1932

CITY OF HALIFAX AND HARRY KITZ (DEFENDANTS) ..... } APPELLANTS; *Oct. 17, 18.

1933

AND

*Feb. 7.

MARY HYLAND (PLAINTIFF) ..... RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA EN BANC

Assessment and taxation—Land offered at tax sale bid in by municipality —Alleged offer of redemption—Alleged misrepresentation by municipal official preventing redemption—Claim to have conveyance by municipality set aside and for right of redemption—Conflict of testimony.

APPEAL by the defendants the City of Halifax and Kitz from the judgment of the Supreme Court of Nova Scotia *en banc* (1) which reversed the judgment of Graham J. (1) in favour of the defendants.

Certain property owned by the plaintiff, on which taxes were in arrear, had been, pursuant to the provisions of the Halifax City Charter, offered for sale by public auction by the Collector of Taxes for the City of Halifax and, there being no bidders, had been bid in for the City by the Collector, pursuant to s. 466 of the Charter. The last day for redemption, under s. 458 (1) of the Charter, was July 6, 1929.

On July 5, 1929, (the day before the last day for redemption), the defendant Kitz, who wished to purchase the property, attended at the Collector's office, gave his cheque for the amount which the City would require for redemption of the property, and an assignment of the City's rights in the property was made out to him, and signed by the Mayor and City Clerk. The assignment was not delivered to Kitz at that time but was kept in the Assistant Collector's desk. Receipts were given to Kitz for the amount, reading as follows: "Received from Mary Hyland per H. Kitz the sum of * * * dollars."

At a time subsequent to the last day for redemption the City conveyed the property to Kitz.

*PRESENT:—Rinfret, Lamont, Smith, Cannon and Crocket JJ.

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On the morning of July 6, 1929, the last day for redemption, the plaintiff's son, William Hyland, went to the City Hall. One Smith, who, it was stated, was going to put up the money to redeem the property, also went there. Hyland met the Collector's Assistant, Young, in the hallway and asked him about the property, and said he wanted to redeem it. Young asked him to go inside, when he would look up the sale book and give him full information on it. Hyland and Young went into the office, Smith remaining out in the hall, and there was a conflict of evidence between Young and Hyland as to what occurred in the office. In the appeal to this Court, the case turned on the question, on conflicting evidence, as to what was said in the conversation in the office between Hyland and Young.

The plaintiff alleged that her agent attended at the Collector's office on the forenoon of the last day for redemption and stated that the plaintiff was prepared to pay the amount required for redemption, but was informed that it was too late to redeem, that the property had been already sold to Kitz; and that as a result of this false representation the amount required for redemption was not paid. These allegations were denied. Young, in his evidence, stated that he got the sales book out, turned up the page where the sale of the property was recorded, told Hyland that a transfer had been made out to Kitz, and that if they did not redeem before the time expired, a deed would be made out and given to Kitz afterwards, that he made out a full memorandum of the amount necessary to redeem and gave it to Hyland.

The action was brought for a declaration that the conveyance of the property by the City to Kitz was null and void and for a declaration giving the plaintiff the right to redeem on payment of the amount owing for taxes, and (by amendment) alternatively for damages.

The trial had been commenced before Harris C.J., who heard all the witnesses except Young. Harris C.J. having been taken ill during an adjournment of the trial, the case was taken over by Graham J., who decided it upon the record of the trial as far as it had proceeded before Harris C.J., and upon the evidence of Young heard by himself. He accepted Young's version, rather than Hyland's, of what was said, as being the more probable. He dismissed

the action (1). His judgment was reversed by the Court *en banc,* which gave judgment for the plaintiff (Ross J. dissenting) (1).

On the appeal to the Supreme Court of Canada, after hearing argument of counsel, the Court reserved judgment, and on a subsequent day delivered judgment, allowing the defendants' appeal and restoring the judgment of the trial judge. Crocket J. dissented.

The judgment of the majority of the court was delivered by Smith J., who, after discussing the evidence at length, stated that he could see no reason for reversing the finding of the trial judge, who heard Young's testimony as to what was said, and accepted it; looking at the whole situation, it was difficult to find any reason for doubting the accuracy of Young's testimony. (In the course of his discussion of the evidence, and dealing with the remark in the judgment of the Court *en banc* that "This is certain, that Hyland and Smith went to the City Hall on the morning of July 6 for the purpose of redeeming the property and Smith was prepared and ready to pay the amount," Smith J. stated that he was satisfied upon the evidence that Smith and Hyland, on the morning of the 6th, went to the Collector's office merely for the purpose of ascertaining the correct amount required, and not for the purpose of then and there paying it, that Smith was not prepared or ready to pay it, and had no intention of paying it on that particular visit.)

Dealing with the assignment made out to Kitz on July 5, Smith J. agreed with the Court *en banc* that the City had no power to make it, but pointed out that the transaction was in accordance with a not unusual practice which was thought by the city officials to be legal and proper, and did not indicate any ill motive; the assignment was a mere nullity, and, whether a nullity or not, had no bearing on the right to redeem. As to the particular form of the receipts given to Kitz, in view of the undoubted facts of the matter no weight should be attached to it; there was no ground for holding that the payment by Kitz was made for the benefit of the owner.

Crocket J. dissented. He discussed the facts at length. He pointed out that, having regard to the fact that the learned trial judge did not have the advantage of person-

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ally hearing the testimony of Hyland or of Smith and professedly based his finding wholly on the balance of probability, there was no objection to the Court *en banc* freely reviewing that finding on a pure question of fact or to this Court now doing so. He stated that, after carefully considering the evidence in all its details and the reasons stated in the judgments of the learned trial judge and of the Court *en banc* for their opposite findings upon the question, he had reached the same conclusion as the majority of the appeal judges that Hyland's was the true version of what took place, and that Young by his statements prevented Hyland from paying the money to redeem the property; a tender was unnecessary under the circumstances. (*Nocton* v. *Lord Ashburton* (1), cited). *Derry* v. *Peek* (2) is not an authority for the proposition that an action for damages for misrepresentation without an actual intention to deceive may not lie in a proper case (*Nocton* v. *Lord Ashburton* (3)) (*Swinfen* v. *Lord Chelmsford* (4) cited). If Young made the false representation and prevented Hyland from paying the money to redeem the property, the City ought to be required to make good whatever loss the plaintiff had thereby suffered; that the City was liable for the misrepresentation and its consequences admitted of no doubt in the circumstances disclosed (*Lloyd* v. *Grace, Smith & Co.* (5); *Percy* v. *Glasgow Corporation* (6)).

Appeal allowed with costs.

F. H. Bell K.C. for appellants.

B. Russell K.C. for respondent.

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(1) [1914] A.C. 932, at 962.

(2) (1889) 14 App. Cas. 337.

(3) [1914] A.C. 932.

(4) (1860) 5 H. & N. 890, at 920-921.

(5) [1912] A.C. 716, at 737: that the principal is liable to third persons "for the frauds, deceits, concealments, misrepresentations * * * and omissions of duty of his agent in the course of his employment, although the principal did not authorize * * *."

(6) [1922] A.C. 299.