THE NORTH BRITISH CANADIAN INVESTMENT COMPANY } APPELLANTS;

AND

THE TRUSTEES OF ST. JOHN SCHOOL DISTRICT, No. 16, OF THE NORTH-WEST TERRITORIES ..... } RESPONDENTS.

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*Oct. 20, 21;
Nov. 4.
*Nov. 21.

ON APPEAL FROM THE SUPREME COURT OF THE NORTH-WEST TERRITORIES.

Appeal—Jurisdiction—Land Titles Act—"Torrens System"—Involuntary transfers—Registry laws—Confirmation of tax sale—Persona designata—Court of original jurisdiction—Interlocutory proceeding—Constitutional law—Conflict of laws—Legislative jurisdiction—Construction of statute—Retroactive effect—Redemption of land sold for taxes——Vesting of title—Interest in lands—Equitable estate—N. W. T. Ord. 1896, *c.* 2; 1900, c. 10; 1901, *cc.* 12, 29 *and* 30—57 *&* 58 *V. c.* 28 *(D)—Practice—Form of order.*

The confirmation of a tax sale transfer by a judge of the Supreme Court of the North-West Territories, under section 97 of the "Land Titles Act, 1894," is a matter or proceeding originating in a court of superior jurisdiction and an appeal will lie to the Supreme Court of Canada from a final judgment of the full court affirming the same. *City of Halifax* v. *Reeves* (23 Can S. C. R. 340) followed. Sedgewick and Killam JJ. *contra.*

The provisions of the N. W. T. ordinance, ch. 2, of 1896, vesting titles of lands sold for taxes in the purchaser forthwith upon the execution of the transfer thereof free of all charges and incumbrances other than liens for existing taxes and Crown dues, are inconsistent with the provisions of the 54th, 59th and 97th sections of the "Land Titles Act, 1894," and, consequently, *pro tanto, ultra vires* of the Legislature of the North-West Territories. Sedgewick and Killam JJ. contra.

The second section of the N. W. T. ordinance, ch. 12 of 1901 providing for an extension of the time for redemption of lands sold

*PRESENT—Sedgewick, Girouard, Davies, Nesbitt and Killam JJ.

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for taxes, deals with procedure only and is retrospective and save the rights of mortgagees prior to the tax sale so as to permit them to come in as interested persons and redeem the lands. Sedgewick and Killam JJ. contra. *The Ydun* (15 Times L. R. 361) referred to. *In re Kerr* (5 Ter. L. R. 297) overruled.

Per Sedgewick and Killam JJ. The provisions of the said section 2 cannot operate retrospectively so as to affect cases in which the transfers had issued and the right of redemption was gone as in the present case.

APPEAL from the judgment of the Supreme Court of the North-West Territories, dismissing an appeal from an order by Mr. Justice Wetmore confirming the transfer of the lands in question on a sale for arrears of taxes.

The lands in question were, on 23rd January, 1897, sold for arrears of school taxes, under the provisions of the North-West Territories ordinance, ch. 22 of 1892 and ch. 22 of 1896, and the trustees became the purchasers under the provisions of section 173 of the latter ordinance, receiving the usual transfer as provided by sections 176 and 184 of the same ordinance. A caveat was lodged by the purchasers in the Land Titles Office and, upon the expiration of the time allowed for the redemption of the lands, they applied (in May, 1902,) to the judge of the district where the lands were situated for the confirmation of the transfer under section 97 of the "Land Titles Act", 57 & 58 Vict. ch. 28 (D.) The necessary evidence was filed on this application, including a registration abstract, as follows:

"LAND TITLES OFFICE FOR THE ASSINIBOIA LAND REGISTRATION DISTRICT.

"REGINA, 22nd July, A.D. 1902.

"Registration Abstract and Certificate of the Title of the N. W. ¼ of Section 14 in Township 15, in Range

3, West 2nd Meridian, in Assiniboia in North-West Territories;

Number of Instrument.	Nature of Instrument.	Date of Instrument.	Date of Registry.	Grantor.	Grantee.	Quantity of Land.	Consideration. Amount of Mortgage, etc.	Remarks.
3139	Cert. of Title.	March 17/90	March 17/90	Registrar.	John McLaren and Charles L. Benedict.	....	$400 00	
1580	Mortgage.	June 17/86	June 22/86	Arthur Biggins et ux.	North British Canadian Investment Co., Ld.	....		
5742	do	Jan'y 11/90	June 6/90	John McLaren et al.	Allan Brydges et al.	....	$200 00	
22082	Tax Sale Notice.	Jan'y 23/97	March 11/97	W. A. Mann, Treas.	St. John S.D. No. 16, N.W.T.	....		

"I certify that the above are all the instruments registered in this office, mentioning the above lands.

(Signed) "J. KELSO HUNTER,

Deputy Registrar, Assiniboia Land Registration District.

The persons appearing by this record to have any interest in the land were notified of the application by the trustees and an opposition was entered by the company, appellants, who claimed to be interested as mortgagees and that they had the right to redeem the lands by paying the trustees the amount of their purchase money with interest, charges and costs as provided by sec. 2 of the N. W. T. ordinance ch. 12 of 1902, the company alleging that these sums amounted altogether to $90, for which they mailed a cheque to the trustees. This cheque, however, was returned as being tendered by a party without interest in the land and, at any rate, insufficient. Upon the investigation as to the regularity of the transfer to the trustees, Mr. Justice Wetmore, the judge of the

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Supreme Court of the North-West Territories, to whom the application was made, referred the matter to that court, *in banco*, stating the circumstances and concluding as follows:—

"It appeared by the transfer executed by the treasurer that the land in question was sold on the 23rd January, 1897, and that the transfer was executed on the 26th January, 1898.

"Only three questions were urged at the hearing or argument against the company's right to redeem;—

"1. That the time appointed for the hearing was the 29th of July last, and the company had no right to redeem after that date.

"2. That the transfer, immediately upon its execution on 26th January, 1898, by virtue of sections 184 and 185 of 'The School ordinance, 1896,' which was then in force, vested the land and all rights thereto in the applicants. And that ordinance No. 12 of 1901 has no retroactive operation to defeat such vested rights.

"3. That under section 179 of 'The School Ordinance, 1896,' the company had no right to redeem.

"By virtue of section 140 of "The Land Titles Act, 1894," I refer the matter to the court *en banc*.

"The question submitted is:—Has the company a right to redeem the land?

"Dated 22nd November, 1902.

"E. L. WETMORE, J. S. C."

The court, *in banco*, after hearing arguments upon the reference, answered that the company was not entitled to redeem the lands and that the tax sale transfer should be confirmed. Mr. Justice Wetmore confirmed the sale accordingly and transmitted the record of his investigation and the proceedings thereon to be filed in the Land Titles Office.

The company now appeals, raising the following points in the factum, namely:

(1) Is section 2, chapter 12, ordinances 1901, retroactive?

(2) If so, are the appellants entitled to redeem?

(3) If the reply to the last question should be in the negative, were the appellants entitled nevertheless to raise the question that the sale was invalid?

When the appeal came on for hearing in the Supreme Court of Canada, objection was taken by motion, on behalf of the respondents, to the jurisdiction of that court to hear the appeal for the following reasons:—

Coutlée K.C. for the motion. The matter or proceeding on which the judgment of the court below was rendered did not originate in a court of superior jurisdiction and special leave was not obtained under subsec. (*i*) of sec. 24, of the Supreme Court Act. The judge, designated by the Land Titles Act, 1894, and the ordinances, is referred to, *nominatim*, as a special examiner on applications for the registration of involuntary transmissions under the "Torrens System"; he did not in any sense constitute or represent a "court" of any kind, certainly not a "court of superior jurisdiction." He was merely an officer of the Land Titles Office for a special purpose, the act he performed was ministerial only and merely interlocutory, the final executive function, that is, the issue of the new certificate, being performed by the registrar, after the lapse of the time limited. See *Virtue* v. *Hayes* (1); *Hamel* v. *Hamel* (2); *Shaw* v. *The Canadian Pacific Railway Co.* (3); *Molson* v. *Barnard* (4); *Rural Municipality of Morris* v. *London and Canadian Loan and Agency Co.* (5); *McDougall* v. *Cameron* (6). Moreover, the appel-

(1) 16 Can. S. C. R. 721.
(2) 26 Can. S. C. R. 17.
(3) 16 Can. S. C. R. 703.
(4) 18 Can. S. C. R. 622.
(5) 19 Can. S. C. R. 434.
(6) 21 Can. S. C. R. 379.

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lants' interest had been cut out and they could not appeal under sec. 139 of the Act; and by confirmation of the transfer and transmission of the record of his investigation to the Land Titles Office, the judge became *functus officio*, consequently, there could be no appeal, even to the Supreme Court of the North-West Territories, the judgment now appealed from is a nullity and, therefore, no appeal lies from that court to the Supreme Court of Canada.

This case is ruled by *The Canadian Pacific Railway Co.* v. *The Little Seminary of Ste. Therèse* (1), where the statute coincided with the enactments in question in this case. In *The City of Halifax* v. *Reeves* (2), the Nova Scotia statute gave the jurisdiction to issue the certificate to the Supreme Court of that province or a judge thereof, representing that court, in chambers; the petition was filed "in court" and the "summons" issued by the "clerk of the court." (54 Vict. ch. 58, s. 455, N. S.) Here the application was presented to the judge in person and he ordered the "notices" to be served in the same manner as the officer known as the examiner of titles would do in ordinary cases.

The record shows no proof of any interest in the appellants which would entitle them to maintain an appeal either in the court below or in this court.

Ewart K.C. contra. This case cannot be distinguished from the case of *The City of Halifax* v. *Reeves* (2), which is the latest case decided in this court on such objections as have been raised.

The court reserved judgment on the question of jurisdiction and, in the meantime, ordered that the hearing on the merits should proceed.

Ewart K.C. for the appellants. The point involved is whether sec. 2 of the N. W. T. ordinance of 1901 is

(1) 16 Can. S. C. R. 606. (2) 23 Can. S. C. R. 340.

etrospective. The cases which determine that vested interests will not be affected by subsequent legislation, unless the statute clearly indicates that intention, are not denied. The contention now is two-fold: (1) The tax purchasers had not a vested right as asserted, and; (2) Even if they had, the ordinance is wide enough to re-open the right to redeem.

The N. W. T. legislation assumes to declare that a school district transfer upon a sale for taxes "shall not only vest in the purchasers all rights and properties which the original holder had therein, but shall also purge and disencumber such land from all mortgages." This ordinance is, however, in direct conflict with the Dominion statute (1894, ch. 28, sec. 54) which declares that "after a certificate has been granted for any land, no instrument until registered under this Act shall be effectual to pass any estate or interest in any land." (See also sec. 59).

The ordinance, moreover, is only operative when the tax sale is valid, for it expressly excludes the three following cases:—1. Where the sale was not conducted properly; 2. Where there were no school taxes in arrear and; 3. Where the land was not liable to be assessed.

It is clear, therefore, that the tax transfer had no such effect as that assumed by the court below, and that no estate whatever had vested in the tax purchaser. The right to redeem had expired, but that right was extended by the ordnance under consideration.

The only remaining question is whether or not the mortgagees were included under the words "any person interested in such land." It is impossible to contend otherwise, for it is quite clear that the legal estate remains in the mortgagees. The "person interested" was some person who would desire to "redeem the

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said land." The judgment appealed from declaring that there was no person entitled to redeem because all rights to the land had been cut out by the tax sale, is wrong. That interpretation would reduce the paragraph to a nullity. It assumes that there are some persons interested in redemption, and the "persons" intended by the ordinance were those who would benefit by the redemption. This is clear by the 3rd section, which provides that upon payment of the taxes and interest, all rights of the purchaser are to cease, that is, to cease as to persons entitled to redeem, and those would be the persons who would be entitled to the land but for the tax sale.

That the ordinance is retroactive is clearly shewn by its language—comparing particularly secs. 1, 2 and 4. The whole ordinance, including the particular section in question, is retroactive as that section cannot be separated from the rest.

Coutlée K.C. and *Macdougall* for the respondents. The Legislature of the N. W. Territories had power to pass the legislation in question dealing with property and civil rights in the territories. Parliament, in enacting the Land Titles Act, dealt merely with matters of procedure and did not, in any way attempt to legislate as to property and civil rights. The Act merely provides a procedure for the purpose of giving certainty to *evidence* of title. It does not deal with titles themselves; they must exist previously, apart from and outside of that Act, in some way or another. The Land Titles Act declares that, for registration purposes, the passing of the title, on transfer or transmissions, shall, so far as the evidence is concerned, be in suspense until the issue of the new certificate of title; it never intended to affect the validity of an owner's title, nor to diminish his rights, but required certain proofs to be furnished and approved as

a condition precedent to the registration, *i. e.*, confirmation of the transfer in the case of involuntary transmissions. In the meantime, in this case, the title vested in the purchaser at the tax sale on the execution of the transfer freed from all encumbrances. All other interests were cut out, likewise all rights of redemption, and the purchasers were entitled to confirmation of their actually existing title, unless the sale could be invalidated on account of fraud, collusion, no taxes being due or exemption from taxation. The Land Titles Act recognizes the validity of these tax titles and provides for their registration; it does not deny the vesting of the title; it provides means for its confirmation and the issue of a certificate as to its indefeasibility. See *Jellett* v. *Wilkie* (1), per Strong C.J. at pages 289-291.

The appellants' interest, if they ever had any, was gone long prior to the application; the trustees had a good title against all the world, although not yet registered. The appellants made no proof of any interest, no mortgage debt is proved. The abstract does not prove it. In fact, it only shews a mortgage from a stranger to the title and without consideration. A mortgage under the "Torrens System" is only a lien, at any rate, and conveys no estate. Even if they had any interest to entitle them to redeem, the ordinance requires the redemption to be made *before the hearing* of the application and they failed to do this. They are, therefore, estopped by the very statute they invoke.

The ordinance of 1901 is retroactive only in its provisions as to procedure. The second and third sections do not deal with procedure but with vested rights accruing subsequently and cannot affect rights in property which vested prior to its enactment. *Nova constitutio futuris formam imponere debet, non præteritis.* See Maxwell on Statutes, (3 ed.) ch. 8, and the cases

(1) 26 Can. S. C. R. 282; 2 Ter. L. R. 133.

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there collected, particularly the remarks at pp. 298 to 318; Hardcastle on Statutes, pp. 353, 354, 357. All presumptions are against disturbing vested rights and no statutes should be so construed unless absolutely necessary. There is no such necessity here for the Dominion Act regulating the procedure as to the registration is quite reconcilable with the ordinance creating the title; they are necessary one to the other.

We rely upon the authorities cited by the judges of the court below on the reference and the remarks of Mr. Justice Scott *In re Kerr* (1).

SEDGEWICK J. (dissenting). — I dissent from the decision of the majority of the court for the reasons stated by my brother Killam.

GIROUARD J.—I concur in the opinion of my brother Davies.

DAVIES J.—As to the question of this court's jurisdiction I entertained great doubts but, being unable to distinguish this case from that of the *City of Halifax* v. *Reeves* (2), I agree in holding that we have jurisdiction.

As to the merits I have reached the conclusion that the appeal must be allowed.

The first question to be decided is whether or not the ordinances of the North-West Territories, under which the sale of the lands in question in this appeal took place, were in conflict with the plain provisions of the "Land Titles Act, 1894," and if so, whether such ordinances, to the extent to which they were so in conflict, were *ultra vires*. The question has lost much of its general importance by the late amendments to the North-West Ordinances bringing them

(1) 5 Ter. L. R. 297. (2) 23 Can. S. C. R. 340.

into accord with the Land Titles Act. The ordinances under which the sale of the lands for taxes took place which the appellants claim to redeem not only vested such lands in the purchaser on the execution of the transfer to him, but also

purged and released such land from all payments, charges, liens, mortgages and incumbrances of whatever nature and kind other than existing liens of the School District or Crown.

They further provided that, after the expiration of one year from the date of the transfer, these latter should be conclusive evidence of the assessment and valid charge of the taxes on the lands therein described and that all necessary formalities had been taken and observed and that, afterwards, such sale and transfer should only be questioned or set aside on three specified grounds which are not now in question.

It was admitted that, if these provisions were *intra vires*, the rights of the appellants, whatever they were in the lands in question, had become extinguished and that, unless they were revived by the ordinance of 1901, the appellants were not interested parties within the meaning of the ordinance and had no right to redeem.

Section 97 of the "Land Titles Act, 1894," amongst other things, enacted that

upon the completion of the time allowed by law for redemption and upon the production of the transfer of the land in the prescribed form with proof of its due execution by the proper officer *and a judge's order confirming the sale*, the registrar shall, four weeks after the delivery to him of the transfer and *the judge's order of confirmation*, register the transferee as absolute owner of the land so sold.

By this legislation the production of a judge's order confirming the sale was made just as essential to give any effect to the sale as the production of the transfer itself.

The object Parliament had in view was very plain. It desired to give an effective means for the recovery

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of taxes against lands while providing that owners, mortgagees and others interested should be notified through the confirmation proceedings before their interests in the land should be, by statutory provisions, transferred to another party. The confirmation of the sale became, therefore, as necessary and essential a condition precedent to giving statutory effect to a sale which disposed of and barred third parties' rights as the production and proof of the transfer by the proper officer. The territorial ordinance under which the lands in question were sold changed all that. It dispensed with the necessity of any previous confirmation of the sale by a judge and gave the effect to a transfer by itself and without confirmation as above pointed out by me. If this latter is *intra vires* it operates *pro tanto* as a repeal of the 54th, 59th and 97th sections of the Land Titles Act and dispenses with the necessity of a judicial act involving notice to all interested parties which parliament declared to be essential.

The power to legislate conferred upon the North-West Territories by the Parliament of Canada was a power given expressly subject to the limitation that it was not to be exercised in a way or to an extent inconsistent with Dominion legislation. In my opinion, the ordinances in question were inconsistent by giving an effect to a transfer alone which the Dominion legislation declared should only be given after the tax sale had been confirmed by a judge. The fundamental error, therefore, of the judgment appealed from is the holding that the present appellant had no interest in the lands in question and that such interest as they formerly had passed by virtue of the ordinances to the purchaser at the tax sale on the execution of the transfer. If these ordinances were *intra vires* that might well be so held. As they are at variance with

Dominion legislation on the special point I cannot agree that any such effect follows the transfer.

I think the ordinance of 1901 under which these confirmation proceedings were taken were clearly retroactive so as to cover the appellants' interest and that being persons interested in the land, within the meaning of those words in subsec. 2 of sec. 1, they have the right to redeem and to oppose the application for confirmation.

If at the time the application was made for a confirmation of this land tax sale the transferees had already acquired vested interests in the land it would require express words in the ordinance to give it a retrospective operation so as to take away these vested interests. But on the construction of the Dominion and territorial legislation reached by me no such vested interests had accrued and the ordinance dealing with matters of procedure only should have a retrospective operation given to it. See the decision of the Court of Appeal in *The Ydun* (1).

The appeal should be allowed with costs.

MEMO. The form of the minutes should be—

(1.) Order that the appeal be allowed and the orders appealed from be discharged. (2.) Declare that the appellants are entitled to appear and contest the confirmation proceedings and, on such appearance, to prove that they are existing *bonâ fide* mortgagees of the lands in question and that, on such proof being given, they are entitled to redeem such lands. (3.) Order that the respondents do pay appellants' their costs of this appeal and of the appeal from Mr. Justice Wetmore's order of the 22nd December, 1903, to the Supreme Court of the N. W. Territories from which the appeal to this court was taken.

(1) 15 Times L. R. 361.

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NESBITT J.—I have arrived at the same conclusion for the same reasons, and having had the advantage of reading the judgment prepared by my brother Davies, I have nothing to add to what he has written.

KILLAM J. (dissenting).—I would dismiss this appeal for want of jurisdiction in this court to entertain it. It was not brought by leave, and so, it is not within section 24, subsec. (*i*) of the Supreme and Exchequer Courts Act. The appellant must rely upon subsection (*a*), under which the right of appeal is confined to

cases in which the court of original jurisdiction is a superior court.

Whether the jurisdiction to make the order is to be considered as having been given by the Dominion Act, 57 & 58 Vict. ch. 28, s. 97, or by one of the territorial ordinances referred to, it does not appear to me that the court of original jurisdiction was a superior court.

Both the Dominion statute and the ordinances authorised a judge to make an order for confirmation of a sale for taxes, not in the course of or as relating to any proceeding in his court. The judge was simply *persona designata*, a particular official considered a fitting one to inquire into the regularity of the sale and the propriety of giving effect to it. The case appears to me to come directly within the reasoning of Patterson J. in *The Canadian Pacific Railway Co.* v. *The Little Seminary of Ste. Therèse* (1), and to be quite distinguishable from *The City of Halifax* v. *Reeves* (2). In the latter case the statute authorised the presentation of the petition to the court or a judge. While it was addressed to the Chief Justice or one of the judges of the court, it was apparently filed in the court and a summons issued upon it by the clerk of the court. The court having jurisdiction it could entertain the petition, in which case the Supreme Court of

(1) 16 Can. S. C. R. 606. (2) 23 Can. S. C. R. 340.

Nova Scotia could properly be said to have been the court of original jurisdiction. In the present case, as the jurisdiction was only in a judge *nominatim*, and not in the court, the intitling of the proceedings in the court could not give the court jurisdiction or prevent the judge from acting in the matter under the statute.

Had it not been that the majority of the court consider that we have jurisdiction, I should not have expressed any opinion upon the merits. But, on this ground, too, I think that the appeal should be dismissed.

When the conveyance in pursuance of the tax sale was made, the jurisdiction of a judge arose under the Dominion statute alone. Whatever the effect of the conveyance, in view of the apparent conflict between the Dominion and the territorial legislation, at any rate all right of redemption under the then existing legislation was gone and the grantee had acquired a vested right to apply for a confirming order under the Dominion Act and, if the sale and conveyance were valid, to have the order made.

I think that the subsequent action of the Legislature of the Territories, in establishing a further period for redemption, should not be construed as affecting cases in which the right was gone and conveyance issued. That legislature had no power to interfere with the jurisdiction under the Dominion Act or to interpose a bar to the exercise of that jurisdiction. It could, for its own purposes and in carrying out the enforcement of taxes by sale of the property taxed, require a confirmation by a judge and allow redemption up to confirmation, but this should not be deemed to have been intended to affect transactions finished and closed, in so far as its own previous legislation was concerned, and merely awaiting action by authorities constituted

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by Dominion legislation for the purpose of the system of land tenure and transfer adopted by the Dominion.

Appeal allowed with costs.

Solicitors for the appellants: *Andrews & Andrews.*

Solicitor for the respondents: *Hugh A. J. Macdougall.*