THE CORPORATION OF THE TOWNSHIP OF BUCKE, J. I. RITCHIE, AND ALPHONSE MONDOUX (DEFENDANTS) ..... } APPELLANTS;

AND

THE MACRAE MINING COMPANY LIMITED (PLAINTIFF) ..... } RESPONDENT;

AND

J. N. MALOOF AND N. N. MALOOF.... (DEFENDANTS).

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*Feb. 22.
*April 20.

ON APPEAL FROM THE APPELLATE DIVISION OF THE SUPREME COURT OF ONTARIO

Assessment and taxation—Mines and minerals—Mining rights and surface rights acquired and held by same corporation under separate grants and titles—Assessment by township municipality—Sale for taxes—Validity—Title of purchaser—Mining rights, as such, not assessable—Description in tax deed—Lost assessment rolls—Presumption as to description of property assessed—Ambiguous description—Presumption as to what property assessed—Falsa demonstratio—Right of township to assess land including minerals—Acquisition, under tax deed, of land including minerals—Assessment Act, R.S.O., 1914, c. 195—Land Titles Act, R.S.O., 1914, c. 126.

Grantees under two Ontario Crown grants, one of the mines, minerals and mining rights in certain land, and the other of that land without mines and minerals, transferred their rights in the properties to plain-

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tiff. The mining rights and surface rights were transferred separately, and were registered separately, under *The Land Titles Act*, Ont., in plaintiff's name. The property was within defendant township's territory, and it imposed municipal taxes in respect thereof, and, certain taxes remaining unpaid, it effected a sale by auction and gave the purchaser a tax deed. This recited that a warrant had issued commanding the treasurer "to levy upon the land hereinafter mentioned for arrears of taxes due thereon", and that the treasurer had sold "that certain parcel or tract of land or premises hereinafter mentioned" on account of arrears of taxes "alleged to be due thereon," etc., and purported to grant "all that certain parcel or tract of land and premises containing 20 acres, more or less, being composed of: the north half of parcel number 2831 in the register * * * and is described as follows: situate in the township of Bucke * * * namely: the north half of the north-east quarter of the south half of lot number 14 in the first concession * * * containing by admeasurement 20 acres more or less." Parcel 2831 in the register comprised only the mining rights. The assessment rolls were lost by fire. Plaintiff asserted right of ownership and asked to have the tax deed set aside.

Held, it must be presumed, in the absence of the assessment rolls, that the description in the deed conformed to that of the property assessed (that the property sold was that assessed, was also the clear purport of the deed's recitals); this description was ambiguous, as parcel 2831 mentioned comprised only the mining rights, while the particular description of the land which followed was a description of the land in which such mining rights would, if not excepted, be included; the mining rights, as such, were not assessable; but the township could assess the land, including the underlying minerals; the description of the subject of assessment being ambiguous, the presumption is that the township acted within its jurisdiction and assessed what it had power to assess; while the surface rights and mining rights were severable, and had, since the Crown grants, been dealt with as separate hereditaments, nevertheless, ownership of both having vested in the same corporation (the plaintiff), there could be valid assessment of the land, including the minerals, which *The Assessment Act*, s. 40 (5), expressly contemplates; to make such assessment was apparently intended, and the description of the land, without exclusion of minerals, included the minerals therein contained; the assessment should, therefore, be treated as assessment of mineral land, and the words "parcel number 2831", etc., might be disregarded as *falsa demonstratio*, or as inserted by mistake; without these words, there was sufficient description of the subject of assessment, and it is not material in what part of the description the *falsa demonstratio* occurs (Broom's Legal Maxims, 9th Ed., p. 404; *Watcham* v. *Attorney General of the East Africa Protectorate*, [1919] A.C. 533); construing the tax deed according to the same rules, and in conformity with its recitals, the purchaser acquired the land including the minerals.

Judgment of the Appellate Division of the Supreme Court of Ontario (58 Ont. L.R. 453) reversed.

Quaere, whether merger is an appropriate term to describe the effect of the ownership of what had been seperate hereditaments in the same area coalescing in the same person.

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APPEAL by the defendants the Corporation of the Township of Bucke, J. I. Ritchie and Alphonse Mondoux (the other defendants not appealing), from the judgment of the Appellate Division of the Supreme Court of Ontario (1) allowing an appeal from the judgment of Mowat J. at trial.

The action was brought for a declaration that the plaintiff is the owner of certain land, or, in the alternative, is the owner of the mines, minerals and mining rights in, upon and under the said land, and to set aside a certain tax sale, and tax sale deed, from the defendant the Corporation of the Township of Bucke to the defendant Ritchie. The interests of the other defendants existed by reason of certain transfers from the defendant Ritchie.

The trial judge, Mowat J., dismissed the action. The Appellate Division varied his judgment by declaring that the defendants are the owners, as their several interests may appear, of the surface rights of the land in question, but that the plaintiff is the owner, free of any claims on the part of the defendants, of the mines, minerals and mining rights in the land, and directing amendment of the land titles registers accordingly, and directing that the certificate of title issued to the defendant Ritchie be delivered up for cancellation.

The material facts of the case are sufficiently stated in the judgment now reported. The appeal to this Court was allowed with costs.

A. G. Slaght K.C. for the appellants.

A. M. Le Bel and *W. J. Gilhooly* for the respondent.

The judgment of the court was delivered by

MIGNAULT J.—The defendants, the corporation of the township of Bucke, J. I. Ritchie and Alphonse Mondoux (in the courts below J. N. Maloof and N. N. Maloof were also defendants, but have not appealed), appeal from a judgment of the second Appellate Divisional Court of Ontario which reversed, Latchford C.J. dissenting, the judgment of the trial judge, Mowat J. The litigation arose out of the following circumstances.

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On January 30th and February 1st, 1907, James A. Macrae and James A. Mulligan obtained two grants in fee simple from the Crown, in right of the province of Ontario, the first of mines, minerals and mining rights, and the second of surface rights, i.e., of land without the mines and minerals (1).

In the first grant, the property is described as follows:

The mines, minerals and mining rights in, upon and under all that parcel or tract of land situate, lying and being in the township of Bucke in the district of Nipissing, in the province of Ontario, containing by admeasurement forty acres be the same more or less, which said parcel or tract of land may be otherwise known as follows, that is to say, being composed of the northeast quarter of the south half of lot no. 14 in the first concession of the said township of Bucke.

The description of the property conveyed by the second grant is the same as that contained in the first grant from the words "all that parcel or tract of land", inclusive, to the end of the extract above quoted. In this grant, ores, mines or minerals are excepted.

The sale of the mining rights was made under *The Mines Act, 1906,* 6 Edw. VII, c. 11, and, as shewn by the price paid ($60.00), was of "mining rights" as distinguished from "mining lands" (s. 174 of the Act).

Both grants were registered under *The Land Titles Act* at North Bay, the grant of the mining rights being entered as parcel 4059 and the grant of the surface rights as parcel 4163.

In October and December, 1907, Macrae and Mulligan assigned to the respondent company their rights in the properties conveyed by these two grants, each of them transferring by separate transfers the mining rights and the surface rights.

In these transfers, the mining rights (referred to as parcel 4059 in the register for the district of Nipissing) are described as

the mines, minerals and mining rights in, upon and under the land hereinafter particularly described, namely, the northeast quarter of the south half of lot no. 14 in the first concession of the township of Bucke, containing by admeasurement forty acres, more or less.

And the description of the surface rights (referred to as parcel 4163 in the same register) is as follows:

the land hereinafter particularly described, namely: the northeast quarter, etc., etc. (*ut supra*).

(1) The interest of Macrae was described as a three-quarters interest and that of Mulligan as a one-quarter interest.

The mining rights and the surface rights, thus registered separately, so remained on the register of land titles in the name of the respondent company for more than ten years. The parcel numbers, however, were changed at some time which is not mentioned, apparently upon the establishment of a new land titles office for the northern division of Nipissing, and the parties agree that parcel 4059 (the mining rights) and parcel 4163 (the surface rights) in the register of Nipissing became respectively parcel 2831 and parcel 2899 in the register for "Nipissing North Division." It also appears that, since the tax sale and transfer to which I will refer, the north half of the northeast quarter of the south half of lot no. 14, alleged to have been sold for taxes, is described as parcel 928 in the register for "South Temiskaming" in the land titles office at Haileybury. I merely mention this parcel number without for the moment entering upon the question whether it covers the surface rights, or the mining rights, or both.

The property in question lies within the territory administered by the corporation of the Township of Bucke, which I will call the Corporation. Municipal taxes in respect of this property were imposed by the corporation on the respondent, and these taxes for the years 1916, 1917 and 1918 were not paid and remained unpaid for more than two years thereafter.

In 1920, the corporation caused a sale by auction to be effected for these taxes, and the purchaser was one John I. Ritchie. Subsequently the warden and the treasurer of the township executed a transfer in favour of Ritchie, the construction of which is in issue between the parties, the respondent contending that it comprised merely the surface rights, while the appellants argue that with the surface rights the mining rights were conveyed to Ritchie. This transfer, which is undated, was filed in the land titles office at Haileybury on the 11th of June, 1921.

S. 66 of *The Land Titles Act* (R.S.O., 1914, ch. 126) requires that, where a sale is made for taxes, a notice of the lodging of the transfer for registration be given to the persons who appear by the register to be interested in the land, and the deputy local master of titles at Haileybury sent a notice by registered letter to "Macrae Mining Co. Ltd., Try Toronto, Ont." The respondent's office is at

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Ottawa and the letter was returned marked "not found"; but as the respondent had not registered its address as required by s. 112 of *The Land Titles Act*, and as no address is given in the other registered documents, the respondent cannot rest anything on insufficiency of the notice.

The transfer was registered and Ritchie's name was entered in the register as owner (vested in fee) of parcel 928 "with an absolute title of the mines, minerals and mining rights in, upon and under." He received from the local master of titles a certificate of title under *The Land Titles Act* for parcel 928. He executed several transfers of parts of or shares in parcel 928, and the transferees were made defendants in this action.

The record contains a copy of the register with respect to parcels 928 and 2,899, as the register stood on the 3rd of November 1925, for parcel 928, and on the 4th of November, 1925, for parcel 2,899. In the register, parcel 928 appears to stand for the mining rights of the north half of the respondent's forty acres, while the surface rights in these forty acres are still called parcel 2,899, N.N.D.

Under these circumstances, the respondent, in May, 1925, brought an action against the appellants and the two Maloofs, asserting its right of ownership in these parcels, and asking that the tax deed or transfer be declared null and void. The learned trial judge dismissed the action on the ground that the respondent was too late to impeach the tax deed, in view of s. 178 of *The Assessment Act* (R.S.O., 1914, ch. 195). This judgment was, however, reversed by the Appellate Divisional Court which decided, on the construction of the tax deed and transfer, that it covered only the surface rights. The learned judges considered the description in the deed ambiguous with its reference to the north half of parcel 2,831 followed by a particular description which they thought could only apply to the surface rights. Being of the opinion that the mining rights, as such, were not assessable (and in this Latchford C.J. concurred), they held that the deed should be restricted to the surface rights, for otherwise it would be void: *ut magis valeat quam pereat.*

In my opinion, the mining rights, as such, were not assessable for municipal taxes. The relevant section of *The Assessment Act* (R.S.O., 1914, ch. 195) is section 40,

subsections 4, 5 and 6 of which are in the following terms:

(4) The buildings, plant and machinery in, on or under mineral land, and used mainly for obtaining minerals from the ground, or storing the same, and concentrators and sampling plant, and, subject to subsection 8, the minerals in, on or under such land, shall not be assessable.

(5) In no case shall mineral land be assessed at less than the value of other land in the neighbourhood used exclusively for agricultural purposes.

(6) The income from a mine or mineral work shall be assessed by, and the tax leviable thereon shall be paid to the municipality in which such mine or mineral work is situate. Provided that the assessment on income from each oil or gas well operated at any time during the year shall be at least $20.

Mr. Slaght, for the appellants, argued that as, under s. 2, ss. (*h*), of *The Assessment Act*, the words "land," "real property" and "real estate" include all mines, minerals, etc., in and under land, and as, in a sale from subject to subject of land containing minerals, the latter pass to the purchaser without special mention, the tax sale of the land carried with it the minerals, and consequently Ritchie became owner of these mining rights.

He also contended that, inasmuch as s. 40 of *The Assessment Act* is under the heading "Valuation of lands," the provisions of ss. 4 must be taken to mean, not that minerals, *qua* minerals, cannot be assessed, but that their value is not to be considered in valuing the land subject to assessment.

The second contention, in my opinion, ignores the plain language of the statute. Subsection 4 states that, subject to subsection 8 (which has no application here), "the minerals in, on or under such land, shall not be assessable." The meaning of the three subsections, when read together, is obvious. Minerals, as such, that is to say minerals considered as a subject of ownership distinct from the ownership of the land in which they are contained, are not assessable (subsection 4). Land containing minerals is however assessable as land, but it is not to be assessed at less than the value of other land in the neighbourhood used exclusively for agricultural purposes (subsection 5). And the income derived from a mine or mineral work, which supposes that minerals have been extracted from the land, is also assessable (subsection 6).

The question involved in Mr. Slaght's first contention is: What, on the proper construction of the tax deed and

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transfer, was the subject of the sale? We have not the assessment rolls for the years 1916, 1917 and 1918, which were destroyed in the great fire at Haileybury some years ago. We know, however, that on the register of the land titles office the mining rights and the surface rights were entered as separate subjects of ownership, and each had a parcel number distinguishing it from the other. In the grants from the Crown and in the assignments from the original grantees they were also treated as separate properties.

Looking now at the tax deed and transfer, which follows the form prescribed by *The Assessment Act* (section 173 and form 12), it recites that a warrant had issued under the hand of the warden and seal of the township commanding the treasurer " to levy upon the land hereinafter mentioned, for arrears of taxes due thereon," and that, on the 16th of February, 1920, the treasurer had sold by public auction to John I. Ritchie " that certain parcel or tract of land or premises hereinafter mentioned," at and for the price of $136.52, on account of arrears of taxes " alleged to be due thereon " up to the 31st of December, 1918, together with costs. Then follows the operative clause, by which

the Warden and Treasurer of the said Township, in pursuance of such sale, and of "*Assessment Act,*" and for the consideration aforesaid, do hereby Grant, Bargain and Sell unto the said John I. Ritchie, his heirs and assigns, ALL THAT certain parcel or tract of land and premises containing twenty acres, more or less, being composed of: The North half of Parcel Number 2831 in the register for Nipissing North Division and is described as follows: Situate in the Township of Bucke in the District of Nipissing North Division, namely: The North half of the Northeast quarter of the south half of Lot Number Fourteen in the first Concession of the said Township of Bucke containing by admeasurement twenty Acres more or less.

Excepting five per cent of the acreage thereby granted for roads and the right to lay the same where the Crown or its officers may deem necessary.

I think it must be presumed, in the absence of the assessment rolls, that the description in this transfer conformed to the description of the property assessed in the assessment rolls for 1916, 1917 and 1918. That the property sold and transferred was the property which had been assessed is also the clear purport of the recitals of the transfer.

We have, therefore, assessments in the terms of the description in the transfer. It seems unquestionable that

this description is ambiguous, for parcel 2831 on the register, at the time of the sale, comprised only the mining rights, while the particular description of the land which followed was a description of the land in which such mining rights would, if not excepted, be included.

It has already been stated that the mining rights, as such, were not assessable. On the other hand, the corporation could assess the land, including the underlying minerals. The description of the subject of the assessments being ambiguous, the presumption is that the corporation acted within the limits of its jurisdiction and assessed what it had the power to assess, for otherwise the assessments would be void. This is the familiar rule of construction expressed by the maxim *ut res magis valeat quam pereat* (Broom, Legal Maxims, p. 343 and following).

There is no doubt that the surface rights and the mining rights were severable. Since the grants from the Crown, they had been dealt with as separate and distinct hereditaments. Nevertheless, ownership of both having vested in the same corporation, there could be valid assessments of the land containing and including the minerals, which the statute (s. 40, ss. 5) expressly contemplates. To make such assessments was apparently intended, and the description of the land, without exclusion of minerals, includes the minerals therein contained. The assessment should, therefore, be treated as assessments of mineral land, and the words "Parcel number 2831, etc.," may be disregarded or struck out as a *falsa demonstratio,* or as inserted by mistake. Without these words, there is adequate and sufficient description of the subject of the assessments, and it is not material in what part of the description the *falsa demonstratio occurs* (Broom's Legal Maxims, 9th Ed., p. 404, *Watcham* v. *Attorney General of the East Africa Protectorate* (1).

The assessments being regarded as of mineral lands, and the transfer being construed according to the same rules, and in conformity with its recitals of a levy upon and a sale of "the land" described, Ritchie acquired that

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land including the minerals in and beneath it. This also applies to the interest that Mondoux took by virtue of the transfer which Ritchie made to him.

Under these circumstances, it is unnecessary to invoke s. 178 of *The Assessment Act,* on which the learned trial judge relied, and which renders valid and binding a tax sale unless it be questioned within two years, unless indeed to meet other objections to the tax sale not relied upon in this court by the respondent.

Section 42 of The Land Titles Act confirms in the appellants Ritchie and Mondoux an absolute title to what was transferred to them.

It appears unnecessary to discuss the question of merger referred to in the arguments and in the judgment appealed from. It may, perhaps, be open to question whether merger is an appropriate term to describe the effect of the ownership of what had been separate hereditaments in the same area coalescing in the same person.

The appeal should be allowed with costs here and in the Appellate Divisional Court and the judgment of the trial judge should be restored.

Appeal allowed with costs.

Solicitor for the appellants: *Arthur G. Slaght.*

Solicitor for the respondent: *Arthur M. LeBel.*