the plaintiff, Allan G. Cavana, purchased the fee simple in the north part of broken lot 1, concession 5, in the Township of Tisdale, in the Province of Ontario, registered in the Land Titles Office as parcel

(1) [1942] O.R. 31; [1942] 1 D.L.R. 465.
(2) [1942] O.R. 31, at 31-38.

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1125 in the register for Algoma, North Section. It is admitted that these lands were mining lands. On December 30th, 1930, Cavana transferred to Charles D. Ferguson the surface rights in the lands, which in the meantime had become parcel 818 in the register for Sudbury, North Division. According to the certificate of ownership, issued under the *Land Titles Act,* Cavana thus became the owner in fee simple, with an absolute title, only of the mines, minerals and mining rights of the lands described. Ferguson became the owner of the surface rights of the same lands, entered as parcel 3191 in the register for Whitney and Tisdale.

In the assessment rolls of the Township of Tisdale for each of the years 1930 and 1931, Cavana is assessed as the owner of these lands without any reference to surface rights or mining rights. By a letter dated April 17th, 1931, Cavana notified the Clerk of the Township that he was not the owner of the lands assessed in his name. Presumably Cavana had paid the taxes assessed against the lands from 1909 to 1929 inclusive. The taxes for 1930 and 1931 were not paid and in December, 1931, an action to recover them was commenced by the Township against Cavana and Ferguson. Apparently Ferguson did not defend the action. Cavana did defend but ultimately a settlement was arrived at between him and the Township. Without entering into the details, I agree with the trial judge and Masten J. and Henderson J., that so far as Cavana was concerned, this was a settlement of the claim for the total amount of taxes for both years, and, this claim being settled, no lien for the taxes for those years could continue to exist. The claim of the Township to uphold the tax sale in question on the basis of there being any taxes in arrears for either of those years therefore fails.

Hence the assessment roll for 1932 is the earliest that need be examined. Under column 2 of the roll for that year, Charles D. Ferguson was assessed as owner. In the second part of that column (divided from the first by a vertical line), under the address of Ferguson,—" Orillia, Ont.", appears " also A. G. Cavana, Orillia ". Opposite this last entry but under column 6, which is headed " Occupation ", appear the words " mining rights ". While the rolls for the years 1933, 1934 and 1935 are not exactly

the same, it may be stated that for all practical purposes similar entries appear. In no case does Cavana's name appear in the appropriate part of column 2 (what may be termed the first half), to designate him as the owner assessed. Thereafter Cavana's name does not appear in any way on the assessment rolls, so that the same remark applies to the years subsequent to 1935. The statement of defence alleges that Ferguson was the only person assessed during the years 1932 to 1939 inclusive but, even without such allegation, I would have no hesitation in coming to the conclusion that he was in fact the only person assessed.

It is contended that, notwithstanding that a severance occurred in 1930 of the mining rights and the surface rights, the former were assessable. It is true that, by section 1 of *The Assessment Act,* R.S.O., 1927, chapter 238:—

> (*h*) "Land," "Real Property" and "Real Estate" shall include:—
>
> * * *
>
> 3. All mines, minerals, gas, oil, salt, quarries and fossils in and under land;

and that by section 4

> All real property in Ontario * * * shall be liable to taxation, subject to the following exemptions:—

none of which exemptions apply. The question, however, is to be determined by a consideration of the provisions of subsections 4 and 5 of section 40 and also of subsection 10, which was added by section 2 of chapter 39 of the 1928 Statutes. These subsections read:—

> (4) The buildings, plant and machinery in, on or under mineral land, and used mainly for obtaining minerals from the ground, or storing the same, and concentrators and sampling plant, and, subject to subsection 8, the minerals in, on or under such land, shall not be assessable.
>
> (5) In no case shall mineral land be assessed at less than the value of other land in the neighbourhood used exclusively for agricultural purposes.
>
> (10) Where any estate in mines, minerals or mining rights has heretofore or may hereafter become severed from the estate in the surface rights of the same lands, whether by means of the original patent or lease from the Crown, or by any act of the patentee or lessee, his heirs, executors, administrators, successors or assigns, such estates after being so severed shall thereafter be and remain for all purposes of taxation and assessment separate estates notwithstanding the circumstance that the titles to such estates may thereafter be or become vested in one owner.

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The argument that because section 40 is one of several that appear in *The Assessment Act* under the heading "Valuation of Lands", subsection 4 thereof deals only with the valuation and not an exemption, was advanced in this Court in *Township of Bucke* v. *Macrae Mining Co. Ltd* (1), and was rejected (p. 409). Subsection 4 declares in explicit terms that (subject to subsection 8, which has no bearing in this case) the minerals in, on or under mineral land shall not be assessable. If there had been no severance, the mineral land purchased by Cavana in 1909 would have fallen within the terms of subsection 5, but, after severance, only the surface rights were assessable. Subsection 4 refers only to "minerals" but the judgment in the *Macrae* case (1) treats that expression as synonymous with "mining rights" It is suggested that that part of the judgment dealing with this point is *obiter*. Assuming that to be so, I have no hesitation in expressing my concurrence in that opinion.

That view is confirmed by sections 15, 16 and 17 of *The Conveyancing and Law of Property Act*, R.S.O., 1927, chapter 137. By force of these provisions, the expression "surface rights" in the transfer from Cavana to Ferguson is to be construed as covering the lands described, with the exception of the ores, mines and minerals on or under the land and such right of access for the purpose of winning the ores, mines and minerals as is incidental to a grant of ores, mines and minerals. Cavana, therefore, was the owner of the ores, mines and minerals and the right of access specified, and all these mineral rights in the lands were not assessable. Subsection 10, which was enacted after the decision in *Bucke* v. *Macrae Mining Co. Ltd.* (1), refers to a case where, after severance, the two so-called estates became vested in one owner. The fact that the legislature enacted that, notwithstanding such vesting, the two estates should remain separate for taxation and assessment purposes, indicates that the conclusion expressed above is the correct one.

The tax sale took place in 1939. By that time the Revised Statutes of Ontario, 1937, were in force wherein *The Assessment Act* appears as chapter 272. Subsection 1

(1) [1927] S.C.R. 403.

of section 14 and subsection 1 of section 15 of that Act are relied on by the appellants. These subsections are as follows:—

14. (1) Where an easement is appurtenant to any land it shall be assessed in connection with and as part of such land at the added value it gives to such land as the dominant tenement, and the assessment of the land which as the servient tenement, is subject to the easement shall be reduced accordingly.

15. (1) Where land sold for arrears of taxes was a dominant tenement at the time of sale and was so sold after the 3rd day of April, 1930, the easements appurtenant thereto shall be deemed to have passed to the purchaser.

The right of access is appurtenant to the minerals and, like the latter, was exempt from assessment.

There is nothing inconsistent with the above in the reasons for judgment in *Township of Tisdale* v. *Hollinger Consolidated Gold Mines Limited* (1). What Mr. Justice Cannon was there dealing with was an entirely different matter; the effect of a severance in connection with assessability was not in issue.

Reference was made to what certain expressions used in clauses (*k*), (*m*), (*n*) and (*o*) of section 1 of *The Mining Act,* R.S.O., 1927, chapter 45, should be taken to mean or include, but no assistance in the determination of this appeal may be gained from a consideration of those provisions. Section 181 of the 1927 *Assessment Act* (see now section 185 of R.S.O., 1937, chapter 272) was also relied on by the appellants. That section is in these terms:—

181. If any part of the taxes for which any land has been sold in pursuance of any Act heretofore in force in Ontario or of this Act, had at the time of the sale been in arrear for three years as mentioned in section 130, 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 upon the former owner of the land and upon all persons claiming by, through or under him, it being intended by this Act 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 Township purported to sell Cavana's mining rights. A settlement was made of the taxes for 1930 and 1931, which taxes were based on the assessment rolls for those

(1) [1933] S.C.R. 321.

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years. Cavana's mining rights were not assessable in the remaining years and were not in fact assessed. Therefore, there were no taxes on those rights in arrears for any period for which they could be sold, and the section has no application.

It was argued that Cavana was in law and in equity the owner at all material times of all the interests in the fee simple, of both the mining and the surface rights, in the lands in question. This is based upon the fact that in the transfer to Cavana and in the certificate of ownership issued to him after the severance, he is described as a trustee. The argument is that there was a resulting trust when he, as trustee, conveyed the surface rights to Ferguson. Whatever might be the position as between Cavana and Ferguson, it is impossible for the appellants to raise any such issue in these proceedings.

Certain defects in the assessments and the tax sale were alleged by the respondents, which need not be considered. The appeal should be dismissed with costs.

*Appeal dismissed with costs.*

Solicitors for the appellant Township of Tisdale and the appellant Murphy: *Langdon & Langdon.*

Solicitors for the appellant Lang: *Lang & Michener.*

Solicitors for the respondents: *Mason, Foulds, Davidson & Kellock.*