CITY OF VANCOUVER (DEFENDANT).....APPELLANT;

AND

THE ATTORNEY-GENERAL OF CANADA, THE ATTORNEY-GENERAL FOR BRITISH COLUMBIA AND THE CANADIAN NORTHERN PACIFIC RAILWAY COMPANY (PLAINTIFFS) } RESPONDENTS.

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*Oct. 7, 8, 12, 13.
*Dec. 15.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Taxation (municipal)—Crown's interests—Tax levied against owner of land leased to Crown—Buildings erected on such land by the Crown—Valuation of land including value of buildings as improvements—Whether property "vested in or held by" the Crown has been taxed—Whether tax has been levied on

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

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Crown's interests—Vancouver Incorporation Act, B.C. Statute, 1921 (2nd session), c. 55, ss. 2 (9) (10) (11), 37, 39, 40, 45, 46, 48, 49, 55, 56, 57, 58, 59, 60, 63, 67, 69, 73, 323—Land Registry Act, R.S.B.C., 1936, c. 140, s. 143—B.N.A. Act. s. 125.

The respondent, The Canadian Northern Pacific Railway Company, owner of a large tract of land within the city of Vancouver, leased a vacant portion of it, on the 1st of January, 1923, to His Majesty represented by the Minister of Agriculture for the Dominion and the Minister of Agriculture of British Columbia jointly; and subsequently, as required by the lease, His Majesty, represented as above, erected thereon a building known as the "Vancouver Fumigation Station Building". On the 1st of May, 1940, His Majesty, represented by the Minister of Munitions and Supply of the Dominion, leased from the respondent company another vacant portion of the same land, and subsequently a building known as the "Boeing Aircraft Building" was erected thereon for and at the expense of the Crown pursuant to a contract made between the Crown and the Boeing Aircraft of Canada Limited. An action was brought by the Dominion and Province for a declaration that these buildings were not subject to taxation and by the railway company for a declaration that it was not liable to be assessed or taxed in respect of these buildings and was entitled to recover back taxes already paid by it thereon. The procedure laid down by the *Vancouver Incorporation Act, 1921,* (B.C.—12 Geo. V, c. 55) for the taxation of land is outlined in the judgments now reported. Briefly, it is enacted that the City Treasurer, or the Collector of Taxes, "shall make out a tax roll" in which there are set down, *inter alia,* "the name * * * of the assessed owner", "the value at which the land and improvements * * * are assessed" and "the total amount of taxes imposed for the current year" (s. 59); it is also enacted that "all rates, taxes or assessments * * * shall be due and payable * * * by the owner of the property upon which they are imposed * * * " (sec. 63); and it is further enacted (s. 46) that "all land, real property, improvements thereon * * * shall be liable for taxation, subject to the following exemptions: (1) All property vested in or held by His Majesty or for the public use of the Province * * * and either unoccupied or occupied by some person in an official capacity". On behalf of the respondents, it was contended that the buildings were the property of the Dominion and Provincial Governments and as such were non-assessable and non-taxable: their contention being that these buildings had been assessed as improvements and that the taxes had been unlawfully levied and wrongfully collected in respect of them. The trial judge maintained the respondents' action, except that the railway company's claim for repayment was restricted to one year's taxes which had been paid under protest, this decision being based on the Crown's ownership of the two buildings and also on the ground that the buildings were "held by" His Majesty within the meaning of section 46 of the Vancouver charter. The Court of Appeal, Sloan J.A. dissenting, affirmed the judgment of the trial judge.

Held, reversing the judgment appealed from (58 B.C.R. 371), Hudson J. dissenting, that the respondents were not entitled to the relief claimed. The provincial statute does not operate by way of attempting to impose any liability on the Crown in respect of any interest under the leases, and there has been no attempt by the city appellant to impose such liability on the Crown. The respondent railway

company, as registered owner of the land, is liable to taxation in respect of its value as assessed in conformity with the statute. The provisions of the statute do not contemplate the assessment, as a separate subject, of improvements in an assessed parcel of land. There has been a separate valuation of the buildings as improvements; but the value of the buildings has been taken into account only for the purpose of valuing the parcel of land and calculating the tax to be paid in respect of it, and also in order to permit of the operation of other sections of the statute. The Crown's exemption, provided by section 125 B.N.A. Act or by section 46 (1) of the Vancouver charter, remained unimpaired.

Per The Chief Justice and Rinfret J.—The "assessed owner" is liable for taxation, and he is liable in virtue of his ownership: the "assessed owner", in light of the provisions of the statute, must be construed as meaning the registered owner in fee. The holder of a lease, if registered, and the owner of a structure erected on a land of which he is not the owner, cannot be registered otherwise than as owner of a charge. The property in this case has been valued in precisely the same way as it would have been valued if the lessees had been subjects, and not the Crown.

Per Davis J.—The parcel of land is wholly owned by the respondent railway company and the only levy of rates has been made against it on an assessment of the land and buildings thereon made under the valid provisions of statute. No attempt has been made by the appellant city to assess or levy rates against the rights or interest of the Crown or to tax the Crown in respect of the buildings.

Per Kerwin J.—The proper construction of the provisions of the statute is that what is rateable or taxable is "land" as defined in the interpretation section. Such taxation is founded upon the appearance in the assessment roll of such rateable land, together with the name of the registered owner. The rateable land includes buildings erected on it, but the land and improvements are assessable and taxable as a unit. The levy under the Act is not only a tax on "land", but is also a tax against the owner. As to the former, the statute must be read as not applying to the Crown and the operation of the statute imposing the tax is limited to the respondent railway's interest. As to the latter, there is no constitutional objection to taxing the respondent company on the basis of the total value of the land and improvements thereon, even though the improvements are the property of, or are held by, the Crown and are themselves not liable to taxation.

Per Taschereau and Rand JJ.—The general scheme of taxation provided by the statute is one of imposing, upon the interest of the private owner of the freehold estate or the private person in possession of Crown land, a tax based on the value of the totality of interest in the land, including improvements, thus including the value of the leasehold interest of property rented to private individuals or to the Crown. Assuming that the exemption in section 46 includes a leasehold interest of the Crown, that does not affect the fact that "rateable parcel of land" includes land so leased, or that the valuation of that parcel is without exclusion of the separate or exempt leasehold interest: the latter, possessed by the Crown, is neither taxed itself nor made the subject-matter of a tax lien. Its value is included in that of the owner's interest as if the owner were in occupation, but that circumstance is unobjectionable and not in conflict with section

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125 B.N.A. Act. Moreover, the inclusion, in the content of value, of an element created or added to the land by the Crown, does not constitute an indirect taxation of the Crown, contrary to section 125 B.N.A. Act.

Per Hudson J. (dissenting).—As to the Boeing Building: The lease was of vacant land, the building was erected at the sole expense of the Crown and was occupied and used exclusively for Crown purposes, and it was the intention of the parties to the lease that the building should be removed at the end of the term. Thus the Crown had the sole beneficial use and ownership of the building and the latter never became the property of the owner of the land. Therefore the tax levy based upon the assessed value of the building is a tax imposed on property "belonging to" the Crown within the meaning of s. 125 B.N.A. Act and "held by" the Crown under s. 46 (1) of the Vancouver charter. As to the Fumigation Station building: The lease differs in some material respects from that of the Boeing property. It contained a covenant by the Crown to erect the building, but there was no provision as to its disposition at the termination of the lease. The Crown had no more than a right to exclusive possession during the term; but there was sufficient to justify a finding that the property was "held by" the Crown within the meaning of section 46. The legislature has not chosen to make provision for distinguishing the interest of the Crown when a tenant and that of a registered owner of the freehold; nor has the appellant city attempted to make such distinction in the assessment and taxation of the land. When the tangible property is rightfully in the possession of the Crown and "held by" the Crown within the meaning of the statute, then such property is exempt as long as the term and possession continue. What remains, that is the intangible property, be it either legal or equitable, which belongs to the owner, may be taxed but, if it is the intention of the legislature to impose such tax, it should provide for the segregation of such interest and the imposition of the tax by a positive enactment.

APPEAL from the judgment of the Court of Appeal for British Columbia (1), affirming by a majority (Sloan J.A. dissenting) the judgment at the trial of Coady J. and declaring that certain buildings either belonged to or were held by the Dominion of Canada and the province of British Columbia and that the respondent railway company was not liable for payment of taxes in respect of these buildings and that the latter should recover from the appellant an amount of $1,178.40 paid under protest by way of taxes.

(1) (1942) 58 B.C. Rep. 371; [1943] 1 W.W.R. 196; [1943] 1 D.L.R. 510.

H. E. Manning K.C. and *J. B. Roberts* for the appellant.

O. M. Biggar K.C. and *W. H. Campbell* for the respondents.

The judgment of the Chief Justice and Rinfret J. was delivered by

THE CHIEF JUSTICE.—The procedure laid down by the *Vancouver Incorporation Act* for the taxation of land may, so far as we are concerned with it on this appeal, be outlined briefly.

The assessor is to prepare an assessment roll in every year (section 40) in which he is required to set down in respect to "each and every rateable parcel of land" certain particulars. These include::

(1) A short description by which the parcel of land can be identified on the books of the Land Registry Office.

(2) The name of the registered owner thereof.

(3) The value of the land estimated separately from the value of the improvements on it.

(4) The value of the improvements estimated separately from the value of the land.

The assessment roll is subject to revision, in a manner with which we are not concerned, and when it has been finally revised it is the duty of the Council (section 57) to "pass a by-law for levying a rate or rates on all the rateable property" on the roll. By section 58 the rate or rates shall "in respect of improvements, be levied upon not more than fifty per cent of the assessed value". The process of collection goes forward as prescribed by sections 59, 60 et seq. By section 59 it is the duty of the City Treasurer, or Collector of Taxes, to make out a tax roll or rolls in which there are "set down with respect to each parcel of land upon which taxes have been imposed" the following particulars *inter alia:*

(1) The name and address of the assessed owner or owners.

(2) The value at which the land and improvements are assessed.

(3) The total amount of taxes imposed for the current year.

Upon the completion of this roll it is the duty of the Collector (section 60) to proceed to collect the taxes thereon set out and "with respect to each parcel of land, transmit by post to the owner" a statement showing "what taxes are due upon such parcel of land". This statement must contain the particulars just mentioned, namely, the

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name and address of the assessed owner, the value at which the land and improvements are assessed, and the total amount of taxes imposed for the current year.

By section 63 it is enacted:

> All rates, taxes, or assessments under this Act shall be due and payable not only by the owner of the property upon which they are imposed, but also by the possessor or occupant of the property, and by the tenant or lessee of such property, to the extent to which the possessor, occupant, tenant, or lessee is indebted to such owner, and the payment by any such person shall be a discharge of the property for the amount so paid, and shall also be a discharge to the possessor, occupant, tenant, or lessee of so much of his indebtedness to the owner as he shall have so paid.

By section 67 the taxes "accrued on any land" are a special lien on such land. By section 69 the Council is required in each and every year to pass a by-law providing for the sale by auction of each and every parcel of land and improvements thereon upon which taxes have been delinquent for a period of two years. By section 73 the Collector is obliged, after selling any land by public auction to any person other than the city, to give a certificate to the purchaser stating *inter alia* that a certificate of indefeasible title will issue to the purchaser at the expiration of one year from the date of sale on payment of the balance of the purchase money and other sums mentioned.

The statute gives a right of redemption to the owner and certain other persons having an interest in the land during the period of one year succeeding the sale. If the land is not redeemed, the purchaser is entitled to be registered as owner and to have issued to him a certificate of indefeasible title.

The land with which we are concerned on this appeal is described in the assessment roll as Parcel "G", D-L 2037. The letters D-L are an abbreviation of District Lot. This parcel so described admittedly was at the date of the assessment the property of the respondent railway company which was the registered owner in fee simple. Part of the parcel was by a lease dated the 1st of January, 1923, leased to His Majesty the King in right of the Dominion of Canada and to His Majesty the King in right of the province of British Columbia for a period of twenty years from the 1st of January, 1923. Pursuant to the provisions of this lease, certain buildings and erections were placed by the lessees on the premises; and another part of the parcel was by lease dated the 1st of May, 1940, leased to

His Majesty the King in right of the Dominion of Canada and on these premises buildings were also erected by the lessee.

In the year 1941 the whole of the parcel of land in question was assessed as the property of the respondent railway company, the value of the improvements being set down as $521,900 and that of the land as $283,650. The Court of Appeal of British Columbia, by the judgment appealed from, held that the respondents are entitled to a declaration that the city of Vancouver was not entitled to assess the buildings mentioned erected on the parcel of land in question by the Crown in the right of the Dominion in the case of the Boeing Aircraft Building and by the Crown in right both of the Dominion and of the province of British Columbia in the case of the Vancouver Fumigation Building. The Court also held that the respondent, the railway company, was entitled to recover from the municipality the sum of $1,178.40, part of the taxes levied for the year 1941 pursuant to the assessment of that year.

On behalf of the respondents it is contended that the buildings mentioned are as to one of them the property of the Dominion Government and as to the other the property of the Dominion and Provincial Governments and as such are non-assessable and non-taxable. The contention is that these buildings have in the assessment in question been assessed as improvements and that the taxes have been unlawfully levied and wrongfully collected in respect of them.

The appeal turns upon the validity of this contention. I think that in considering it it is more convenient to examine the situation first of all as if the lessees were subjects and the interests of the Crown were not in any way involved. The respondent railway company being the registered owner in fee, the assessor rightly entered the company as the assessed owner. If the leases and the rights incidental thereto had been registered as charges, the lessees would have been entitled to give notice under subsection 4 of section 40 requiring notices of assessments and taxation proceedings to be sent to them and they would have been in a position to challenge the assessment before the Court of Revision and would have apparently been invested with a right of redemption on a sale of the property for default in payment of taxes; but the property

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assessed is, nevertheless, a parcel of land with its improvements. In my opinion, the provisions of the statute, to which I have referred, do not contemplate the assessment (as a separate subject) of improvements in an assessed parcel of land. There is a separate valuation of improvements, because in calculating the tax to be paid in respect of a particular parcel of land the rate is levied in respect only of fifty per cent of the assessed value of the improvements. The language is perhaps not as precise as it might be, but it seems very clear to me that what is assessed is the land as it stands with its improvements. The holder of a lease and the owner of a structure erected upon the land, not being the owner of the land, cannot be registered otherwise than as the owner of a charge. By section 143 of chapter 140, R.S.B.C. 1936, it is enacted:

> The owner of the surface of land shall alone be entitled to be or remain registered as owner of the fee simple. The owner of any part of land above or below its surface who is not also the owner of the surface shall only be entitled to register his estate or interest as a charge * * *

This view is supported by reference to the provisions of sections 59 and 60 and the terminology thereof, as well as to those of section 40. I think, moreover, that section 63 is conclusive upon this point. I have no doubt that "owner" of property in that section must be construed in light of sections 59 and 60, as well as section 40, and so construed it means the "assessed owner" and, therefore, in such a case as that before us, the registered owner in fee.

The owner, to whom the Collector is required by section 60 to post the notice therein provided for, can be none other than the owner whose name it is the duty of the assessor to set down in the roll under subsection (1) of section 40, that is to say, the registered owner.

As regards possessors or occupants, tenants or lessees, the taxes are due and payable only to the extent to which such person is indebted to the registered owner. The liability is primarily the liability of the registered owner; and where the possessor or occupant, tenant or lessee, is liable, his liability is only to pay out of the property of (his indebtedness to) such owner. The statute imposes no liability upon the owner of a charge, other than this limited responsibility of occupants, possessors, tenants and lessees under section 63. This limited liability is not imposed in respect of the interest of such persons in the

property assessed, but is a liability only to discharge to the extent of the owner's monies in his hands the responsibility of the owner which is imposed upon the owner in respect of his ownership. I repeat, it is the rateable parcel of land entered and described in the assessment roll under subsection (1) of section 40 in respect of which the registered owner is liable to assessment and taxation. Emphasis is given to this by reference to the language of section 59 where the Collector is required to make out a tax roll or rolls "which may be an extension of the assessment roll" and in which shall be set down "with respect to each parcel of land upon which taxes have been imposed" the particulars therein mentioned, which include the assessed owner.

In the case I have supposed, therefore, in which, that is to say, the lessees, under such leases as those before us, are subjects, the assessed owner is liable; and section 63 shows that he is liable in virtue of his ownership. I repeat, his lessees are liable to the extent of monies of his they have in their hands. The equities and rights as between the owner and occupants, possessors, tenants or lessees, arising out of his liability to taxation on the full assessed value of the property, including improvements, is left by the statute to be adjusted by the parties themselves. The same principle seems to have been adopted as regards the owners of other charges.

I think counsel for the appellant corporation is right in his contention that for the purposes of the *Land Registry Act* and the *Assessment Act* the buildings in question are part of the land and the property of the owner of the registered fee, subject to the rights of the lessees under the leases. But, even if the respondents' contention is right, they are still taken into account only for the purpose of valuing the parcel of land, including the improvements, of which the respondent railway company is the registered owner and, as such, the assessed owner.

The lessees, however, in the case actually before us, are the Crown. In each case there is a term of years, created by an instrument of demise, in which the lessee has certain rights and obligations. It follows, therefore, that the liability imposed on occupants and tenants by section 63 is not operative in this case. It follows also that the enactments of the statute providing for the sale of lands for unpaid taxes and the vesting in the purchaser of an indefeasible title to such lands must equally be inoperative.

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Section 67 is also inoperative so far as any interest of the Crown is concerned. The statute, that is to say, does not operate by way of attempting to impose any liability on the Crown in respect of any interest under or in relation to the leases in question and, in particular, in respect of the two buildings mentioned.

Moreover, the respondent company is assessed, that is to say, its property is valued, in precisely the same way in which it would be valued if the lessees were subjects. The tax rate is levied upon the assessed value of the assessed parcel of land, including improvements, and it is in virtue of its ownership in fee that, according to the legislative scheme, the rate is computed on this value.

It is perhaps proper to say in passing that there is nothing necessarily unfair or exceptional in such a method of taxation. The legislature may very well have thought it just that the registered owners in fee simple of land which is leased and occupied should be taxed upon a valuation proceeding upon the same basis as if the land were occupied by the owner or were vacant. Similarly the legislature has evidently considered it just to make the owner of the registered fee liable in respect of the full value of the parcel of land, including the improvements, leaving the equities to be adjusted between the owner of the fee and the owner of any charge. In *City of Montreal* v. *Attorney-General for Canada* (1), it was held that a provision in the charter of Montreal, under which persons occupying Crown property for commercial or industrial purposes should be taxed as if they were the actual owners of such immoveables, was not constitutionably objectionable.

It is clear enough, I think, from the judgment in *Smith* v. *Vermillion Hills Rural Council* (2), and the judgment in *City of Halifax* v. *Fairbanks* (3), that section 125 of the *British North America Act* must always control the enactments of any such statute as that before us, and, moreover, that the provisions of the statute ought to be construed by the light of that section, unless, at all events, there is language which is necessarily repugnant to it.

(1) [1923] A.C. 136, at 138. (2) [1916] 2 A.C. 569.
(3) [1928] A.C. 117.

The position of the Crown is dealt with in section 46 and I turn now to the consideration of that section. The pertinent provisions are as follows:

46. Except as otherwise in this Act provided, all land, real property, improvements thereon, machinery and plant, being fixtures therein and thereon, in the city shall be liable to taxation, subject to the following exemptions, that is to say:

(1) All property vested in or held by His Majesty or for the public use of the Province, and also all property vested in or held by His Majesty or any other person or body corporate in trust for or for the use of any tribe or body of Indians, and either unoccupied or occupied by some person in an official capacity:

* * *

(3) When any right or interest, whether legal or equitable, in any property mentioned in subsection (1) of this section is held, possessed, or enjoyed by any person other than in an official capacity, the owner of any such right or interest therein shall be assessed in respect of such right or interest, and shall be personlly liable to taxation in respect thereof.

I cannot agree that the registered fee in the property in question here is "held by His Majesty" in the sense of subsection (1). In any case, subsection (1) must be read with subsection (3) and, applying subsection (3) to the circumstances in this case, it would appear that if the language of subsection (1) is to be stretched in such a way as to comprehend such a case as this then subsection (3) would quite plainly extend to the ownership of the respondent railway company. The respondents' registered ownership in fee is certainly a "right" and must, therefore, be assessed as such a right is assessed, that is to say, as the registered fee is assessed. I should be disposed to think, however, that reading subsection (1) by the light of the first limb of subsection (3), "property" in subsection (1) must be construed (so far as concerns us now) as extending to any interest in property and that what is exempted by that subsection is any interest in property vested in or held by His Majesty. The interest so held by His Majesty in virtue of the leases before us, or of any rights arising therefrom, is not subject to taxation under this statute, but the registered owner of the land is liable to taxation in respect of its assessed value, in virtue of its registered ownership.

As to section 125 of the *British North America Act*. I have already referred to that section, but I think it proper to add that, in the view of the statute to which I

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have given effect, its operation does not involve the imposition of taxation upon any lands or property of Canada, or of the province of British Columbia.

The appeal should be allowed and the action dismissed with costs throughout.

DAVIS J.—This is an appeal by the city of Vancouver from the judgment of the Court of Appeal for British Columbia which affirmed (Sloan J.A. dissenting) the judgment of Coady J. at the trial—holding that the respondents were entitled to a declaration that the city of Vancouver was not entitled to assess for any sum of money two buildings erected on lands belonging to the respondent, Canadian Northern Pacific Railway Company, by the Crown in right of the Dominion in the case of one building and by the Crown in right both of the Dominion and of the province of British Columbia in the case of the other building, and holding further that the respondent railway company was entitled to recover from the city the amount of a payment it made "under protest" of part of the taxes in and for the year 1941, upon an assessment of the respondent railway company for the aggregate of the land and improvements thereon.

The *Vancouver Incorporation Act, 1921,* and amendments thereto, provides for the annual raising of money for the purposes of the municipality by the levy of rates on land within the municipality. Buildings and other things erected upon or affixed to the land, and all machinery and other things so fixed to any building as to form in law a part of the realty, are by s. 2 (10) of the statute included within the definition of the word "land". And by s. 2 (9), "improvements" shall extend to and mean all buildings and structures erected upon or affixed to the land and all machinery and things so fixed to any building as to form in law a part of the realty.

It was agreed by counsel at the trial (*a*) that the buildings in question are substantial structures attached to the freehold; (*b*) that the respondent railway company is and has been the registered owner of the land at all material times; (*c*) that both buildings are on the property of the said company; and (*d*) that no question arises in the action as to whether the taxes were regularly levied by the city pursuant to its regular practice.

Notwithstanding a rather loose and sometimes interchangeable use by the draftsman of the words "assessment" and "valuation", the effect as I read the statute is that the basis of computation for the assessment of an improved "rateable parcel of land" upon which the annual rate of taxation shall be levied is to take the estimated actual cash value of the land, as if it were unimproved, and then add not more than one-half the amount of the estimated value of the improvements (sections 39, 46 and 58). It is not right, as I see it, to say, as contended by the respondents, that the buildings or improvements are to be taken separate and apart from the land taken by itself; that is the fallacy that undermines, it seems to me, the position taken in the relief sought by the respondents in this action. That there may be different interests or estates held by different persons in rateable property, whether vacant or improved, is recognized by the statute, but that does not involve the levying of rates against buildings or improvements as distinct and separate from the land upon which they are erected or to which they are affixed.

The parcel of land involved in this litigation is wholly owned by the respondent Canadian Northern Pacific Railway Company, and there was but one levy of rates for the year in question, 1941, and that was against the railway company, the owner of the land, on an assessment of the land and buildings thereon. But in respect of two large buildings erected by the Crown upon the land there are certain outstanding leases or agreements with the Crown, either in right of the Dominion or in right of the province of British Columbia. It is unnecessary to detail the provisions of the documents; sufficient to say that it is admitted by the city that the Crown, either in right of the Dominion or in right of the province, has certain rights or interests in the buildings. But no attempt was made by the city to assess or levy rates against the right or interest of the Crown, whatever it may be, or to tax the Crown in respect of the buildings or either of them. The owner of the parcel of land was the only one assessed and taxed and it was a levy of the annual municipal rates in respect of the entire parcel of land, including the improvements erected thereon.

Ample statutory provision is made for a Court of Revision for hearing all complaints against assessments,

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which Court, after hearing the complaints, as well as the Assessor, and such evidence as may be adduced, shall alter or amend or confirm the assessment roll accordingly (s. 48). Any person complaining of an error or omission or as having been undercharged or overcharged in the roll, may apply to the Court of Revision (s. 49). Then by s. 56 there is the right of appeal from the Court of Revision to a Board of Assessment Appeals and a further right of appeal from the Board to the Court of Appeal, which Court may raise or lower or otherwise correct the assessment of any property in respect of which such appeal is taken. By s. 55 the assessment roll as revised or confirmed and passed by the Court of Revision shall, except in so far as the same may be further amended on appeal, be valid, final, and binding on all parties concerned, subject, however, to such alterations, if any, as are made on appeal to the Board of Assessment Appeals or to the Court of Appeal, as the case may be.

The statement of claim in this action acknowledges that appeals were duly taken by all the respondents to the Court of Revision and to the Board of Assessment Appeals in respect of the assessment of the two buildings and that the said appeals were dismissed. This action then sought a declaratory judgment in favour of the respondents the Attorney-General of Canada and the Attorney-General for British Columbia and the company, and judgment in favour of the railway company for the return of a payment of the taxes made under protest.

The substantial answer to the action is that the city of Vancouver does not and did not assert any right to tax the Crown's interests, and those interests are not in any way affected or touched by the assessment and levy of the rates in question. The Crown's exemption by s. 125 of the *British North America Act* remains unimpaired; in fact the city's Act of Incorporation specifically provides by s. 46 (1) for the exemption from municipal taxation of all property "vested in or held by His Majesty or for the public use of the Province".

It is contended, however, that if the owner of the land has to pay taxes on the whole parcel, that will necessarily throw a portion at least of the taxes ultimately against the Crown, either by way of increased rental or by virtue of a covenant to indemnify in the leases or agreements between the owner and the Crown. But that argument is not a new

one in the field of municipal taxation in this country and has been authoritatively rejected. It is no answer to the statutory liability to taxation that rests upon the owner of the land. *Calgary & Edmonton Land Co.* v. *Attorney-General of Alberta* (1); *Smith* v. *Vermillion Hills Rural Council* (2); *City of Montreal* v. *Attorney-General of Canada* (3); *City of Halifax* v. *Fairbanks Estate* (4).

In this view of the case, it becomes unnecessary to consider the question whether the payment of a portion of the taxes that had been made by the owner, the railway company, could be recovered back as an involuntary payment when the payment was made merely "under protest".

I should allow the appeal with costs and dismiss the action. The appellant should have its costs of the action and of the appeal to the Court of Appeal from the Canadian Northern Pacific Railway Company.

KERWIN J.—The defendant in this action, the city of Vancouver, appeals from the judgment of the Court of Appeal for British Columbia affirming the judgment at the trial. The respondents, the Attorney-General of Canada, the Attorney-General for British Columbia, and the Canadian Northern Pacific Railway Company are the plaintiffs in the action. By the judgment complained of, it is declared that the Boeing Building, being on a portion of lot "G", plan 1341, in the city of Vancouver, and assessed as improvements on the said lot by the appellant at the sum of $42,500, is the property of His Majesty the King in right of his Dominion of Canada, or held by His Majesty in the right of his Dominion of Canada within the meaning of section 46 of the *Vancouver Incorporation Act, 1921,* and that the said building is not liable to taxation by the appellant. It is declared that the building known as the Fumigation Station and being on another portion of said lot "G" and assessed as improvements on the said lot by the appellant at the sum of $6,600, is the property of His Majesty the King, as in the right of his Dominion of Canada and His Majesty the King as in right of the province of British Columbia or held by His Majesty the King as in right of his Dominion of Canada and His Majesty the King as in right of the province of British Columbia within the meaning of section 46 of the

(1) (1911) 45 Can. S.C.R. 170.
(2) [1916] 2 A.C. 569.
(3) [1923] A.C. 136.
(4) [1928] A.C. 117.

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Vancouver Incorporation Act, 1921, and is not liable to taxation by the appellant. It is also declared that the respondents are not liable to be assessed and are not liable for payment of taxes in respect of the said buildings.

It is admitted or may be assumed that these two buildings are "property belonging to Canada or any Province" within the meaning of section 125 of *The British North America Act* or "property * * * held by His Majesty" within clause 1 of section 46 of the *Vancouver Incorporation Act* and are therefore not liable to taxation by the municipality. It should be emphasized, however, that the appellant never contended that it could assess the fabric of either building as land or improvements or that either building qua building was liable to taxation by it. Furthermore, it never claimed that the Attorney-General of Canada or the Attorney-General for British Columbia was liable to be assessed or was liable for payment of taxes in respect of either building.

The position adopted by the appellant is shown by what occurred in 1941. In that year the Vancouver assessor *valued* the land of the respondent Railway Company (lot G) and the improvements erected thereon, separately. Such improvements included not only the two buildings in question but also other buildings in which the Crown, either in right of the Dominion or province, had no interest. The Railway Company received from the office of the Assessment Commissioner a memorandum showing how the value of these improvements was arrived at and included therein were the sum of $42,500, for the Boeing Building and $6,600 for the Fumigation Station Building. However, neither these two buildings nor any of the other buildings were assessed. The land and all the improvements thereon were assessed as a unit, as appears from the following extract from the assessment roll:

Roll No.	Description of Parcel	Name and Address of Registered owner	Value of Improvements	Land Value
			$	$
K-9568 9569	Parcel "G" D. L. 2037.	Canadian Northern Railway, c/o R. R. Nichol, Canadian National Railways, Winnipeg, Manitoba.	521900	283650

It is admitted that the respondent Railway Company owns Lot (or parcel) "G" and that it is the Company described as owner in the assessment roll. It is also admitted that no question arises as to whether the taxes were regularly levied by the city pursuant to its regular practice.

Although not put precisely in this form, the contention of the respondents really amounts to this,—that the *Vancouver Incorporation Act* requires the appellant to assess and tax the fabric of buildings separate and distinct from the land upon which they stand. Whether that contention be right or wrong depends upon the construction of the provisions of the statute relating to assessment and taxation.

It conduces, I think, to a better understanding of the scheme of the Act as to these two matters if reference be made first to taxation. By section 57, the Council of the city shall in each year after the final revision of the assessment roll, pass a by-law for levying a rate or rates on all the rateable property on the said roll. "Rateable", as here used, is synonymous with "liable to taxation" as found in section 46, which enacts:

> Except as otherwise in this Act provided, all land, real property, improvements thereon, machinery and plant, being fixtures therein and thereon, in the City shall be liable to taxation, subject to the following exemptions

and then continues with certain named exemptions, such as property vested in or held by His Majesty, city property, etc.

The words "land" and "real property" which here appear are referred to in clause 10 of section 2 as follows:

> (10) The words "land", "real property", and "real estate", respectively, shall include all buildings and other things erected upon or affixed to the land, and all machinery and other things so fixed to any building as to form in law a part of the realty:

and by clause 9 of section 2, "Improvements", (which word also appears in section 46),

> shall extend to and mean all buildings and structures erected upon or affixed to the land and all machinery and things so fixed to any building as to form in law a part of the realty.

By section 58 the annual rate referred to in section 57 shall, in respect of improvements be levied upon not more than fifty per cent of the assessed value thereof, and by section 45, power is given the Municipal Council to

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exempt from taxation, wholly or in part, any improvements, erections, and buildings erected on any land within the city, notwithstanding that they may be part of the real estate.

So much for taxation. Before turning to assessment, two sections dealing with valuation require to be noticed. By section 37 it is the duty of the assessor annually to make a valuation of all rateable property in the city, and section 39 provides how this valuation shall be made:

39. All rateable property, or any interest therein, shall be estimated at its actual cash value as it would be appraised in payment of a just debt from a solvent debtor, the value of the improvements (if any) being estimated separately from the value of the land on which they are situate.

The separate estimate of the value of the improvements is necessary because of the provisions of such sections as 58 and 45.

Section 40 deals with the assessment roll. The relevant parts of subsection 1 thereof are as follows:

40. (1) The Assessor shall once in every year prepare an assessment roll in which he shall set down with respect to each and every rateable parcel of land within the city:

(*a*) A short description thereof by which the same can be identified on the books of the Land Registry Office for the Vancouver Land Registration District: Provided, however, that in the case of lands the fee of which is in the Crown either in the right of the Province or of the Dominion, but which have been leased agreed to be sold, granted, or conveyed, or which have been sold, granted, or conveyed, and the lessee, purchaser, grantee, or any one of them has not registered his lease, agreement, or conveyance in the said Land Registry Office, the Assessor shall assess and enter the same on the roll with the best description available to him in the name of such lessee, purchaser, or grantee, where known:

(*b*) The value thereof:

(*c*) The value of all improvements thereon:

(*d*) The name or names of the registered owner thereof:

(*e*) The addresses of all such owners as provided in subsection (2) hereof;

This subsection requires a critical examination. The phrase "rateable parcel of land" is used therein, and by clause 22a of section 2:

22a. "Rateable parcel of land" shall mean any lot or parcel of land, and may include two or more lots or parcels of land on which improvements have been constructed so as to form a single unit situate upon such lots or parcels.

By clause 11 of section 2 the word lot

shall mean any one of the portions or subdivisions into which a block of land has been or shall be divided.

The effect of these provisions is that the assessor shall set down in the assessment roll a short description of each rateable portion or subdivision into which a block of land has been divided, the value thereof, the value of all improvements thereon and the name or names of the owner of such portion or subdivision recorded in the Land Registry Office. By subsection 10 of section 40, the assessor, for the purposes of information and record, is to enter every year upon the assessment roll, in addition to each rateable parcel of land, every exempt parcel of land.

The progress from assessment to taxation is accomplished in this way. By section 59, after the final revision of the assessment roll as provided in intervening sections, the City Clerk is to deliver it to the City Treasurer, who is to be the Collector of Taxes unless some other person is appointed by resolution of the Council as such Collector. Forthwith, after the passage of the by-law levying a rate as provided for in section 57, such collector is to make out a tax roll "which may be an extension of the assessment roll" and in which shall be set down, with respect to each parcel of land upon which taxes have been imposed:

(*a*) A short description of the land:

(*b*) The name and address of the assessed owner or owners:

(*c*) The value at which the land and improvements (exclusion of exemptions) are assessed:

(*d*) The total amount of taxes imposed for the current year.

In section 60 the tax roll becomes the Collector's roll, and the Collector shall, with respect to each parcel of land, transmit by post to the owner a statement or notice showing what taxes are due upon such parcel of land, which statement shall contain certain information,—and then follow clauses (*a*) to (*d*) as in section 59.

Finally, by section 63, all rates, taxes or assessments are due and payable by the owner of the property upon which they are imposed, and by section 323 the rates, taxes and assessments, due, owing or payable to the city may be recovered, and collection thereof enforced by suit or action instituted in any court of competent jurisdiction.

At this point I desire to quote certain words of Lord Atkinson in *City of Victoria* v. *Bishop of Vancouver Island* (1). I do not refer to this decision to compare the provisions there under review with those with which we

(1) [1921] 2 A.C. 384.

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are concerned, nor for any of the purposes for which the decision was referred to in the courts below or at bar. Speaking for the Judicial Committee, Lord Atkinson decided that an exemption in the British Columbia *Municipal Act* from municipal rates and taxes of "every building set apart and in use for the public worship of God" applied to the land upon which a building of the description mentioned was erected as well as to the fabric itself. After stating that it was impossible to conceive the public worship of God being carried on in a building without the use of the land which it embraces within its walls as it was impossible to conceive walls existing without the support, direct or indirect, of the soil of the earth, he continued (p. 389):

> The conception of such things is not the less impossible because the Legislature has by statute made the attempt fancifully to divide for the purpose of taxation concrete entitles notionally into sections or portions which are presumably mutually exclusive and independent of each other. Their attempt will be abortive unless the language used be clear and plain.

Similarly, the language used would have to be clear and plain in the present case to justify the respondents' contention that the *Vancouver Incorporation Act* authorized and required the city to assess and impose a tax on the fabric of buildings. But in my opinion the Legislature has not made such an attempt. While some confusion appears to have existed in the draftsman's mind, in my opinion the proper construction of the provisions of the Act, relevant to the present case, is that what is rateable or taxable is "land" as defined in the interpretation section and that taxation is founded upon the appearance in the assessment roll of such rateable land, together with the name of the registered owner thereof. The rateable land includes buildings erected on it but the land and improvements are assessable and taxable as a unit,—the separate valuation of the buildings being merely to permit of the operation of such sections as 58 and 45. Provision is made of course for the assessment and taxation of interests in land and for special cases, such as lessees of Crown land, but with these we are not concerned.

The levy under the Act is not only a tax on "land" but is also a tax against the owner. As to the former, in accordance with the well-known rule, the statute must be read as not applying to the Crown, and the operation of the

statute imposing the tax is limited to the Railway Company's interest. *Smith* v. *Vermillion Hills Rural Council* (1). As to the latter, there is no constitutional objection to taxing the company on the basis of the total value of the land and improvements thereon even though the improvements are the property of, or are held by, the Crown, and are therefore themselves not liable to taxation. *City of Halifax* v. *Fairbanks' Estate* (2).

This conclusion disposes of the respondent's contention as to the declaration made by the Courts below and also of the claim of the Railway Company to recover back from the appellant the sum of money paid under protest.

The appeal should be allowed with costs and the action dismissed. The appellant should have its costs of the action and of the appeal to the Court of Appeal from the Canadian Northern Pacific Railway Company.

HUDSON J. (dissenting).—In this action the plaintiffs claimed and by the judgments in the court below were granted:

1. A declaration that the building known as the Boeing Aircraft Building situate on a portion of Lot "G", Plan 1341, city of Vancouver, and assessed as an improvement on the said Lot "G" by the defendant at the sum of $42,500 is the property of His Majesty the King in the right of his Dominion of Canada or held by His Majesty the King in the right of Canada; that this building is not liable for taxation by the defendant and that the plaintiffs are not liable to be assessed and are not liable for payment of taxes in respect thereof.

2. A similar declaration that the building known as the Vancouver Fumigation Station Building situate on another portion of said Lot "G" and assessed as an improvement thereon by the defendant at the sum of $6,600 is the property of His Majesty the King in the right of the Dominion of Canada and of the province of British Columbia.

3. An order that the plaintiff Canadian Northern Pacific Railway Company should recover against the defendant the sum of $1,178.40 paid as taxes on these two buildings under protest.

(1) [1916] 2 A.C. 569, at 574. (2) [1928] A.C. 117.

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The Canadian Northern Pacific Railway Company owned Lot "G" which covered a considerable acreage, part of which was unsubdivided. A vacant portion of this acreage was on the 1st of May, 1940, leased by the Railway Company to His Majesty the King in the right of the Dominion of Canada, represented by the Minister of Munitions and Supply. The purpose of the Minister in acquiring this lease was the establishment of a plant for manufacturing aircraft parts. The lease provided for the payment of an annual rental by the Crown to the Railway Company of $1,125. It also provided that all buildings, erections and improvements thereon should be subject to the approval of the lessor and should during the existence of the lease be moved, removed, altered, improved, repaired or maintained by the lessee at the lessee's own cost and expense, and in accordance with such instructions as might be given from time to time by the lessor.

There was also a covenant by the lessee to indemnify and save harmless the lessor from the payment of all taxes that might become due during the existence of the lease in respect of the lands and premises demised. There was also a provision enabling the Crown to surrender the lease to the lessor at any time on six months' notice; and finally, it was provided by paragraph 15

> that at the termination of this lease or any renewal thereof, whether by effluxion of time or otherwise, the lessee shall forthwith remove his buildings or structures from the demised premises, failing which the lessor shall be entitled to remove the same at the expense of the lessee or to retain the same free of compensation as the lessee may see fit.

In due course a building for the purpose intended was erected on this land by and at the expense of the Crown and since completion this building has been occupied and used exclusively for the Crown's business. It is known as the Boeing Aircraft Building.

The whole area of lot "G" was assessed by the defendant as one parcel but, in making the assessment roll for the year 1941, an amount of $42,500 was added as representing the value of the building constructed by the Crown.

At the instance of the Crown, objection was raised to this assessment on the ground that the building being Crown property was not taxable. This objection was overruled and the sum of $1,178.40 was paid by the Railway Company, representing the amount of the tax levy for the

year 1941 appropriated to the assessed value of the Boeing Building and the Fumigation Station Building, which I shall afterwards discuss.

The claim of the Crown for exemption is based on:

1. Section 125 of the *British North America Act* which reads as follows:

> No lands or property belonging to Canada or any province shall be liable to taxation.

2. Section 46 of the *Vancouver Incorporation Act* which which reads as follows:

> All property vested in or held by His Majesty or for the public use of the Province, and also all property vested in or held by His Majesty or any other person or body corporate in trust for or for the use of any tribe or body of Indians, and either unoccupied or occupied by some person in an official capacity.

It was strongly contended on behalf of the defendant that as admittedly the building in question was of a substantial character and affixed to the soil, it was in law part of the freehold of which the railway company was the owner and, for this reason, liable to taxation.

The lease was of vacant land. The rental reserved was for the land alone because there was no covenant by the Crown to erect buildings. The building in question was erected at the sole expense of the Crown and was occupied and used exclusively for Crown purposes. The final clause of the lease was a recognition of ownership by the Crown and, more important, shows that it was the intention of the parties that the building should be removed at the end of the term.

The landlord had no real beneficial interest in the building. Its powers in respect of the same were only inhibitory. The possible reversionary interest under paragraph 15 depended on the Crown and was merely in the nature of a provision for compensation in case the Crown failed to perform its duty of removal.

The result is that the Crown had the sole beneficial use and ownership of the building. The real situation is that the building never became the property of the landlord and, for that reason, no conveyance from it was called for. The exemption from taxation under section 125 is of "lands and property belonging to the Crown". There is no limitation on the kind of property. It may be real or personal, tangible or intangible, with a title legal or

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equitable. The words "belonging to" are more comprehensive than the words "owned by". That the equitable title of the building is in the Crown could hardly be open to doubt and, for the purposes of exemption, beneficial ownership does not differ from legal ownership (6 Halsbury at 736 et seq.) and was recognized by this Court in the case of *Quirt* v. *The Queen* (1).

For some purposes or as between some parties the building might be considered as part of the freehold but this, I think, is beside the question. Here we are construing the application of a fundamental law overriding any provincial enactment. Moreover, it is by no means clear that, even at law, this building could be considered as a fixture. It is quite clear that the parties intended that the building should be removed at the end of the term, so that if a fixture in any degree it was only of a limited character. The maxim *cujus est solum ejus est usque ad coelum* gives way to the intention of the parties. A recognition of this is found in the case of *Corbett* v. *Hill* (2). At page 673 Sir W. M. James, V.C., said:

> Now the ordinary rule of law is, that whoever has got the *solum*—whoever has got the site—is the owner of everything up to the sky and down to the centre of the earth. But that ordinary presumption of law, no doubt, is frequently rebutted, particularly with regard to property in towns.

Examples of separation of ownership of property are given in Broom's Legal Maxims at pages 263 and 264.

That the legislature may by properly framed legislation authorize the imposition of taxation on the interest of the landlord in property let to or occupied by the Crown, or the converse, on the interest of a tenant or purchaser of land owned by the Crown, is definitely settled by a number of decisions of this Court and of the Judicial Committee.

In the case of *City of Halifax* v. *Fairbanks' Estate* (3), the charter of Halifax, under authorization of the provincial legislature, imposed a tax called a business tax to be paid by every occupier of real property for the purposes of any trade, profession, or other calling carried on for the purposes of gain: the tax was assessable according to the capital value of the premises. By section 394 of the charter any property let to the Crown or any person, corporation, or association exempt from taxation, was to be deemed for business pur-

(1) (1891) 19 Can. S.C.R. 510. (2) (1870) 9 L.R. Eq. Cas. 671.
(3) [1928] A.C. 117.

poses to be in the occupation of the owner, and was to be assessed for business tax according to the purposes for which it was occupied. The respondent owned the premises let to the Crown, represented by the Minister of Railways, for use as a ticket office of the Canadian Northern Railway, the lessee agreeing to pay the business tax. The premises were used exclusively for the purpose above stated. The city assessed the respondent estate for the business tax under section 394 of the charter. What is said in the judgment applies in most part to an argument that this tax was *ultra vires* under section 92 (2) of the *British North America* Act as indirect taxation, but it was further contended that the premises were exempt from taxation by reason of section 125 as being property belonging to the Crown. Their Lordships, without much discussion of principle, held that the tax was specifically imposed on the owner of premises and not on the property of the Crown and, therefore, section 125 did not apply.

The converse of this was the case of *City of Montreal* v. *Attorney-General of Canada* (1). There the charter of the city of Montreal had provided that persons occupying for commercial or industrial purposes Crown buildings or lands should be taxed as if they were the actual owners, and should be held liable to pay the annual and special assessments, the taxes and other municipal dues. The city brought action against a tenant who had failed to pay taxes and it was held by the Judicial Committee that the taxation was in respect of his interest as lessee and accordingly was not a tax on Crown lands so as to be *ultra vires* under section 125. Lord Parmoor who gave the judgment of the Board stated after reviewing previous decisions of the Board, at page 142:

> The question to be determined is the simpler one, whether the taxation, which is impeached, is assessed on the interest of the occupant, and imposed on that interest. In the opinion of their Lordships the interest of an occupant consists in the benefit of the occupation to him during the period of his occupancy * * *

It will be observed that in these cases there was a special enactment imposing liability on the tenant in one case and the landlord in the other. Where there was no such special provision, this court took a different view. In a case of *Attorney-General of Canada* v. *City of Montreal* (2), it was held that where the Dominion Government had leased

(1) [1923] A.C. 136. (2) [1885] 13 Can. S.C.R. 352.

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certain property in Montreal for the use of Her Majesty, with the condition that the Government should pay all taxes and assessments which might be levied and become due on the said premises, the Corporation of Montreal brought an action against the owners of the property for the municipal taxes accruing during the period of time the property was so leased and occupied by the Government. It was decided that the property in question was exempt from taxation and the action dismissed. It was pointed out by Sir W. J. Ritchie, C.J., at page 355:

> It cannot, I should think, be disputed that the property of the Crown, or property occupied by Her Majesty or Her servants for Her Majesty, is exempt from taxation, and it seems to me equally beyond dispute that this exemption can only be taken away by express legislative enactment.

In this he followed what was said by Mr. Justice Blackburn giving the opinion of the judges to the House of Lords in the case of *Mersey Docks* v. *Cameron* (1).

It was contended that this decision of the Court should no longer be taken as law in view of subsequent decisions, but it has been referred to on a number of occasions, both here and in provincial courts, and I cannot find any occasion in which its authority has been successfully disputed. I think the distinction is fairly clear, namely, that the property "belonging to" the Crown or "held by" the Crown is exempt. If the individual landlord or the individual tenant, as the case may be, has an interest, that is an intangible interest, it may be taxed but, if so, only by positive language.

The exempting section of the Vancouver Act is followed immediately by provisions imposing liability on the tenants or occupants of Crown lands or of persons having interest therein, in respect of such interest.

There is no provision similar to that in the *Fairbanks'* case (2), imposing liability on the owner in respect of property occupied by the Crown.

Expressio unius est exclusio alterius.

On the assessment roll the whole large area of Lot "G" appears as one item for the value of all the lands and one item for the value of all of the buildings thereon appearing under the heading of "Improvements". It is admitted,

(1) [1864] 11 H.L. Cas. 443. (2) [1928] A.C. 117.

however, by the Assessment Commissioner that there was added to the roll for 1941, after the erection of the Boeing building, a figure of $42,500 to represent the value of that building. There was sent or delivered to the Railway Company a notice appearing to show that the Boeing building was assessed at the above-mentioned figure, and when the Railway Company paid the amount in question it was done with a voucher which was produced by the defendant and in material part read as follows:

Date of Account 1941	For this amount being to cover 1941 taxes being paid under protest on the ground that the buildings concerned are the property of the Crown and exempt from taxation, as follows:—		Amount
	Vancouver		
	Block G, D.L. 2037, Fumigation Plant Bldg. Assd.	$ 6,600	
	Boeing Aircraft Bldg.	42,500	
		49,100	
	50% taxable $24,500		
	$24,500 at 50 mills	$1,227.50	
	4% discount	49.10	
			$1,178.40
	Pay June 25/41		
	Disc. July 3/41		
	Per cheque Paid under protest		

Received Eleven Hundred and Seventy-eight and.....40/100 Dollars $1178.40 in full settlement of the above account.

June 24, 1941.

Upon these facts it seems impossible to say that the tax is not imposed on property "belonging to" the Crown within the meaning of section 125 of the *British North America Act,* and "held by" the Crown under section 46 (1) of the *Vancouver Incorporation Act.*

For these reasons I would hold that the first declaration in the judgment below is well founded.

The lease of the Fumigation Station property differs in some material respects from that of the Boeing property. It was made to the Dominion and Province jointly in 1923.

It contained a covenant by the Crown to erect the building.

It did not contain any provision similar to paragraph 15 of the Boeing lease.

There was a right in the lessees to surrender the term on notice but no provision as to disposition of the building.

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There was a right of re-entry by the lessor in case of breach of the covenant.

It cannot be said here that the Crown had more than a right to exclusive possession during the term, but there was sufficient to justify a finding that the property was held by the Crown within the meaning of section 46 of the *Vancouver Incorporation Act.*

An early interpretation of these words is found in the case of *Shaw* v. *Shaw* (1), where it was held that property, whether leasehold or freehold, in the use or occupation of the Crown, or of any person or persons in his or their official capacity as servants of the Crown, is not assessable, and that property held by the Crown under lease or by any person in an official capacity under the Crown is not assessable either at present or as a charge upon the reversion. Where property was assessed in the occupation of a Crown official and not appealed against, and taxes collected thereunder upon replevin. Held, that it was the assessor's duty to ascertain and assess the proper parties, and that it is not the duty under such circumstances of the party assessed to appeal to the court of revision, the improper assessment being of itself a nullity.

This decision was affirmed in the case of *The Principal Secretary of State for War* v. *The Corporation of the City of Toronto* (2), where the land was leased to a commissariat officer on behalf of the Secretary of State for War and occupied by Her Majesty's troops. It was held exempt from taxation and that a provision in such lease binding the lessee to pay all taxes to which the premises should be liable could make no difference.

The words of the relevant Upper Canada statute under consideration in these cases were "all property vested in or held by His Majesty", precisely the same as in the Vancouver Act.

Under the lease of the Fumigation Station the landlord held an interest not only in the land but in the building which, in this instance, might be one of substance because there is no evidence that it was the intention to remove or destroy the building at the end of the term, such as existed in the Boeing case.

(1) (1862) 12 Upper Can. C.P. Rep. 456.

(2) (1863) 22 Upper Can. Q.B. 551.

The Fumigation Station building has apparently been included in the general assessment of land and buildings during each of the years 1923 and following until 1941, when objection was first raised. The amount placed on the roll in respect of this building was of an estimated value of $6,600. Otherwise, the procedure was the same as in the case of the Boeing building.

We must assume that the taxes on the land, without the building, have been paid. The amount in question paid under protest was calculated on the assessed value of the building alone. The Legislature has not chosen to make provision for distinguishing the interest of the Crown when a tenant and that of a registered owner of the freehold; nor has the defendant municipality attempted to make such distinction in the assessment and taxation of the land in question. This difficulty was avoided in the *Fairbanks* (1) and *Montreal* (2) cases by special provisions, but there are none such to cover the case here.

In my view, when the tangible property is rightfully in the possession of the Crown and "held by" the Crown within the meaning of the statute, then such property is exempt as long as the term and possession continue. What remains, that is the intangible property, be it either legal or equitable, which belongs to the owner, may be taxed but, if it is the intention of the legislature to impose such tax, it should provide for the segregation of such interest and the imposition of the tax by a positive enactment.

For these reasons, I come to the conclusion that the second declaration in the judgment should be sustained.

The right to question the validity of the assessment in this action would seem to be settled by the decision of this Court in *Donohue* v. *Corporation of the Parish of St. Etienne de la Malbaie* (3), and by the Judicial Committee in *Toronto Railway Company* v. *City of Toronto* (4).

With respect to the order for the return of the moneys paid, what has been said above is sufficient, in my opinion, to dispose of any claim of the defendant to any right to impose a personal tax. The personal liability must necessarily fall with the validity of the tax.

On the other matters involved, I agree with the Court of Appeal and would dismiss the appeal with costs.

(1) [1928] A.C. 117.
(2) [1923] A.C. 136.
(3) [1924] S.C.R. 511.
(4) [1904] A.C. 809.

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Taschereau J.

TASCHEREAU J.—For the reasons given by Mr. Justice Rand, I would allow this appeal with costs and dismiss the action. The appellant Corporation should have its costs of the action and of the appeal to the Court of Appeal against the Canadian Northern Pacific Railway Company.

RAND J.—The question raised in this appeal is the right of the city of Vancouver to impose certain taxes against the respondent, The Canadian Northern Pacific Railway Company. That Company is the owner of a large tract of land within the city, two parcels of which are the subject of the taxes challenged. One of these was leased to the Crown for the Departments of Agriculture of both the Dominion and the Province for a term of twenty years from January 1st, 1923. By the provisions of the lease, the Crown undertook within six months to erect a building and plant suitable for fumigation purposes under *The Destructive Insect and Pests Act*. The second parcel was leased on the 1st of May, 1940, to the Dominion Crown represented by the Minister of Munitions and Supply for one year and thereafter from year to year. On it a large plant has been erected for the construction of airplanes under a contract with the Boeing Aircraft of Canada Limited. In each lease there was a clause giving the lessor a limited regulatory control over buildings and improvements "now or hereafter made or placed upon the said demised premises". The second contained a clause (15) as follows:

> Provided further that, at the termination of this lease or any renewal thereof, whether by effluxion of time or otherwise, the lessee shall forthwith remove his building or structures from the demised premises, failing which the lessor shall be entitled to remove the same at the expense of the lessee or to retain the same free of compensation as the lessor may see fit.

Both these buildings, by admission of counsel,

> are substantial structures, attached to the freehold and sunk in the soil.

In addition to those set up on these two parcels by the Crown, there were on the remaining portions of the tract many other buildings. For the whole of the block there was a single item of assessment and of taxation, but the case contains particulars of valuations of the land and the various buildings from which the total assessed value and the taxes are constructed and calculated.

The assessment and taxation of land in Vancouver are provided for in the *Vancouver Incorporation Act, 1921*. By section 37

> It shall be the duty of the Assessor annually to make a valuation of all rateable property in the city, and to report the same with such particulars as the Council may require.

Section 39 directs that

> All rateable property, or any interest therein, shall be estimated at its actual cash value as it would be appraised in payment of a just debt from a solvent debtor, the value of the improvements (if any) being estimated separately from the value of the land on which they are situate.

By section 40, various items of information are to be set out on the assessment roll: these include a description of every rateable parcel of land, its value and the value of all improvements, the name and address of the registered owner, the name and address of any person requesting notice and being the holder of a registered agreement to purchase, the names of all tenants, and the name of every person having an assessable interest in land, the fee simple of which is held in the name of the Crown, and the value of that interest. By section 46,

> All property vested in or held by His Majesty or for the public use of the Province

is exempted from taxation but, by subsection 10 of section 40, every exempt parcel, including lands the title to which is in the Crown, shall, for purposes of information and record, be set down on the assessment roll with the same particulars as are required for rateable land. Section 45 authorizes the Council by by-law to exempt from taxation wholly or in part any improvements or buildings, "notwithstanding that they may be part of the land on which they stand". By subsection 3 (*a*) of section 46, specific provision is made for the taxation of a lessee or sub-lessee of His Majesty in lands "vested in or held by His Majesty", and he is to be assessed in respect of his right or interest on the basis of the actual cash value of the lands and improvements so occupied "as if he were the actual owner of such lands and improvements".

Upon the completion of the assessment roll, which is, in fact, a valuation roll, the City Treasurer is to make out a tax roll with appropriate particulars. Sections 63 and 67 are as follows:

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63. All rates, taxes, or assessments under this Act shall be due and payable not only by the owner of the property upon which they are imposed, but also by the possessor or occupant of the property, and by the tenant or lessee of such property, to the extent to which the possessor, occupant, tenant, or lessee is indebted to such owner, and the payment by any such person shall be a discharge of the property for the amount so paid, and shall also be a discharge to the possessor, occupant, tenant, or lessee of so much of his indebtedness to the owner as he shall have so paid.

* * * *

67. The taxes accrued on any land shall be a special lien on such land, having preference to any claim, lien, privilege, or encumbrance of any party except the Crown, and whether the same are registered or not, and shall not require registration to preserve it.

As can be seen, the general scheme of the taxation is the simple one of imposing upon the interest of the private owner of the freehold estate or the private person in possession of Crown land, a tax based on the value of the totality of interest in the land, including improvements. That includes the value of the leasehold interest of property rented to private individuals or to the Crown. In this way a uniformity of valuation arises in respect of all properties which possess taxable interests either possessory or reversionary.

It was admitted in argument that the buildings on both lots could be removed only by complete dismantling: they have no removable identity. The mode of annexation has already been mentioned. The whole tract, owned by the railway company, is adjacent to railway trackage and operations, and it requires no stretch of the imagination to appreciate potential railway uses for which it might be required as railway operations expanded. The express obligation to remove, therefore, in the Boeing lease, is for the benefit of the lessor. Subject, then, to the contentions now to be dealt with, there can be no doubt that in both cases the improvements have become incorporated in and integral parts of the land leased: *Whitehead* v. *Bennett* (1).

It was argued that the Boeing building, by agreement, remained a chattel and was not within the taxing provisions. There is no stipulation in the lease that it shall be deemed a chattel, but the contention is put on the fact of its erection at the cost of the lessee, of the obligation to remove by the lessee, and that it was not intended to be used or enjoyed by the lessor. I am unable to draw any such con-

(1) (1858) 27 L.J. Ch. 474.

clusion from these circumstances. But even an express agreement would operate only in the way of an estoppel between the parties, and without effect as to the taxing authority: *Hobson* v. *Gorringe* (1).

It is then urged that actually the building belongs, in a colloquial sense, to the Crown, that no beneficial interest in it was ever intended to enure to the lessor, and that the technical conceptions of incorporation of improvements in lands ought to give way to the common sense notion of real ownership at all times in the Crown. Alternatively it is put that, if the building has become in fact incorporated in the land, the Crown, by force of the real transaction, is vested with an ownership in it as part of the land in the nature of a vertical section. This would be analogous to the creation of title to a seam or stratum of minerals.

As to the former, the governing rules are free from doubt. This building has become a portion of the land and its title subsumed in that of the owner of the fee: *Whitehead* v. *Bennett* (2). The beneficial enjoyment enures to the Crown during its possession under the lease, and if there should be sufficient salvage value to constitute an object of its removal, that likewise would be a right under the lease and not otherwise. It is sufficient to say that, apart from statute, such a notional estate or interest is unknown to the law of real property.

Nor is the alternative contention of any greater validity. Doubtless, by appropriate formality, a freehold interest in the area of the land comprising the building could be vested in the Crown (although its precise character, in view of the purpose of the lease and its special provisions, would call for some ingenuity in the language of limitation); but no such estate has been created here nor has the Crown bargained for it.

A fortiori do these considerations apply to the buildings occupied by the Agricultural Departments.

Mr. Biggar urged that the scheme of municipal taxation generally throughout this country was fundamentally a tax on possession, as exemplified by the case of *City of Montreal* v. *Attorney-General of Canada* (3); and that where the Crown was in possession, no tax could properly be imposed on any other interest. But that is precisely what *City of Halifax* v. *Fairbanks' Estate* (4) decided

(1) [1897] 1 Ch. 182.
(2) (1858) 27 L.J. Ch. 474.
(3) [1923] A.C. 136.
(4) [1928] A.C. 117.

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could be done. In that case, under the Halifax charter, there were three classes of interests taxed: the ownership of the land assessed on the capital value; the occupation for business purposes assessed at 50 per cent of the capital value; the occupation for residential purposes assessed at 10 per cent of the capital value. Section 394 expressly provided that property leased to the Crown should be deemed to be in the occupation of the owner for the purposes of the business and residential tax. The business tax there imposed on the owner was held to be on the reversion or on the owner in respect of the reversion but on the basis of the value of the occupation determined under the charter.

It should be particularly observed that there too the value of the leasehold interest as such was already included in the capital valuation of the property; but that possessory interest was the valuation basis of the business tax as well. There was, therefore, a double tax in relation to some portion, at least, of the value of the leasehold interest. That same situation is present here. There is no objection to the taxation of the capital value of the land apart from the building, nor is there any suggestion that that taxation, without any deduction for the valuation of the leasehold interest, is an infringement of section 125; neither is it contended that such a deduction would be permissible under the charter. On the footing that the buildings are within the legal title of the land, what distinction can be made between occupancy of the land with and without the improvement? The case of a lease for nine hundred and ninety-nine years is offered to demonstrate the absurdity of treating such a tax as not being one directly on the interest of the Crown. But the answer is that if the Crown sees fit to employ a mode of acquiring real property interests that entails a certain taxing consequence to other interests, it must accept that consequence, so far as it may be affected by it, as a necessary concomitant of that quality of interest.

By a number of decisions, i.e. *Calgary and Edmonton Land Company* v. *Alberta* (1), *Smith* v. *Vermillion Hills Rural Council* (2), *City of Montreal* v. *Attorney-General of Canada* (3), *City of Halifax* v. *Fairbanks' Estate* (4),

(1) (1911) 45 Can. S.C.R. 170.
(2) [1916] 2 A.C. 569.
(3) [1923] A.C. 136.
(4) [1928] A.C. 117.

certain propositions are now beyond controversy. First, provincial legislation may provide for the taxation of any private beneficial interest in land in which the Dominion Crown also may have an interest; second, the taxation of such an interest may be on a basis of the valuation of the Crown's interest, i.e., in the case of a lease by the Crown as if the tenant were the owner of the fee (*Smith* v. *Vermillion Hills Rural Council* (1), *City of Montreal* v. *Attorney-General of Canada* (2); and in the case of a lease to the Crown, as if the owner were in actual occupation of the land (*City of Halifax* v. *Fairbanks' Estate* (3)); third, the taxation of such an interest on such a basis of valuation is direct taxation, regardless of the actual incidence of the tax in any particular case.

Two questions, therefore, remain here: first, do the provisions of the Vancouver charter, on a reasonable construction, embrace the taxation of private beneficial interests in lands on the foregoing valuation basis while leaving the interest of the Crown untouched, or do they require us to say that they are directed against the interest of the Crown and are consequently in conflict with section 125; and secondly, does the inclusion in the content of value of an element created or added to the land by the Crown take the case out of the principles of the decisions mentioned and constitute an indirect taxation of the Crown contrary to section 125? Let us consider each of these questions.

As the first becomes a matter of exemption or non-exemption of a private interest which is subject to the general taxing power of the province, if the language of the taxing statute on a reasonable construction can extend to such an interest, it will be held to do so; that has to be the rule followed in the cases mentioned: *Calgary and Edmonton Land Company* v. *Attorney-General of Alberta* (4), *Smith* v. *Vermillion Hills Rural Council* (5). Interpreting the provisions of the Vancouver charter from the point of view of that rule and in the light of the constitutional barrier to the taxation of Crown interests or property, I find no difficulty in holding that the charter does bring within its ambit the private interests which are present

(1) [1916] A.C. 569.
(2) [1923] A.C. 136.
(3) [1928] A.C. 117.
(4) (1911) 45 Can. S.C.R. 170, at 192.
(5) (1914) 49 Can. S.C.R. 563, at 573; [1916] 2 A.C. 569, at 574.

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here and on the foregoing valuation basis. I assume that the exemption in section 46 includes a leasehold interest of the Crown; but that does not affect the fact that "rateable parcel of land" includes land so leased, or that the valuation of that parcel is without exclusion of the separate or exempt leasehold interest. The latter, possessed by the Crown, remains untouched by any taxation effect. It is neither taxed itself nor made the subject-matter of a tax lien. Its value indeed is included in that of the owner's interest as if the owner were in occupation, but that circumstance is unobjectionable. If section 40 had specifically directed the valuation of the land leased to the Crown "as if the owner were in possession" the situation would have been the same as *City of Halifax* v. *Fairbanks' Estate* (3). But that is what the section does by necessary intendment, and its propriety has not been challenged either in the Halifax real property tax or in the separate land assessment here.

The remaining question, in my opinion, presents the real and narrow point for decision. Is there, in such a case, a limitation upon the basis of valuation which the provincial jurisdiction can prescribe for the taxation of a private interest in land? Can that basis reach to an increment of value created and added to the land by the Crown in respect of which no enjoyment or benefit on the part of the lessor is contemplated? Admittedly, the Crown's interest created out of the existing property by the lease—which is the conjoint act of the Crown—may be used as the measurement of taxation of the owner's interest *Halifax* v. *Fairbanks* (3): how, then, can the mere enhancement of the value of that possessory interest, by enlarging its content through improvements added by the Crown, take the case out of the rule laid down by those decisions. I am unable to see how it can do so.

I would, therefore, allow the appeal with costs and dismiss the action. The appellant will have its costs of the action and of the appeal to the Court of Appeal as against the Canadian Northern Pacific Railway Company.

Appeal allowed with costs.

Solicitor for the appellant: *Arthur E. Lord.*

Solicitor for the respondents: *Wm. H. Campbell.*

(3) [1928] A.C. 117.