THE NORTH WEST LUMBER CO. LTD. (DEFENDENT)..... } APPELLANT;

AND

MUNICIPAL DISTRICT OF LOCKERBIE NO. 580 (PLAINTIFF)..... RESPONDENT.

1925

*Oct. 12.
*Nov. 2.

APPEAL FROM THE APPELLATE DIVISION OF THE SUPREME COURT OF ALBERTA

Licencee of Crown Lands—Assessment—Over-valuation—Municipal Districts Act, R.S.A. [1922], c. 110

The appellants, licencees of timber berth No. 2335, of which 3,884 acres are situated within the territory of the respondent municipality, were assessed in 1920 by the respondents at a total sum of $35,000, subsequently reduced by the Assessment Equalization Board to $32,882.40. The land subject to the licence is the property of the Crown in right of the Dominion and under s. 125 of the B.N.A. Act is not liable to taxation. The assessment was made for a five-year period beginning in 1921. Notice of assessment was sent to the appellants and later tax notices based on it were also sent in that year and in following years. The appellant did not appeal to the Court of Revision against the assessment, but upon being sued for taxes based thereon together with statutory penalties, contended that the assessment was null and void, alleging fraud on the part of the respondent in making the assessment. The assessment was based upon the value of the land, upon which the timber stood, as farm lands, whereas the appellant's interest is in the timber only.

Held, that the legislature of a province may authorize the assessment of the interest of an individual in property belonging to the Crown in right of the Dominion and that such assessment is not obnoxious to sec. 125 of the B.N.A. Act. *Smith* v. *Council of Rural Municipality of Vermilion Hills* (1); *City of Montreal* v. *Attorney General for Canada* (2) followed.

(1) [1916] 2 A.C. 569. (2) [1923] A.C. 136.

*PRESENT:—Anglin C.J.C. and Duff, Mignault, Newcombe and Rinfret JJ.

1925

NORTH WEST LUMBER CO., LTD. v. MUNICIPAL DISTRICT OF LOCKERBIE, No. 580.

Held, a case of over-valuation of the timber berth. The appellant should have availed itself of its right of appeal under the Municipal Districts Act, R.S.A., c. 110.

APPEAL from the judgment of the Appellate Division of the Supreme Court of Alberta, affirming a judgment of the trial judge in favour of the respondent.

The facts are sufficiently stated in the above headnote and in the judgment now reported.

MacLean K.C. for the appellant.

Woods K.C. for the respondent.

The judgment of the majority of the court (Anglin C.J.C. and Duff, Mignault and Rinfret JJ.) was delivered by

MIGNAULT J.—The appellant, for some years, has held under a license to cut timber from the Dominion Government timber berth no. 2335 of which 3,884 acres are within the territory of the respondent. The license is a yearly one, with right of renewal subject to the conditions therein specified, and vests in the licenses all right of property whatsoever in all trees, timber, lumber and other products of timber which it is entitled by the license to cut, and which have been cut during the continuance of the license. The land subject to this license is of course the property of the Crown in right of the Dominion, and under section 125 of the British North America Act is not liable to taxation.

In the year 1920, the respondent assessed against the appellant what was described as timber berth no. 2335, containing 3,884 acres, at a total sum of $35,000, subsequently reduced by the Assessment Equalization Board to $32,882.40. This assessment, under the law governing the respondent, was made for a five-year period beginning in 1921. Notice of the assessment was duly sent to the appellant, and subsequently tax notices based on it were also sent in that year and in the following years. The appellant did not appeal to the Court of Revision against the assessment, but being now sued for the recovery of $2,338.15 for taxes imposed in 1921, 1922 and 1923, and based on this assessment, together with statutory penalties, it contends by way of defence that the assessment is null and void. It also alleges fraud on the part of the respondent in making this assessment. I will at once dispose of this allegation of fraud by saying that it is totally unsupported by the proof.

The most that the appellant can contend under the testimony is that the assessor committed a mistake in making this assessment.

Eliminating the question of fraud, the appellant's grounds of attack on the assessment are sufficiently set out in paragraphs 8, 9 and 10 of the statement of defence:

8. The plaintiff in the year 1920 purported to assess the defendant and its interest in the said timber berth no. 2335 at the sum of $32,882.40, but in arriving at the said value assessed the value of lands on which the said timber stood, and which lands stand in the name of and are owned by the Government of the Dominion of Canada and are exempt from taxation * * *

9. The said plaintiff in the year 1920 did not assess the defendant's interest in the said timber berth at its actual cash value as it would be appraised as a just debt from a solvent debtor as required by the Municipal Districts' Act, but on the contrary assessed the defendant's interest at a far higher rate than its actual cash value, and in the said assessment included the value of the land on which the said timber stood, and the said purported assessment in 1920, assessed the defendant's interest at a far higher value than it assessed the land of residents within the plaintiff district.

10. Wherefore the said purported assessment in 1920 was and is illegal, null and void and made on a wrong principle.

The evidence relied on by the appellant is contained in the cross-examination of Mr. Hooper, secretary-treasurer of the respondent, and its assessor during the years in question in this case. Mr. Hooper, who made this assessment, is perfectly frank in speaking of his method of valuation. Formerly lands were assessed on an acreage basis, but afterwards at a valuation. He knew that the only interest of the appellant was under its license and that it owned no land in the district. He made very little personal inspection of this berth on account of the depth of the snow on the ground. He had struck a rate on the land that he knew well and he worked it out in accordance with whether the land was better or poorer, and in assessing had reference to the soil, the situation and so forth. He assessed the appellant on a farm land basis, taking into consideration the soil and the location. In making the valuation, he did not consider the timber on the land, of which he appears to have had little knowledge. His valuation has not included in it any reference to the timber. If he had proceeded to assess the value of the timber in the municipality, he supposes that his assessment probably would have been in the neighbourhood of $2,600 which is suggested to him as its

1925

NORTH WEST LUMBER CO., LTD. v. MUNICIPAL DISTRICT OF LOCKERBIE, No. 580.

Mignault J.

value. He adds that the berth had always been previously assessed exactly the same as farm land, on the acreage basis, and at the time he made the assessment he was not certain how to proceed, but there did not seem (to be) any definite instructions, so he went along; and he thought, at any rate, they had the right to appeal and it would probably be brought up and heard of.

It is quite possible in this case that there may have been an over-valuation, a point on which it is not necessary to express any opinion, for there seems to be a marked difference between the value of this tract of land, considered as farm land, and what is stated to be, after a cruise was made in 1924, the value of the timber which the appellant is entitled to cut. But this brings up the question on which the case turned in the appellate divisional court: Should not the appellant have appealed against this assessment to the Court of Revision and, if its appeal failed, to the district court judge, and not having done so, is it entitled to resist payment of the taxes claimed by the respondent? The appellate court decided this question adversely to the appellant, following a previous decision of its own in another case affecting this same appellant: *Municipal District of Pershing* v. *North West Lumber Co.* (1). The answer of the appellant is that the assessment is null and void as made without jurisdiction over the subject matter, thus raising the only question which need now be considered, for, as stated, there is no proof of fraud.

A short statement of the legislation governing the assessment of lands in the municipal districts of Alberta, at the time of the assessment complained of, will assist us in deciding this question.

This legislation is contained in the Municipal District Act, statutes of 1918, c. 49, frequently amended, and forming now chapter 110 of the revised statutes of Alberta. The Act (s. 2) defines "land" or "property" as including lands, tenements and hereditaments and any estate or interest therein, including, *inter alia*, the interest of a holder of any lease of grazing, hay or marsh lands, or of any timber limit, or of any mineral rights from the Dominion of Canada. "Occupant" means the inhabitant occupier of any land exempt from taxation in a municipal district, or, if

(1) [1923] 19 Alta. L.R. 302.

there be no inhabitant occupier of such land, the person entitled to the possession thereof. "Owner" means any person who appears by the records of the Land Titles Office to have any interest in any land in the district, other than as mortgagee, lessee or incumbrancee.

Assessments in the municipal districts are made for five-year periods beginning in 1920, and a statement showing the total assessed value of the land in the district is forwarded by the assessor to the department of municipal affairs and is then considered by a board called the Assessment Equalization Board which may confirm the total assessed value as the equalized assessment of the municipal district, or may fix some other amount as such equalized assessment, and the amount so confirmed or fixed is the local assessed value for the year 1921 and each year thereafter until the next equalized assessment is made, 1920, c. 30, s. 28.

All land in every municipal district is liable to assessment and taxation subject to certain exemptions, comprising *inter alia* all lands belonging to Canada or to the province. R.S.A. 1922, s. 224. Land is assessed at its actual cash value as it would be appraised in payment of a just debt from a solvent debtor, exclusive of the value of any buildings erected thereon or of any other increase in value caused by the expenditure of labour or capital thereon. R.S.A. 1922, s. 226.

If any person thinks that he or any other person has been wrongly assessed or assessed too high or too low, he may, within the time limited by the Act, appeal from the assessment to the council which is constituted a Court of Revision for revising the assessment roll, and from the decision on this appeal he has a further right of appeal to a judge of the district court. The decision and judgment of the judge is final and conclusive in every case adjudicated upon. R.S.A. 1922, s. 241 and following, 258 and following, 271. I refer merely to the sections of the revised statutes which consolidate provisions in force at the time of this assessment.

Upon the termination of the sittings of the Court of Revision, or, where there are no appeals, upon the expiry of the time for appealing thereto, the secretary enters over his signature at the foot of the last page of the roll the fol-

1925

NORTH WEST LUMBER CO., LTD. v. MUNICIPAL DISTRICT OF LOCKERBIE, No. 580.

Mignault J.

lowing certificate, filling in the date of such entry: "roll finally completed this.....day of.....19..." And the roll thus finally completed and certified is the revised assessment roll for the year, subject to amendment on appeal to a district court judge and to amendment necessary to bring the roll into conformity with the assessment made by the Assessment Equalization Board and any directions of the board with respect thereto, and is valid and binds all parties concerned, notwithstanding any defect or error committed in or with regard to such roll. R.S.A. 1922, s. 254.

There is no doubt that where the assessor in making an assessment acts without jurisdiction, e.g., by assessing against a ratepayer property not subject to assessment, the failure to appeal to the Court of Revision or to the district court judge does not preclude the ratepayer from setting up the nullity of the assessment in answer to a demand for taxes levied on the basis of such an assessment, unless, perhaps, where jurisdiction is conferred on the court or judge to deal with such matters, as would appear to be the case under s. 83 of the Ontario Assessment Act. I may merely refer here to the latest decisions bearing on this question: *Toronto Railway Co.* v. *City of Toronto* (1); *Donahue Brothers* v. *Corporation of the Parish of St. Etienne de la Malbaie* (2).

On the other hand, it is settled that the legislature of a province may authorize the assessment of the interest of an individual in property belonging to the Dominion of Canada, and that such assessment is not obnoxious to s. 125 of the British North America Act. *Smith* v. *Council of the Rural Municipality of Vermillion Hills* (3); *City of Montreal* v. *Attorney General for Canada* (4).

Finally, if the complaint of the ratepayer, who has an interest in the assessed property, is that he has been assessed too high, in other words, if he objects to the excessive valuation of a subject matter of assessment which is within the jurisdiction of the assessing authority, and an appeal is afforded him by the assessing statute, he cannot be heard to attack the assessment in answer to an action claiming the tax, if he has not availed himself of this right of ap-

(1) [1904] A.C. 809.
(2) [1924] S.C.R. 511.
(3) [1916] 2 A.C. 569.
(4) [1923] A.C. 136.

peal, or if, having asserted an appeal, the decision has sustained the assessment. *Town of MacLeod* v. *Campbell* (1); *Shannon Realties Limited* v. *Ville de St. Michel* (2).

The able argument of Mr. Maclean has not convinced me that this is not really a case of alleged over-valuation of the timber berth of the appellant, and therefore my opinion is that the latter should have availed itself of its right of appeal under the statute. The cross-examination of the assessor, as well as the assessment roll, clearly shew that what was assessed in this case was the timber berth or the interest of the appellant under its license from the Crown, and not the lands themselves, although they were considered for purposes of valuation. The assessor thought that he was entitled to assess the appellant's interest in this land, and he knew it had no other interest than its license, at the value of the land on a farm land basis. It would probably be vain to expect that the persons whom the district municipal councils employ to assess property and prepare an assessment roll, should have expert knowledge of the principles of valuation. To guard against and correct their mistakes, the statute provides what may be called a domestic tribunal, with a further appeal to a judge. Here the searching enquiry into the motives or state of mind of the assessor does not show that an attempt was made to assess anything else than the appellant's interest in the land, however much the assessor's mode of valuation may be criticized. If a mistake was made, it could have been corrected by an appeal under the Act.

I have not failed to notice Mr. Maclean's contention at the argument that the interest of the appellant under its timber license would not come within the definition of "*owner*" under the Municipal District Act. I am inclined to think that it would, for the appellant does not appear to be a lessee within the meaning of the exception in the definition, but could be better described as a licensee, and it certainly had an interest in the land subject to its license. I think the whole gist of the appellant's case is that it had an assessable interest in the lands, but that it was illegally assessed for the lands themselves. To my mind, in the last analysis, we have nothing more here than an attempt to

(1) [1898] 57 Can. S.C.R. 517. (2) [1924] A.C. 185.

1925

NORTH WEST LUMBER CO., LTD. v. MUNICIPAL DISTRICT OF LOCKERBIE, No. 580.

Mignault J.

resist payment of taxes by complaining of an over-valuation of the subject matter of the assessment.

I would dismiss the appeal with costs, but I think it unnecessary to express any opinion on the ground relied on by the learned trial judge in giving judgment for the taxes claimed, that the matter was concluded by the 1923 amendment to the Municipal District Act.

NEWCOMBE J.—I acquiesce in the conclusion because I think it is impossible to decide otherwise, having regard to the judgment of the Judicial Committee in *City of Montreal* v. *Attorney General for Canada* (1). There, although it is provided by s. 125 of the British North America Act 1867, that no lands or property belonging to Canada or any province shall be liable to taxation, it was nevertheless held that a provincial legislature might authorize the taxation of a tenant in respect to lands belonging to the Dominion, as if he were the actual owner; and therefore an assessment was upheld which differed in no respect from an assessment of the property against the Dominion Crown, except that by the statute, it was the tenant who was held to pay the tax, and the land was nominally assessed against the tenant. If this legislation did not offend against the Constitutional Act, I do not perceive how it can be successfully maintained that anything is involved except the amount of the assessment, when, in the present case, the assessor, in the absence of a statutory direction, valued the land as if the tenant were the owner, and charged the assessment against the tenant in the assessment roll.

Appeal dismissed with costs.

Solicitors for the appellant: *Short, Cross, Maclean & McBride.*

Solicitors for the respondent: *Milner, Matheson, Carr & Dafoe.*

(1) [1923] A.C. 136.