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*Oct. 15, 16.
*Dec. 21.

TOWN OF KAMSACK (PLAINTIFF) ..... APPELLANT;

AND

THE CANADIAN NORTHERN TOWN PROPERTIES COMPANY, LIMITED (DEFENDANT) ..... RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR SASKATCHEWAN

Municipal Corporation—Assessment and taxation—Crown land—Contract —Construction—B.N.A. Act, s. 125—"The Town Act," R.S.S. [1909] c. 85, ss. 2 and 301.

Certain land had formed part of an Indian reservation and was surrendered in trust for disposal by the Crown. Under a contract with the Crown the respondent paid an advance of $10 per acre and the Indians were to share equally with it in the proceeds of sale of the townsite lots after the respondent had recouped itself for the advance and subdivision expenses; title to be retained in the Crown and patent to issue from it direct to each purchaser from the respondent.

Held, Davies C.J. dissenting, that the respondent had no beneficial or proprietary interest in the land which would render it liable to assessment under "The Town Act." (R.S.S. [1909] c. 85); and that the land was at the time of the assessment Crown land and as such exempt from assessment.

Judgment of the Court of Appeal (16 Sask. L.R. 429) affirmed, Davies C.J. dissenting.

APPEAL from a decision of the Court of Appeal for Saskatchewan (1), reversing the judgment of the trial judge (2) and dismissing the appellant's action.

The material facts of the case and the questions in issue are fully stated in the above head-note and in the judgments now reported.

Chrysler K.C. and *J. G. Banks* for the appellant.

D. H. Laird K.C. for the respondent.

THE CHIEF JUSTICE (dissenting).—After hearing the argument in this case and reading the judgments in the Court of Appeal I incline to the opinion that the order in council, when properly read in connection with the existent facts when it was made, as I gather them from the record and from the exhibits and plans submitted, did convey some "interest"—an interest in the land—to Mackenzie & Mann, (to which the present respondents have succeeded)

*PRESENT:—Sir Louis Davies C.J. and Idington, Duff, Anglin and Mignault JJ.

(1) [1922] 16 Sask. L.R. 429; [1923] 1 W.W.R. 161.
(2) [1922] 3 W.W.R. 1.

though the Crown did retain to itself the legal title to such lands as trustees for the Indians on whose behalf the lands were to be held. When sold one half of the proceeds of such sales were to be given to the Indians.

I am inclined to agree with the trial judge and would concur in the argument and substantive contention of the plaintiff. So I come to the conclusion, though not without some doubt, that the appeal should be allowed with costs and the judgment of the trial judge restored.

IDINGTON J.—The appellant sued respondent to recover taxes alleged to be due by virtue of assessments made upon lands which, in my opinion, were clearly vested in the Crown at the time when such assessments were made and hence void, by virtue of section 125 of the B.N.A. Act; and as they were unoccupied lands and hence not assessable against anybody under the Assessment Act of Saskatchewan, which expressly exempts the interest of the Crown in lands, including any such held in trust for the Crown, could not properly be assessed against respondent.

A fair way to test the arguments put forward by appellant would be, to see what the legal result would be of attempting to sell the lands for non-payment of the said taxes in question.

Let any one try to follow out anything, probable or possible, in the way of the results of such an attempted sale and ascertain what they would be and, I submit, he must see how futile such a proceeding would be on the facts presented herein.

Presumably it is because someone has applied that test to the facts in question and realized the absurd results such an attempt would produce, that resort has been had to this suit.

Occupants such as Smith, a lessee of the Crown, in the case of *Smith* v. *Vermilion Hills* (1), might be assessed as such and become under such an assessment debtor of the municipality and be sued as Smith was. In the facts presented herein there is nothing resembling the facts there in question.

There is simply presented by the order in council relied upon by the appellant a recital therein of a proposed sale

(1) [1914] 49 Can. S.C.R. 563.

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by the superintendent of Indian Affairs who had no authority to sell, nor did he pretend to have, and on these facts thus presented to the Minister he discarded any such proposition, as he had a perfect right to do, and proceeded to recommend something else constituting Mackenzie & Mann sales agents on the terms set forth, and that constitutes the order in council which did not give them any interest in the lands which would be taxable.

The other cases cited arising out of Alberta legislation are quite irrelevant herein.

I agree so fully with the reasoning of the learned judges in the Court of Appeal below, reaching the conclusion that the lands never were assessable and hence the assessments void, that I need not repeat same here.

I think, therefore, this appeal should be dismissed with costs.

DUFF J.—This appeal, I think, should be dismissed. I have been unable to come to the conclusion that the transaction evidenced by the order in council of the 28th September 1904, had the effect of constituting Messrs. Mackenzie & Mann either the purchasers or the holders of any beneficial interest in the lands. The fact which appears to me to be fatal to the contention of the appellants upon this point is that the price at which the lands were to be sold is not fixed, nor is there any evidence that the arrangement included any procedure for determining the price which Messrs. Mackenzie and Mann had a legal right to insist upon being followed. No doubt the arrangement was made in the full expectation that as the policy of selling the lands had been decided upon and as both the department and Messrs. Mackenzie and Mann were interested in selling them to the best advantage, no difficulty would be experienced in agreeing upon prices. I think it must be taken from the material before us that in this most important particular the parties proceeded upon reciprocal faith in one another's reasonableness. In the circumstances an agreement that the price should be such as a court of justice should regard as reasonable cannot, I think, be implied.

That being so there was not, I think, in point of law either a contract or a trust legally enforceable vesting in

Messrs. Mackenzie and Mann any right which could be described as a right or interest in the land.

I think there is nothing in the Saskatchewan Assessment Act which prevents this point being raised in answer to the appellants' action. Section 389 is in identical terms with section 65 of the Ontario Assessment Act (R.S.C. c. 193) that was in question in *Toronto Railway Co.* v. *City of Toronto* (1) where that section was held to be without effect when the assessment is a nullity by reason of the absence of jurisdiction.

Admittedly the lands assessed are, as regards the legal title, vested in the Crown, and the evidence does not indicate that they were in the occupation of the respondents except, perhaps, as agents for the department of Indian Affairs. *Prima facie,* therefore, they were not subject to assessment, and I think it was open to the respondents to show that the lands were the property of the Crown within the meaning of section 125 of the British North America Act.

ANGLIN J.—The Court of Appeal unanimously held that the respondent had no such proprietary interest in the lands in question as would render it liable to assessment under the Saskatchewan Assessment Act. The lands are vested in the Crown in right of the Dominion of Canada and, as such, are exempt from assessment under the Saskatchewan statute and by virtue of the paramount authority of section 125 of the British North America Act.

The reasons for these conclusions are so fully and so clearly stated by Mr. Justice Turgeon in his opinion, concurred in by the learned Chief Justice of Saskatchewan and Mr. Justice MacKay (Martin J.A. reached the same conclusions), that it is quite unnecessary to do more than say that I accept them as the basis of my judgment dismissing this appeal.

MIGNAULT J.—The validity of the assessment which the appellant seeks to enforce depends on the answer to the question whether the respondent or the Crown in the right of the Dominion is owner of the property assessed. The learned trial judge decided this question in favour of the

(1) [1904] A.C. 809.

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appellant, holding that the ownership of these lands was vested in the respondent. This judgment was unanimously reversed by the Court of Appeal for Saskatchewan, which was of the opinion that the Crown was the owner of the lands assessed. The appeal is from the latter judgment.

To determine this question of ownership, it is necessary to construe the order in council of the Dominion Government, dated the 28th of September, 1904. The lands assessed were part of an Indian reserve and were surrendered to the Crown by the Indians. An agreement was then made between the Government and Messrs. Mackenzie, Mann & Co., whom the respondent now represents, the terms of which—for there is no other contract—are set forth in the order in council.

This order in council is based on a memorandum from the superintendent of Indian Affairs stating that Messrs. Mackenzie, Mann & Co., representing the Canadian Northern Railway Co.,

> are purchasers from the Department of Indian Affairs of what is known as the Kamsack Townsite comprising an area of 241.94 acres in Cote's Indian Reserve in the Pelly agency, Assiniboia. An advance of ten dollars per acre has been paid by the company, and the Indians are to share equally in the proceeds of the sales of lots after the company has recouped itself $5,000 made up of the $2,419.40 advance, and the cost of laying out the townsite, dedicating streets, etc.
>
> The Minister further states that the company has applied for patent for the land in the townsite; but as owing to the circumstances that the Indians are to share with the company in the proceeds of the sales and that the sale of the townsite is necessarily incomplete, patent cannot issue therefor, it is considered that it would be well to provide for the issue of a patent to each purchaser from the company of land in the townsite on report of the sales agent.

Notwithstanding the use of the word "purchasers" in the order in council, I am of opinion that the ownership of these lands remained in the Crown. This is shown by the express statement in the order in council that

> the sale of the townsite is necessarily incomplete

and that patent cannot issue therefor. It was recognized that the Indians, for whom the Crown was trustee, were to share with the company in the proceeds of the sales to be made and it was proposed to issue a patent to each purchaser from the company of land in the townsite on report of the sales agent.

The Crown therefore remained the owner of the lands until patents were issued to purchasers from the company.

Mr. Chrysler for the appellant referred to section 101 of the Indian Act (R.S.C. c. 81) excepting from the general exemption from taxation of Indian lands

those lands, which having been surrendered by the bands owning them, though unpatented, have been located by, or sold, or agreed to be sold to any person.

There is here no sale or agreement of sale of these lands to the company. The most that can be said is that the order in council gave selling rights as agents to Messrs. Mackenzie, Mann & Co., their remuneration to be one-half of the proceeds, after they had recouped themselves their expenses. The company had an interest in the price to be obtained on the sale of lots, but this is not an estate or interest in the lands themselves.

Mr. Chrysler also referred to the recent decision of the Judicial Committee in *City of Montreal* v. *Attorney General for Canada* (1). The question there was as to a provincial statute, amending the Montreal charter and providing 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 municipal taxes. It was held that as the tenant was only liable as long as his occupancy continued, 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 of the British North America Act.

Reference was also made to the judgment of their Lordships in *Smith* v. *Rural Municipality of Vermilion Hills* (2), where it was held that persons holding Dominion land under grazing leases could be assessed in respect of their interest in the land under such leases, "land," in the taxing statute, being defined as including any estate or interest therein.

I do not think that these cases help the appellant. The lands in question were not sold or leased to the respondent, and it has no interest or estate therein under the order in council. When it disposes of lots, the necessary patent issues to the purchaser from it but the sale would be a direct purchase by the purchaser from the Crown,

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

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even though an agreement to purchase the lots might have been made between the purchaser and the company.

I do not attach any importance to the numerous letters written in connection with the assessment of these lands by Mr. Nichol, the representative of the respondent. Although these letters refer to the respondent as owner of the land, it is obvious that no such expression could give it a title or interest which it did not possess under the order in council. And there is no room here for the application of the doctrine of estoppel.

I would therefore dismiss the appeal with costs.

Appeal dismissed with costs.

Solicitors for the appellant: *Banks & Stewart.*

Solicitors for the respondent: *Patrick, Doherty & Cumming.*

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*Oct. 22, 23.
*Dec. 21.

THE FIDELITY & CASUALTY CO. OF NEW YORK (DEFENDANT)..... APPELLANT;

AND

VICTOR MARCHAND (PLAINTIFF)..... RESPONDENT.

ON APPEAL FROM THE COURT OF KING'S BENCH, APPEAL SIDE, PROVINCE OF QUEBEC

Insurance—Automobile—Insured injuring own child—Action by tutor against father—Damages paid without consent of company—Right to recover—Arts. 165, 250, 1053 C.C.

The appellant company issued in favour of the respondent an automobile insurance policy against loss from liability imposed by law upon him for damages resulting from any accident caused by reason of the use of the respondent's automobile. The respondent, while backing his car from his residence to the public highway, ran over and injured his minor son. The respondent took the necessary steps to have a tutor appointed to enable an action to be brought by his son against himself for damages and was condemned to pay $5,000. The respondent paid this amount to the tutor before the delay for appealing had expired and while the appellant company was considering the advisability of so appealing. The liability of the appellant under the policy was subject to certain conditions amongst which were condition A. which provided that the assured should "at all times render to the company all co-operation and assistance within his power," and condition E. which provided that "the assured shall not * * * settle any claim * * * without the written consent of the company previously

*PRESENT:—Sir Louis Davies C.J. and Idington, Duff, Anglin and Mignault JJ.