M. D. DONALD LIMITED.....APPELLANT;

AND

CHARLES R. BROWN, PROVINCIAL ASSESSOR.....RESPONDENT.

1933

*April 25.
*April 26.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Assessment and taxation—Income—Company assessed for income tax in respect of profit on sale of land—Whether profit was a profit of the company—Whether sale was made by or on behalf of the company—Facts and circumstances in connection with transaction—Agreement of sale by individuals to whom company had made voluntary and unregistered conveyance—Resulting trust—Land Registry Act, R.S.B.C., 1924, c. 127, s. 34.

*PRESENT:—Duff C.J. and Rinfret, Lamont, Smith and Crocket JJ.

1933

M. D. DONALD LTD. v. BROWN.

The question in dispute was whether or not the profit on sale of certain land was a profit of the appellant company and therefore income of the company upon which it was liable for income tax under the *Taxation Act*, R.S.B.C., 1924, c. 254, ss. 2, 4. The land had been purchased by or on behalf of three individuals (who, with their solicitor, were the company's only shareholders) who paid the purchase price. The land was transferred to the company (which made no payment therefor), one lot by a conveyance (direct from the original vendor) in February, 1928, and the other lot by a conveyance in May, 1928. The land (upon which were rented buildings) was managed by one of the individuals, the same as if the company did not exist. In 1929 the said three individuals entered into an agreement to sell the land to a purchaser at a profit (the profit in question), which agreement was registered on February 5, 1929. On the face of the agreement, it was a sale by the three individuals; the money was payable to them, and the proceeds of the sale were paid to them. In June, 1928, the company had executed a conveyance of the land to the three individuals, for a nominal consideration, which conveyance was not registered until February 5, 1929, a few minutes after the registration of said agreement of sale.

Held: Upon all the facts and circumstances in evidence, the sale on which said profit was made was not a sale by the company or on its behalf, the profit was not a profit of the company, and it was not liable for income tax thereon.

It was contended that the said conveyance from the company to the individuals was a voluntary deed, and that, consequently, it passed nothing but the legal estate, and that there arose a resulting trust in favour of the grantor, the company. *Held:* Although it may be a disputed question whether or not a voluntary deed, without more, gives rise to a resulting trust in favour of the grantor, yet the law is clear that all the circumstances are to be looked at, and if the conclusion is that, in view of all the circumstances, no resulting trust was intended, then no resulting trust arises. In the facts and circumstances of the present case, no resulting trust was intended. The intention was to vest the full beneficial, as well as the full legal, title in the grantees.

The individuals were in a position to enter into the agreement of sale, notwithstanding that the conveyance from the company to them had not been registered; and the mere fact that, at the times of the making and registering of the agreement of sale, the conveyance from the company to them had not been registered, did not militate at all against the conclusion that the sale was their sale and that the purchase price was theirs. (The effect of s. 34 of the *Land Registry Act*, R.S.B.C., 1924, c. 127, discussed).

Upon the facts in evidence, the individuals, in managing the property and in receiving the conveyance of June, 1928, from the company, were not acting as agents or trustees for the company; the company was intended to be merely the depositary of the title, while all responsibilities in relation to the land were to be borne by, and all benefits to be enjoyed by, the individuals. Certain assessment returns made by the company, while entitled to their proper weight as evidence against the company, could not, under the circumstances in which they were made and in light of all the facts, affect the above conclusion.

1933

M. D. DONALD LTD. v. BROWN.

In re Hastings Street Properties Ltd., 43 B.C. Rep. 209, discussed and distinguished.

APPEAL by the company, M. D. Donald Ltd., from the judgment of the Court of Appeal for British Columbia, dismissing (Macdonald, C.J.B.C., and Galliher, J.A., dissenting) its appeal from the judgment of the Judge of the Court of Revision and Appeal, Vancouver Assessment District, dismissing its appeal against an assessment for income tax with respect to a certain profit made on a sale of land. The material facts of the case are sufficiently stated in the judgment now reported, and are indicated in the above head-note. The appeal to this Court was allowed with costs.

J. W. de B. Farris K.C. for the appellant.

Eric Pepler for the respondent.

After hearing argument of counsel, the Court reserved judgment, and on the following day delivered judgment orally.

The Chief Justice, delivering the judgment of the Court, said:

This appeal arises out of a controversy concerning the assessment of the appellants to income tax in respect of a sum of $77,000 which, the Crown alleges, was a profit "of" the appellants from the sale of real estate in Vancouver in the year 1929. The material sections of the Act (the *Taxation Act* of British Columbia, R.S.B.C., 1924, c. 254) are sections 2 and 4. Section 2 defines "income" as including

* * * all * * * profits arising * * * from real and personal property, or from money * * * invested, * * or from any venture, business, * * * of any kind whatsoever.

Section 4, which is the section creating the liability, imposes taxes upon

all * * * income of every person resident in the Province, * * * and income earned within the Province of persons not resident in the Province.

There is no question raised here whether this sum of $77,000, in respect of which the dispute arises, was in the nature of income, and upon that point it is quite unnecessary to express any opinion.

The question of substance is whether it was income "of" the appellant; and the answer to that depends upon the

1933

M. D. DONALD LTD. v. BROWN.

Duff C.J.

determination of the point whether or not the sale, in the execution of which this sum was paid, was a sale by the company or on behalf of the company. If it was such a sale, so that the proceeds belonged to the company beneficially, then the form of the transaction is of no importance whatever, and, admittedly, the appeal must fail, because the assessment was a right assessment.

The property consisted of two lots, which were throughout the argument referred to as lots 9 and 10, and that will be a sufficient description for our purposes. In 1929, Mrs. Meltzer, Mr. William Meltzer and Mrs. Schwartz entered into an agreement to sell this property to a purchaser for $210,000. That agreement was subsequently registered on the 5th of February, 1929. On the face of it, it is a sale by these three individuals; the money is payable to them, and, in point of fact, the proceeds of the sale were actually paid to them, and so far as appears enjoyed by them. The Meltzers, at the time of the execution of the agreement, were not the registered owners of the property. There had (on 12th June, 1928) been a conveyance to them of these lots, executed by the company, for the expressed consideration of one dollar and "other good and valuable consideration"; the resolution, however, by which the sale had been authorized by the Board of Directors having fixed the consideration at the nominal consideration of one dollar. This deed was not registered until the 5th February, 1929. On that same day, and a few minutes before the registration of the deed, the agreement of sale was registered.

Here, there are two points with regard to which some observations ought to be made. First, it is said that this deed from the company to the Meltzers was a voluntary deed, and that, consequently, it passed nothing but the legal estate, and that there arose a resulting trust in favour of the grantor, the company. Now, the question whether or not, to-day, a voluntary deed gives rise to a resulting trust in favour of the grantor, is a question about which there is a good deal of dispute. I refer to paragraph 108 in the 28th volume of Lord Halsbury's collection, upon the subject of Trusts and Trustees, which is in these words,

> It would seem that a voluntary conveyance of real property is deemed, in the absence of evidence to the contrary, to pass the beneficial interest in the property conveyed.

That statement is based mainly upon the observations of Lord Hardwicke in *Young* v. *Peachy* (1), and of Lord Justice James in *Fowkes* v. *Pascoe* (2). In the note, however, it is observed that a contrary view is expressed in Lewin on Trusts and concurred in by the eminent property lawyer, Mr. Joshua Williams, in his Law of Real Property, as well as by others.

The question as to the effect of a voluntary deed, without more, is, beyond doubt, a question upon which there is difference of opinion among real property lawyers. But there is no dispute about this: all the circumstances are to be looked at, and if the conclusion is that, in view of all the circumstances, no resulting trust was intended, then no resulting trust arises.

I think the proper conclusion from the facts I shall presently mention is that, in the circumstances of this case, it is quite out of the question to conclude that these parties intended there should be a resulting trust; quite impossible to reach any other conclusion than that the intention was to vest the full benefical as well as the full legal title in the grantees under that deed.

Another point is raised which it is perhaps desirable to consider, and that is based upon section 34 of the *Land Registry Act* of British Columbia. It is said that, by force of that section, this document which was executed on the 12th June, 1928, but which was not registered until the following February, conveyed, before registration, no interest of any description whatever to the grantees, so that, at the time the agreement of sale was made and registered, the land was the property of the company. Now, it is to be observed that the section, while it declares that an unregistered deed conveys no interest in the land, limits its operation in this way: "except as against the person making the same." As between the parties, the instrument has its full operation according to its terms. As between the parties, the interest in the property which is the subject of the instrument, the interest of the grantor, is deemed to pass to the grantee. Moreover, the section expressly declares that the grantee, in any case, acquires the right to apply to be registered. It is quite plain that where

(1) (1742) 2 Atk. 254, at 256.

(2) (1875) 10 Ch. App. 343, at 348.

1933

M. D. DONALD LTD. v. BROWN.

Duff C.J.

a registered owner, having a title to real estate as registered owner, and having the right to convey, executes a conveyance, the duty of the Registrar is, upon application, to register the transfer and to take all the steps necessary to lead to the issue of a certificate of title in favour of the grantee. The effect of the deed, therefore, is to vest in the grantee at least a right, enforceable by mandamus, to require the registrar to register him as the owner of the property. Moreover, the express terms of section 34 leave no doubt that this right is a right which passes by alienation *inter vivos*, by inheritance, by will; and the possessor of the right is in a position to make a sale of the property. From the economic point of view, there can probably be little difference between the position of an unregistered grantee from an honest grantor, who has not registered his grant, and the position of a person who has registered his grant and has received a registered title. Accordingly, assuming the deed to be operative to pass the beneficial as well as the legal interest, as it would be on the face of it, to the grantee upon registration, the grantees are in a position to enter into an agreement for sale of the property; and the mere fact that the document had not been registered would not militate in the slightest degree against the conclusion that the sale was their sale, that the benefits of the sale secured on the face of the instrument to the vendor were their benefits; in other words, that the purchase price was theirs.

Now, as against this, there could, in the present case, be only one possible effective answer; and that is, that these three persons who received this grant from the appellant company, received it in the capacity of agents or trustees for the company. And that is a question which must be determined by a consideration of the facts as a whole, and it is, therefore, necessary to review the history of the company's title and of the company's conduct and the conduct of the Meltzers in relation to these properties.

The company was incorporated in December, 1926. The nominal capital was $10,000. Four people signed the memorandum of association,—Mrs. Meltzer, Mr. Meltzer, Mrs. Schwartz (their daughter) (the persons who were the grantees under the deed from the company and the vendors under the deed to the Vested Estates Ltd., to which I have

just referred), and Mr. Grossman, their solicitor. Four shares were allotted, one to each of these persons. These shares were paid in full and the sum of $400 received for these shares by the company was deposited to the credit of the company; and that appears to have been the only bank account the company ever had, and that sum of $400 appears to have been the only sum that was ever credited to the company in the bank account.

The company had, as assets, these two lots, and two mortgages,—one for $75,000 and the other for $9,500, held by Mrs. Schwartz as mortgagee, and assigned to the company. They were transferred to the company shortly after its incorporation, for a nominal consideration, apparently. There is no suggestion that the consideration was anything but nominal.

Lot 9 was purchased in December, 1926, prior to the incorporation of the company, by Mrs. Schwartz, for the sum of $53,000, $15,000 of which was paid in cash. A final payment was made on the 6th of February, 1928, and was, as Mrs. Meltzer says, paid by the Meltzers. The other part of the consideration consisted of the assumption of a mortgage and of the obligations of a purchaser under an agreement of sale, and clearly before the execution of the conveyance to the company these encumbrances must have been discharged, because in the conveyance which was registered 20th February, 1928, there is no reference to any encumbrance of any description. There is no suggestion that the company entered into any obligation to repay any of these moneys; or that one cent of the money paid by the Meltzers was repaid. Mrs. Meltzer's evidence is directly to the contrary. But, for the moment, I dwell upon the fact that, apart from the evidence of Mrs. Meltzer, there is no suggestion that there was any obligation on the part of the company to reimburse, or that there was any reimbursement to Mrs. Schwartz, or to any of the Meltzers, in respect of these payments.

Lot 10 was purchased, apparently, in December, 1927, for $70,000. Thirty thousand dollars was paid in cash. The other part of the consideration was by way of the assumption of a mortgage for the balance of the purchase money. The property was transferred by a conveyance on the 5th May, 1928, to the company. Here again, there is

1933
M. D. DONALD LTD. v. BROWN.
Duff C.J.

no suggestion that there was any obligation entered into to repay this sum of $30,000 or that there was any repayment of a single cent of that money. I ought to have remarked, with respect to lot 9, that the conveyance is taken direct from the vendor to the company, that, in other words, the purchase was a purchase in the name of the company.

These are the facts of the situation as they appear from the documents, and altogether apart from the evidence of Mrs. Meltzer.

It is stated by Mrs. Meltzer, and not contradicted (if there were any dispute, there could have been contradiction), and I understand Mr. Pepler did not dispute, that these two properties, upon which there were buildings and which were rented, were managed by Mrs. Meltzer for the family. Indeed, the learned judge of the Court of Revision finds that she managed these properties precisely as she would have done if there had been no incorporation of the company, and did that because she was accustomed to doing business in that way.

I mentioned the bank account of the company. Mrs. Meltzer had her own personal account in the Bank of Montreal, and it must be taken, I think, as established that all rentals received from this property were paid to her, that all the outgoings were paid by her. She paid the insurance, the taxes, and for the repairs. There were virtually no meetings of the company. The company, as a company, did not intervene in any respect in the management of these properties. I repeat, the properties were dealt with, were managed, precisely as they would have been, if there had been no company in existence. The company received no money, had no money, and paid no money.

There is, in addition to what has been said, the circumstance already mentioned that the conveyance of lot 9 was taken directly in the name of the company, the purchase money having been paid by the Meltzers. That being so, there was, of course, a resulting trust in favour of the Meltzers. The company, I think, clearly held that property in trust for the Meltzers.

It may be noted that the total of the rentals received was less than $15,000; the specific payments by the Meltzers mentioned in the evidence amount to $51,000. The payments by them must have been much more. Mrs. Melt-

zer's testimony is, as already stated, that all payments were made by her. On the face of all these facts, the proper conclusion seems to be that the company was intended to be merely the depositary of the title, while all responsibilities in relation to the property were to be borne by, and all benefits to be enjoyed by, the Meltzers as individuals. That being so, the proposition upon which the position of the Crown is necessarily founded, viz., that in managing these properties, and in receiving the deed of June 12, 1928, the Meltzers were acting as agents or trustees of the company necessarily falls to the ground.

This conclusion does not necessarily rest upon the strict legal presumption. Looking at the whole situation,—the way in which the parties acted in relation to the property, the disregard of the company in the actual transactions in connection with the property, the fact that in both cases the property was purchased by the Meltzers, that the purchase money was paid by the Meltzers,—apart altogether from strict legal presumption, there is sufficient support for a highly probable conclusion that the parties had no thought of any such intention as a resulting trust in favour of the company when the transfer took place in June, 1928.

As against all this, the Crown puts forward, and very properly, certain assessment returns made in the name of the company. And let me say here that I see no ground for criticizing the action of the Assessment Department. On the face of the transaction, there was undoubtedly something to be investigated, and one can hardly be surprised that the assessor reached the conclusion he did. I do not understand Mr. Farris to cast any reflection on the Department or upon anyone connected with it. But here we are concerned, not with the appearance of things, but with the proper result when the real facts are, as they are now, known.

As to these assessment returns, Mrs. Meltzer, who had management of the estate, says she never saw them. They appear to be signed by Mrs. Schwartz who, apparently, did not know anything about the business. They were compiled by Mr. Clyne on instructions from Mrs. Meltzer, no doubt, with perfect bona fides. The datum from which he started, I think, plainly was this, that in his view the

1933

M. D. DONALD LTD. v. BROWN.

Duff C.J.

company was the owner of the properties; and that being so, he concluded that the rents would be a part of the income of the company. It is perfectly plain, I think, from the evidence, that he had no sufficient knowledge of the actual facts to direct his attention to the distinction between the company and the Meltzers individually, and from the point of view of the parties themselves it was not a matter of consequence whether, as regards rentals, the parties as individuals or the company should be assessed to income tax in respect of them.

Mrs. Meltzer says she didn't know whether in the municipal assessment roll the property was assessed to the company or to the individuals. In all probability, as the registered title was in the company, the company was assessed in respect of them. Now that the facts are known, I cannot regard these returns as in any way affecting the inferences to be drawn from the facts I have mentioned.

Now, a word as to the judgments. The Judge of the Court of Revision has given his reasons, and from those I think we can see pretty clearly the considerations by which he was influenced in reaching the conclusion he did. He does find as a fact that the business which was carried on by Mrs. Meltzer was the company's business. He finds also as a fact that the company did carry on the business of dealing in real estate, within its powers, and that the company did make the profit alleged from such dealings.

I think it is necessary to consider here his remark that the company in order to succeed has to get away from its own returns as made to the Assessor. I am not sure that the learned Judge of the Court of Revision has not misdirected himself just at that point.

The returns by the company were undoubtedly evidence against the company. They should receive their proper weight as evidence. But, in truth, the real question which the learned judge had to decide was whether or not the sale which was made in December, 1928, was a sale made by the Meltzers entitling them to the purchase money or whether it was a sale by the company entitling the company to the purchase money, and, as I have already said, there could be only one basis for a conclusion that it was a sale made by the company, and that would be that the Meltzers were acting either as agents or as trustees of the

company. Now, I repeat, in considering that question, these returns were some evidence undoubtedly, in favour of the Assessor's view; but the returns were compiled by a man who really did so without taking into consideration, and without really knowing, the real facts, and the conclusion, if he had come to the conclusion, that the business was the business of the company would have been a conclusion involving, to some extent at all events, conclusions of law the validity of which he was entirely incompetent to determine. The learned judge has, I think, quite failed at that point to realize what the real question was that he had to decide. Then, he emphasizes the fact that it is not denied that Mr. Clyne's figures are correct. I do not think there is any dispute as to that and I do not think that the correctness of the figures really enters into the controversy at all. The learned primary Judge does, I think, indicate very clearly what is influencing his mind by his allusion to the *Hastings Street Properties Ltd.* case (1). That is a case to which I think some reference ought to be made, because it really illustrates the point before us.

That was a case in which some people incorporated a company with an authorized capital of $50,000, five shares being issued of $1 each. The shareholders were minded to enter into a speculation and proposed to do so by using the company as an instrument and, in order to effectuate their design, loaned the company $40,000. The company bought property and sold it at a profit of $30,000. The terms on which the loan was made were that any profit on the transaction was to be distributed among them. I should have thought there could be only one question in that case, —whether the company was entitled to deduct from the moneys received the sums which it paid under the obligation to the lenders for the purpose of determining the amount of its taxable income. If it was not so entitled, the case was an obvious one. The purchase was the company's, the sale was the company's, the profit (for the purposes of the *Taxation Act*) was the company's.

There is no kind of analogy to the present situation where the sale was not made by the company; where the proceeds of the sale never, even momentarily, belonged to the company.

(1) 43 B.C. Rep. 209; [1930] 3 W.W.R. 561; [1931] 1 D.L.R. 604.

1933

M. D. DONALD LTD. v. BROWN.

Duff C.J.

Again, the learned Judge referred to section 34, which I have already discussed, in a manner which I think shows his view to be that, as the title to the property remained, except as between the parties, vested in the company until after the sale was made, the benefit of the sale necessarily enured to the company, and that consequently the profit was the company's profit.

For these reasons, I think the learned Judge's so-called findings of fact cannot be regarded as conclusive.

Coming to the Court of Appeal, the judgments in favour of the Crown are very brief and they seem to proceed upon the view that, as there was some sort of design to "evade" the *Taxation Act*, the appellants are liable. Of course, the word "evade" is, in this connection, a rather ambiguous one. It may mean that the intention was to engage in a transaction not touched by the *Taxation Act;* if so, nobody has any ground of complaint. It may be, on the other hand, that you are imputing an intention to put a transaction, which is in substance within the taxing provisions, into a form which, on the face of it, takes it out of the taxing provisions; and such a scheme as that must fail. I think, on the whole, that the view expressed by the Chief Justice in his dissenting judgment, concurred in by Mr. Justice Galliher, is the correct one.

For these reasons, I think the appeal should be allowed; and the order will be that the assessment will be amended by striking out this sum of $77,000. The appellants will be entitled to their costs throughout.

Appeal allowed with costs.

Solicitors for the appellant: *Grossman, Holland & Co*

Solicitors for the respondent: *Harper & Sargent.*