JOHN HERON AND OTHERS (PLAINTIFFS) ..... } APPELLANTS;

AND

ABRAHAM LALONDE AND OTHERS (DEFENDANTS) ..... } RESPONDENTS.

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*May 3, 4.
*June 24.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA.

Assessment and taxation—Sale for delinquent taxes—Tax sale deed —Premature delivery — Statutory authority — Condition precedent —Evidence—Presumption—Curative enactment—"Assessment Act", B.C. Con. Acts, 1888, c. 111, s. 92—B.C. "Assessment Act, 1903", 3 & 4 Edw. VII., c. 53, ss. 125, 153, 156—Certificate of title (B.C.)

The British Columbia "Assessment Act" (Con. Acts, 1888, ch. 111, sec. 92), provides that the owner shall have the right to redeem land sold "at any time within two years from the date of the tax sale or before delivery of the conveyance to the purchaser at the tax sale." The tax sale deed in question was dated on the day before the expiration of two years from the date of the tax sale. The B.C. "Assessment Act, 1903," 3 & 4 Edw. VII., ch. 53, secs. 125, 153 and 156, declares that all proceedings which may have been heretofore taken for the recovery of delinquent taxes under any Act of the province, by public sale or otherwise, should be valid and of full force and effect; that tax sale deeds should be conclusive evidence of the validity of all proceedings in the sale up to the execution of such deed, and that such sale and the official deed to the purchaser of any such lands shall be final and binding upon the former owners of the said lands and upon all persons claiming by, through or under them.

Held, per Fitzpatrick C.J. and Idington and Anglin JJ. (reversing the judgment appealed from (9 West. W.R. 440; 24 D.L.R. 851)), Davies and Brodeur JJ. dissenting, that, in the absence of evidence to the contrary, it must be presumed that the delivery of the conveyance to the tax sale purchaser took place on the date of the tax sale deed; that the execution and delivery thereof were premature,

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*PRESENT:—Sir Charles Fitzpatrick C.J. and Davies, Idington, Anglin and BrodeurJJ.

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and, therefore, the conveyance was ineffectual and insufficient to justify the issue of a certificate of title under the provisions of the "Land Registry Act" or of the "Torrens Registry Act, 1899", nor could the curative clauses of sections 125, 153 and 156 of the "Assessment Act, 1903" be applied so as to have the effect of validating the void conveyance.

APPEAL from the judgment of the Court of Appeal for British Columbia (1), affirming the judgment of Clement J. at the trial, by which the plaintiffs' action was dismissed with costs.

The plaintiffs brought the action, as beneficiaries under the will of the late Robert Heron, deceased, for a declaration that certain lands in the City of Vancouver, B.C., had been unlawfully and wrongfully sold at a tax sale of lands for delinquent taxes by the assessor of the District of New Westminster, on the 22nd of July, 1896, and subsequently, for a second time, by the assessor for the District of Vancouver, on the 9th of December, 1903; and for a decree setting aside the said tax sales and all deeds, etc., subsequent thereto. The circumstances of the case are stated in the judgments now reported.

W. N. Tilley K.C. for the appellants.
James A. Harvey K.C. for the respondents.

The CHIEF JUSTICE concurred with IDINGTON J.

DAVIES J. (dissenting).—The appeal in this case is absolutely without any intrinsic merits and if successful may cause very grave injustice to *bonâ fide* purchasers of land in British Columbia.

I am glad to find myself fully in accord with the unanimous judgment of the Court of Appeal for British Columbia confirming the judgment of the trial Judge, Clement J.

(1) 9 West. W.R. 440, 24 D.L.R. 851.

The questions relied upon in this court were that the tax deed in question was dated the 22nd July, 1898, that the time for the owner to redeem did not expire till the end of that day, and, although there was no evidence whatever of any delivery of the deed on the *day* it is *dated*, it must be presumed to have been delivered on that day.

The other point attempted to be raised in this court as to the jurisdiction of the assessor, E. L. Kirkland, to hold and conduct the tax sale in question was not raised in the Court of Appeal, and was, in fact, abandoned before that court. The affidavit of Mr. McCrossen who was counsel in the court of first instance for the defendant respondents and also in the Court of Appeal makes this quite clear. He not only states that the question of the tax sale deed having been executed, as counsel for appellant alleged, a day too soon "was the only point argued by Mr. Martin," but that

> at the conclusion of his argument the learned Chief Justice of the Court of Appeal for British Columbia expressly asked Mr. Martin if that was the only point in the case and Mr. Martin replied that it was the only point in the case.

The judgment of the learned Chief Justice, who spoke for the whole court, expressly shews that only one point was there raised and that was the one arising out of the date of the deed.

No affidavit to the contrary was made on behalf of the appellant and I cannot but think that to allow a point abandoned in the Court of Appeal to be raised in this court would be contrary to our usual practice and would be an injustice to the respondent. In such a case as this, where the appellant has no merits whatever and is relying upon mere technical objections, I do not think he should be heard on the abandoned point. If the majority think otherwise then I say that

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I agree with the judgment of my brother Brodeur, which I have had an opportunity of reading, that the objection to the jurisdiction of Kirkland is without foundation.

The other point was that the presumption from the date of the deed necessarily must be the date of its delivery; I decline to accept it. It should not have been in strictness delivered till the morning of the 23rd. If the appellant had tendered his taxes on the 22nd no such delivery on the 23rd or afterwards would have taken place.

I would think the proper presumption to draw from all the facts proved is that legal delivery did not take place till after the 22nd had expired in which case, of course, the claim of the plaintiff entirely fails.

I take it as a general presumption of law illustrating the maxim *omnia præsumuntur ritè et solennitur esse acta* that a man acting in a public capacity should, in the absence of proof to the contrary, have credit given to him for having done so with *honesty and discretion.* See judgment in *Earl Derby* v. *Bury Improvement Commissioners*,(1).

The proper presumption to be drawn under the facts as proved in this case is, in my opinion, that the tax commissioners, having a number of sales to complete, for convenience had the deeds prepared on the day of the expiry of the redemption period after the sale and dated on that day, but knowing that the tax defaulters had the whole of that day in which to redeem, did not deliver this deed in question to the purchaser until the next day. To presume that he acted contrary to law and in violation of his duty I cannot do in the state of the evidence.

(1) L.R. 4 Ex. 222, at p. 226; Broom's Legal Maxims (8 ed.), p. 740.

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But, if I am wrong on this question of the proper presumption to be drawn from the date of the deed, then I am in full accord with the judgment appealed from and with the reasons in support of it of my brother Brodeur and those of Chief Justice Macdonald in the Court of Appeal.

I would dismiss the appeal with costs.

IDINGTON J.—I am unable to understand how a bare power given by statute to do anything, only to be exercised by a designated statutory officer within a specified time, and upon certain conditions precedent, can be said to have produced anything effective in law when attempted to be exercised at another time than specified without the conditions precedent having been fulfilled and by another statutory officer than the one designated and having no power in the premises.

Much less can I see how, when the instrument to be produced is a deed, it can when made under such circumstances be called one.

Can the forger if he succeed in getting a specimen of his fine art, wearing the semblance of a tax deed, upon record, by the complaisant negligence of him put on guard as registrar, divest any man of his estate?

The condition precedent to the registrar's authority validating anything is the production to him duly attested of a tax sale deed. How can he validate the forgery? How can he validate that which when it came to him was of no higher legal value than a forgery?

And the appeal to the following curative section in the "Taxation Act":—

A tax sale deed shall, in any proceedings in any court in this province, and for the purpose of the' Land Registry Act" and the "Torrens Registry Act, 1899", except as herein provided, be *conclusive evidence* of the validity of the assessment of the land and levy of the rate,

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the sale of land for taxes, and all other proceedings leading up to the execution of such deed, and *notwithstanding any defect in such assessment, levy, sale or other proceedings, no such tax deed shall be annulled, or set aside, except upon the following grounds and no others,—*

does not help further than to substitute the effect of its language for the conditions precedent to the due execution of the power.

Its plain language only touches that which precedes the deed.

It assumes a deed otherwise pursuant to the power to have been executed and by one competent to execute it.

The contention that the point involved in the question of the status of the officer executing the deed was abandoned below does not appear to be well founded.

The case of *Osborne* v. *Morgan*(1), relied upon by the learned Chief Justice of the Court of Appeal, does not seem to me in point.

That was a case where the Crown had an interest in the land and had recognized rights in those given by the executive. The court above merely denied the right of him suing to question in his action that granted and recognized by competent authority.

This is a case, I repeat, of bare power to an officer to do a certain act and nothing more and the question asked whether in law he did so or not—clearly, to my mind, he did not, and I doubt very much on his own evidence if the one who attempted it was the officer who could have executed it.

The appeal being successful as to the first deed renders consideration of the later sale unnecessary further than to say that the assessor was clearly in error in such a view of appellants' right in refusing to

(1) 13 App. Cas. 227.

permit any one to redeem unless under the title supposed to have been acquired by virtue of the first sale.

The appeal should be allowed but, I think, without costs throughout. The contention for abandonment is unfounded so far as the legal rights of the parties are concerned.

There was nothing done to estop the appellants or their predecessors but there was such an approach to laches as entitles us properly to refuse costs.

ANGLIN J.—The respondent's title to the land in question depends upon the validity of an alleged tax sale deed and a certificate of "absolute title" issued under the British Columbia "Land Registry Act," 1906, ch. 23.

That the taxes for which the land was sold were in arrear and that the sale was fair and open, though conducted by an official not authorized, are facts not now disputed. But it is admitted that the tax sale deed bears date one day before the expiry of two years from the date of the tax sale—the statute allows the deed to be made only after that period has elapsed—and it has been proved that the person who executed it was not the assessor for the County of Vancouver in which the land was situated, but the assessor for the County of Westminster who had no authority or jurisdiction whatever in the matter.

It is contended that because there is no positive evidence of when the deed was actually delivered it should be presumed that it was delivered in conformity with the statute. But the officer who executed and delivered it was called as a witness and, although the issue as to the date of delivery was distinctly raised on the pleadings, he did not say a word to suggest

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that delivery was not made on the day on which the deed bears date. Under these circumstances the ordinary presumption that the deed was delivered on the day of its date must prevail. Sheppard, Touch. 72; *Stone* v. *Grubbam* (1614)(1). The matter is of substance because

> the right of redemption subsists until delivery of the conveyance to the purchaser at the tax sale.

It was argued that the deed should be deemed merely irregular and voidable because this objection to its validity could have been cured by re-delivery after the expiry of two years. But in that case it would operate as a new deed then delivered and not at all by virtue of any efficacy which it had previously possessed. Moreover, there is no suggestion that there was in fact any such re-delivery before tender of the redemption money. For these reasons I think this objection to the validity of the deed must prevail.

The objection based on the fact that the wrong assessor had executed the deed is in my opinion even more clearly fatal to its validity. It was mere waste paper.

Counsel for the respondent maintained that this objection had been abandoned in the court below, and he supported this contention by an affidavit not altogether satisfactory. Counsel for the appellants read a telegram from the counsel who had represented them in the provincial courts denying that there had been any such concession. The point is not noticed in the judgments below. If the appellants' success should be dependent upon this ground of appeal, while they would not be precluded from urging it, since the authority of the assessor who executed the

(1) 1 Roll. Rep. 3.

deed is expressly challenged in the statement of claim and there is no controversy as to the facts, a question of costs might arise. *McKelvey* v. *Le Roi Mining Co.*(1), and see cases in Snow's Annual Practice, 1916, at page 1111. The appellants' success on the point as to date of delivery renders it unnecessary further to consider this aspect of the matter.

To meet these difficulties the respondent invokes three curative statutory provisions, sections 125, 153 and 156 of the British Columbia "Taxation Act" of 1903-4, ch. 53.

The first of these sections declares valid and of full force and effect

all proceedings which may have been taken for the recovery

of taxes unpaid on the 31st December, 1902,

under any Act of this province heretofore in force, by public sale or otherwise.

The void tax sale deed was not, in my opinion,

a proceeding for the recovery of taxes under any Act of the province

which this provision would validate.

Section 153 provides that a tax sale deed shall be conclusive evidence of the validity of all proceedings in the sale "up to the execution of such deed." It is obvious that this provision is predicated upon the existence of a tax sale deed. Its curative effect is expressly limited to proceedings anterior to the execution of the deed. It certainly does not constitute a mere piece of waste paper a valid tax sale deed.

Under section 156, if the tax for which the land has been sold was due and it has not been redeemed within the period allowed for redemption,

such sale and the official deed shall be final and binding upon the former owners of the said lands and upon all persons claiming by, through or under them.

(1) 32 Can. S.C.R. 664.

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The facts that the time for redemption does not expire until the delivery of the tax sale deed, *i.e.*, a valid and effectual deed, and that the existence of the official deed, likewise a valid and effectual deed, is a pre-requisite to the operation of this section, render it inapplicable to the case at bar.

No curative section has been brought to my notice which vests title in the tax purchaser or deprives the owner of his right of redemption where no tax sale deed which can be recognized as such has been executed or delivered.

The defendant also relies upon the provisions of the "Land Registry Act" of British Columbia, 1906, ch. 23. A certificate of title under that statute confers on the holder merely a *primâ facie* title: *Howard* v. *Miller*(1), decided in this court on the 28th May, 1913. By section 31, in case of an application for registration by a purchaser of land at a tax sale, the registrar is empowered, after notice to the persons appearing upon the assessment roll to be interested in the land and in default of opposition by any of them, to register such purchaser as owner of the land. By section 32 he is authorized to direct substitutional service of such notice

> where it is made to appear to (him) that the notice mentioned in the last preceding section cannot be personally served or cannot be personally served without *undue* expense.

The owner in this case resided in Victoria, where assessment and other notices had been sent to him, as appears by the evidence. An order was made by the registrar for substitutional service upon him, in common with a number of other owners of property sold for taxes, by advertisement and by mailing a notice addressed to him at Vancouver. This order was made apparently

(1) [1915] A.C. 318.

without any material. The only affidavit produced, made by one Hartley, was sworn several days after the last insertion of the advertisement, and states, as to some twenty-three property owners, that in the opinion of the deponent "it would entail *considerable expense* to *serve all* the above parties personally." The registrar, when examined as a witness at the trial, said that he had no personal recollection of the matter or why he had made the order for substitutional service; that it was his practice to do so; that from the papers in the registry office, including Hartley's affidavit, he assumes he made an order for service in this way; that the statute is very broad and wide and he understood authorized a general order for substitutional service without considering the case or position of each particular individual involved. It is fairly obvious that no inquiry was made as to the whereabouts or residence of the registered owner of the lots now in question and that it was not "made to appear to the registrar" that he could not be personally served or could not be so served without undue expense.

Moreover, the notice mailed to the owner at Vancouver was returned to the registrar through the post office undelivered, yet no steps appear to have been taken under sub-section 3 of section 32 which provides that

> on the return of any letter containing any notice the registrar shall act in the matter requiring such notice to be given in such manner as he shall think fit.

In my opinion the order for substitutional service was clearly made without jurisdiction, with the result that registration of the purchaser as owner under section 31 was made without the notice required by that section and was therefore ineffectual and the certificate of absolute title issued to the defendant Lalonde claiming under him is invalid.

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The defendant finally set up abandonment and acquiescence as an answer to the plaintiff's claim. The circumstances would probably not warrant a defence on the ground of laches being made to an equitable claim. The plaintiffs are asserting a legal right which no mere lapse of time short of the period fixed by the statute of limitations would extinguish.

I do not find in the circumstances anything amounting to a representation by the plaintiffs or their testator to persons dealing with the property that they would not assert their right to it, followed by action and on the part of the latter of such a nature that an estoppel would arise against any subsequent assertion of their rights by the former. *Anderson* v. *Municipality of South Vancouver*(1), at pages 446 *et seq.*, and 462.

In my opinion the appeal should be allowed with costs here and in the Court of Appeal and the plaintiffs should have judgment for the recovery of the land with costs of the action. If the relief of an accounting and the claim for damages are insisted upon they are entitled to a reference to the proper officer of the Supreme Court of British Columbia to have those matters dealt with, the costs of which should be reserved to be disposed of in the Supreme Court of British Columbia according to its usual practice.

BRODEUR J. (dissenting).—The question that arises in this case is whether the plaintiffs may redeem some lands sold for taxes. Robert Heron, the former owner of those lands, never paid any taxes on them from 1893, the date he got them from the Crown, until they were sold for taxes on the 22nd of July, 1896.

(1) 45 Can. S.C.R. 425.

Those lands were in the assessment district then known as the New Westminster District and the assessor and collector for that district was Mr. E. L. Kirkland.

In 1895, the New Westminster District seems to have been divided in two, one was called the Vancouver District, for which Mr. Bryne was appointed assessor and collector, and the other was called the Westminster District, with Mr. Kirkland as assessor and collector.

The lands in question being in the City of Vancouver they became part of the Vancouver District.

There is nothing in the Official Gazette, the only document we have on the matter, shewing that the power of the collector for the old "New Westminster District" to collect moneys for arrears of taxes was cancelled.

In 1896, on the 22nd of July, Mr. Kirkland proceeded to sell those lands for the payment of those arrears and, on the 22nd of July, 1898, he made a deed in favour of the person who had bought the property at the public tax sale.

It is now claimed on this appeal that Mr. Kirkland had not the power to sell the lands in question and to execute that deed.

There is no doubt that he was the assessor and the collector of the New Westminster District and that as such he could assess the lots in question and levy taxes thereon. We have no evidence that his powers with regard to the collection of overdue taxes were cancelled in 1895 as claimed by the appellant.

That point was not formally raised by the statement of claim. It is true that some evidence was given which might have some effect on that point but it was not complete and it does not show that Mr.

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Kirkland's authority over the taxes then due was at an end by the division of the district.

I do not see that the point was dealt with in the notes by the judges of the courts below and we have an affidavit shewing that it was never mentioned in the Court of Appeal.

I consider that the evidence which we have before us does not shew that Mr. Kirkland had no power to deal with the collection of the taxes and the sale of the lands upon which they were imposed and that, in these circumstances, the point raised by the appellants in that regard should not be entertained. I may add that the provisions of the "Assessment Act" (ch. 179 of 1897) and particularly sections 27, 78, 81, 87, 92, 94, 96, 116 and 119 give to the assessor who has assessed the property the right to collect the taxes thereby imposed.

From 1896, the date of the tax sale, until 1904, the date of his death, Mr. Robert Heron does not seem to have taken any steps to redeem the property. The evidence does not shew either whether he made inquiries with regard to the payment of taxes or the redemption of the property.

In 1904, after his death, his executor, Mr. Brown, found some papers concerning those lands and made inquiries with regard to them. Having found, however, that they had been sold for taxes, he did not exercise any right of redemption which he might have.

The property was once more sold in 1906 for taxes. From that date until 1913 no steps have been taken by the Heron estate, the appellants, with regard to that property; but the lands having increased in value they instituted the present action.

There is no doubt as to the validity of the second tax sale. There is no question either with regard

to the validity of the first tax sale; but they claim that their right of redemption under the first tax sale still exists because the deed was executed a day before the date at which it should have been made.

Under the "Assessment Act" of British Columbia the owner of land sold for taxes may

> at any time within two years from the date of this tax sale or before the delivery of the conveyance of the tax sale

redeem the estate sold.

The appellants claim that they are still within the time for exercising that right because there has never been delivery of any legal conveyance to the purchaser.

Was the tax deed void or voidable? If it is an absolute nullity, then no delivery of conveyance has taken place.

The actual execution of the deed could have been performed at any time after the 22nd July. A new deed could have been executed the very next day and no question could be raised with regard to its validity. If the money had been tendered on or before the 22nd July, 1898, the rights of the appellants could not be denied and the execution of the deed on that date, could not have been invoked against them. But no such tender was made and the deed which has been prematurely executed could not be, in my opinion, considered as a nullity. It was simply voidable and now that the deed has its full effect, that it was formally delivered to the purchaser, it seems to me that the right of redemption which the owner of the land possessed has expired. The purchaser's right has become absolute.

Besides, I agree with the learned trial judge that the provisions of section 255 of chapter 222, Revised

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Statutes of British Columbia, 1911, have cured any defects which might have occurred in connection with this tax sale. The section says:—

> A tax sale deed shall, in any proceedings in any court in this province, and for the purposes of the "Land Registry Act", except as hereinafter provided, be conclusive evidence of the validity of the assessment of the land and levy of the rate, the sale of the land for taxes, and all other proceedings leading up to the execution of such deed; and, notwithstanding any defect in such assessment, levy, sale, or other proceedings, no such tax deed shall be annulled or set aside, except upon the following grounds and no other:—
>
> (*a*) That the sale was not conducted in a fair and open manner;
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> (*b*) That the taxes for the year or years for which the land was sold had been paid; or
>
> (c) That the land was not liable to taxation for the year or years for which it was sold.

It is true these curative sections should not be construed in too liberal a way but the statute is drafted in such terms and such language that a deed which has been executed, like the present one, would preclude the appellants from claiming seventeen years after the sale has taken place the right to redeem the property.

For these reasons, the appeal should be dismissed with costs.

Appeal allowed without costs.

Solicitors for the appellants: *Martin, Craig & Parkes.*
Solicitors for the respondents: *McCrossan & Harper.*