

*Judgment of the Lords of the Judicial Committee
of the Privy Council on the Appeal of The
Corporation of the City of Toronto v. John
Russell, from the Court of Appeal for
Ontario; delivered the 30th July 1908.*

Present at the Hearing :

LORD ROBERTSON.

LORD ATKINSON.

LORD COLLINS.

SIR ARTHUR WILSON.

SIR HENRI ELZÉAR TASCHEREAU.

[Delivered by Lord Atkinson.]

This is an Appeal from a judgment of the Court of Appeal for Ontario, dated the 23rd December 1907, upholding the judgment of the trial Judge, whereby it was held that a sale of certain lands of the Plaintiff (Respondent) to the Defendants (Appellants) in respect of taxes due to the Defendants thereout was invalid, and that a certain deed, dated the 1st October 1902, by which the said lands were conveyed to the Defendants, should be delivered up to be cancelled, and further that the Plaintiff was entitled to redeem the said lands on paying to the Defendants all the taxes due thereout, including those which had accrued since the said sale, together with the interest thereon.

It will be observed that this latter relief necessarily presupposes that taxes had accrued on these lands before the sale, which must mean either that the lands were validly and properly assessed for those taxes, or, if invalidly assessed,

that the invalidity had, in some way, been effectively cured. But one of the main arguments before their Lordships was that the assessment roll had, by reason of the insufficient description of the property contained in it, been improperly drawn up; that the assessment of the property was therefore invalid; that this invalidity was not cured; and that no taxes had ever accrued upon the lands at all. If, therefore, the sale has been declared invalid by reason of the illegal and improper assessment of the land, the two forms of relief given are entirely inconsistent with each other.

The facts of the case are simple and instructive.

The Plaintiff, a citizen of the city of Toronto, and an Alderman of its Corporation, in the year 1892, during a boom in the real estate market, purchased as a speculation a plot of land about 8 acres in extent, in Ward No. 1, Division 2, near the intersection of two thoroughfares of the city named Carlaw Avenue and Queen Street respectively, the first running north and south and the second east and west. The plot was valued in that year at close upon \$26,000, and was liable to be assessed for a special rate or tax in respect of certain sanitary works by which it was alleged to have benefited, in addition to the taxes leviable by the city for general purposes.

The boom soon ceased. The value of real property rapidly declined. The valuation of this plot sank from \$25,710 in 1892 to \$8570 in 1895 and to \$3000 in 1897. In the face of this decline, the Plaintiff did not dispute that these lands of his were validly assessed, and that rates or taxes were due upon them, but he determined to diminish his loss, at least for the time being, by refusing or omitting (with the exception hereafter mentioned) to pay any of

the taxes due in respect of them to the Corporation, of which he was a member, so that in April 1901 (the date of the impeached sale) there remained still due for taxes, leviable on this plot, the sum of \$8,857.48, and in January 1907 the sum of \$13,387.48.

The result of the Plaintiff's neglect to discharge the liabilities attaching to the property, the benefit of which he was enjoying, and for which he swears he was all these years receiving rent, was that the burden he ought to have borne was thrown on the shoulders of his fellow-citizens.

In order to recover the arrears due the Mayor of Toronto, purporting to act in exercise of the powers conferred upon him by two statutes, styled "The Consolidated Assessment Act, 1892," and "the Assessment Act" (Rev. St. Ont. 1897, c. 224), and the Acts amending the same, on the 20th December 1900 issued his warrant, directed to the City Treasurer, the proper officer, commanding him to sell the several plots of land, over 1,000 in number, described in the several ward lists thereunto annexed, for the arrears of taxes then due upon them and costs.

The Plaintiff's plot was amongst those so directed to be sold, and was described in the ward list as follows:—

WARD 1. DIVISION 2.

Parcel No.	Description of property to be sold for arrears of taxes.	Name of person assessed as owner or otherwise.	Years in Arrears.	Amount of taxes in Arrears.	Charges for commission.	Charges for advertising.	Total.
118	8 57/100 acres (1,242 x 300) east side Carlaw Ave., north of Queen St.	John Russell	1892 to 1898	\$ 8,640.62	\$ 216.01	c 85	\$ 8,857.48

Advertisements were duly published in the "Toronto Gazette," announcing a sale to be held on the 10th April 1901, of the lands described in these lists, and notices of the intended sale were, in the form prescribed by the above-mentioned statutes, duly published in the local papers. It is contended that the above description of the lands, which was copied from the assessment roll, is insufficient, but it is admitted by the Plaintiff himself that, with this exception, everything that was done, up to and including the issue of the Mayor's warrant, was regular and proper. And in argument before their Lordships it was not suggested that, save in this matter of the description of the lands on the assessment roll, and in the lists and advertisements up to the 9th April 1901, the requirements of the above-mentioned statutes had not been observed.

Sales of several lots of these lands for arrears of taxes due thereon had been attempted in January and April 1898, but without success. A body called "The Board of Control" (which is apparently of the nature of a Committee of the Corporation having the matter of these sales in hand), mindful of what had occurred in 1898, had before the day fixed for the sale (the 10th April) reported to the Corporation on the subject. And that report having come up for consideration at the meeting of the Corporation on the 9th April 1901, the following paragraph of the report was adopted:—

" The Board have received a communication from
 " the City Treasurer stating that the Assessment Act
 " empowers municipalities to purchase lands offered
 " for arrears of taxes when the price offered at the
 " adjourned sale is less than the amount of arrears
 " registered against such lands, provided the Council
 " of the municipality has signified its intention to do

“ so at least one day before the sale, and, on the
 “ advice of the Treasurer, recommend that such notice
 “ be given before the date of the adjourned sale on
 “ the 24th inst., and that an officer of the Corporation,
 “ viz., the Assessment Commissioner, be authorized
 “ and instructed to purchase and acquire such lands
 “ for and on behalf of the Corporation as may be
 “ deemed advisable in the city's interest, the said
 “ lands so acquired to be again offered for sale within
 “ the time specified in the statutes, namely, seven
 “ years.”

From the minutes of the Corporation it appears that the Plaintiff was one of the members present at this meeting who adopted this paragraph of the report. When examined for discovery on oath, he did not venture to deny it.

The sale on the 10th April proved, as was anticipated by the members present at the meeting of the previous day, abortive, and was adjourned, as it was evidently arranged it should be, to the 24th of the same month.

No notice in writing was served upon the Plaintiff of the intention of the Corporation to purchase the lands so advertised for sale, if the price offered at the adjourned sale should be less than the arrears; but a notice to the following effect was published in the “Toronto Gazette” and in several local papers:—

“ ADJOURNED SALE OF LANDS FOR TAXES.

“ Will take place on Wednesday, April 24th, 1901,
 “ at 10.30 o'clock a.m.

“ PURSUANT to instructions from the City Council,
 “ the Corporation of the City of Toronto, under the
 “ provisions of section 184 of the Assessment Act,
 “ hereby gives notice of its intention to purchase such
 “ of the lands offered at the said adjourned sale as
 “ may be deemed advisable and in the interest of the
 “ city, if the sums offered for the said lands are less
 “ than the arrears due.

“ R. T. COADY,

“ City Treasurer.

“ City Treasurer's Office,

“ Toronto, April 11th, 1901.”

The adjourned sale came on on the 24th April, and the Assessment Commissioner attended it. Believing that it was necessary that a bid should be made by some third party to fulfil the technical requirements of section 184 (3) of the Assessment Act of 1892, he procured two persons to make two bids, and ultimately bought the Plaintiff's lands for the amount due upon them for arrears. The lands were subsequently, by the deed of the 1st October 1902, by a full and adequate description, conveyed to the Defendants.

The Plaintiff has formally admitted that before each of the sales he knew his lands were to be offered for sale for taxes; that before the 10th April 1901 he knew that his lands were then to be offered for sale, and also that no sale had been effected on that day; and that his lands were to be again offered for sale on the 24th April, but that he made no inquiries as to what happened on the latter occasion. He paid the general purposes taxes for the years 1892, 1893, and 1894, but none others. He admits that he never took any steps to redeem the land till 1905; that he had always been in possession of the land, which was "closed in" and had always been rented (though it did not appear to have been built upon or used for any purpose); and that he always knew that the land so closed in was the land which was under consideration and in question. He now seeks to have this sale set aside, on the grounds (1) that his land was insufficiently described in the assessment; (2) that he did not receive written notice of the Corporation's intention to buy on the 24th April; and (3) that the Assessment Commissioner had been given a discretion to buy or not to buy at the sale on the 24th April. Yet he himself must have known how his land was

described, and he never objected to the description ; he was fully cognizant of the Corporation's intention to buy ; and he had himself joined in conferring on the Commissioner the discretion of which he now complains. Unless, therefore, it be a merit in a citizen of a municipality not to pay his debts to the Corporation of which he is a member, this is, on the part of the Plaintiff, the most unmeritorious proceeding that could well be conceived.

The main objections to the description of the plot on the assessment roll put forward by the Plaintiff were (1) that the land was stated to be vacant ; and (2) that, by not stating where the frontage began or ended, it was impossible to identify its position. There is much to show that the description was adequate. Its alleged insufficiency was not shown to have misled anybody, least of all the Plaintiff. If, however, it was insufficient or erroneous, it was only so because the roll was not made up in accordance with the requirements of the Assessment Act of 1892. But by s. 8 of 3 Edw. VII., c. 86, a remedial Act passed to cure defects in sales of this kind which had taken place in the city, it was provided as follows :—

“ All sales of land within the said city up to and
 “ including the one held in the year 1902, and
 “ purporting to be made for arrears of taxes in respect
 “ of the lands so sold are hereby validated and
 “ confirmed, notwithstanding any irregularity in the
 “ assessment or other proceedings for imposition of
 “ any taxes so in arrear, or any failure to comply
 “ with the requirements of The Consolidated Assess-
 “ ment Act, 1892, or The Assessment Act in regard
 “ to the manner in which any assessment roll, or
 “ collector's roll of the said city has been prepared.”

The concluding proviso shows clearly that the section applies to sales to the Corporation for arrears of taxes, and it is obvious that the insertion of an insufficient or inaccurate description of premises in the assessment roll is a

failure to comply with the requirements of these two statutes, since they require a description to be inserted which is neither inaccurate nor insufficient. Their Lordships are therefore clearly of opinion that this defect, if it exists, comes within the very words of this statute, and is cured by it.

The next point relied upon by the Plaintiff is that he did not, as required by sec. 184 (3) of the Assessment Act, receive from the Council notice in writing of their intention to purchase his lands at the adjourned sale, should less than the amount of the arrears be bid for them. Their Lordships concur with both the Canadian Courts in thinking that the notice must, if given, be given to the owner of the lands, though it is not so expressed in the statute. But the notice, by warning the owner of what is about to take place, can only serve the purpose of enabling him either (1) to oppose the sale as illegal or improper, or (2) to attend the sale and bid at it, and see that it is regularly conducted, or (3) to redeem his land by payment of the taxes due. These being things entirely for his own benefit, he can undoubtedly waive the notice. (*Great Eastern Railway v. Goldsmid*, 9 A.C. 927, at page 936.) The question is, Has he waived it? In other words, Is there evidence from which it may fairly be inferred that he consented to dispense with the notice? Bowen, L.J., in *Selwyn v. Garfit* (38 Ch.D. 273, 284), says:—

“ What is waiver? Delay is not waiver. Inaction
 “ is not waiver, though it may be evidence of
 “ waiver. Waiver is consent to dispense with the
 “ notice. If it could be shown that the mortgagor
 “ had power to waive the notice, and that he knew
 “ that the notice had not been served, but said
 “ nothing before the sale and nothing after it,
 “ although this would not be conclusive, there would
 “ be a case which required to be answered.”

The Plaintiff must be fixed with the knowledge of what passed at the meeting of the 9th April at all events. Nowhere does he state that he did not know, or did not think, that the service of notice upon him was not necessary to validate the sale. And it is clear from his evidence that he knew the Defendants had purchased his lands, for, as an explanation of his not having made any move to redeem them till the year 1905, he states on oath:—

“ I thought that when the city held the land, it
 “ was all right ; I could redeem it any time I liked.
 “ . . . I always had it in my mind that, as long as
 “ the city had my property, I could, by paying the
 “ taxes, redeem it.”

There is no evidence to show that the Plaintiff, up to a short time before bringing this action, ever complained that he had not received the notice which his Counsel now insist was a condition precedent to a valid sale, or that the sale was invalid for any reason. On the contrary, he treated the sale as valid, but mistook the effect of it on his right to redeem. Their Lordships think that, in the absence of all explanation by the Plaintiff other than that given in his evidence on discovery, the legitimate inference to be drawn is that he consented to dispense with this notice ; that is, he waived it.

Their Lordships are, moreover, of opinion that, since the main and obvious purpose and object of the Legislature in passing the Act 3 Edw. VII., c. 86, was to validate sales made for arrears of taxes in the carrying out of which the requirements of the different statutes as to the mode in which they should be conducted had not been observed, and to quiet the titles of those who had purchased at such sales, the statute should, where its words permit, be

construed so as to effect that purpose and attain that object.

The Council can only act through its officers. The notice to be given by the Council must be given by or through one of its officers. The omission to give it may therefore be fairly held to be "a failure or omission on the part of an official of the said city" to comply with the requirements of the Consolidated Assessment Act, 1892, and the Assessment Act, within the words of this statute.

The Plaintiff's third point was that, in the certificate given by the Treasurer under section 193 of the Assessment Act, the description of the property sold was in itself insufficient, and different from the description of the parcel in the deed. Even assuming that this section applies to a purchase by the Council like the present one, the same remark applies to it as to the preceding point. The defect is cured by the same words of the same statute.

The fourth point is as to the alleged impropriety of the Assessment Commissioner getting two men to make bids at the adjourned sale of less than the amount of the taxes due. It is an abuse of language to describe this as a fraud. It was a perfectly harmless and unnecessary proceeding. The Commissioner, thinking erroneously that a bid was technically necessary to satisfy the conditions of the statute, procured these men to make the bids, but they were in no sense "puffers." Under s. 148 of 4 Edw. VII., c. 23, the municipality were to purchase for the *amount due*, and no less. These bids did not raise the price, or induce any one to offer more than he would otherwise have offered. Their Lordships think the incident in no way invalidates the sale.

The only remaining question is that touching the Plaintiff's right to redeem. The Plaintiff swore that he thought he could redeem at any time. His Counsel contended that he was entitled to do so at any time. If so, the litigation to set aside the sale was a useless proceeding. This contention is sought to be supported by confining attention to section 148 of 4 Edw. VII., c. 23, and ignoring the provisions of the general statute by which the redemption scheme is shaped.

By s. 200 of the Assessment Act and s. 180 of the Consolidated Assessment Act, 1892, in the case of an ordinary purchaser of land sold for arrears, the owner may, within a year from the day of sale, redeem the land sold by tendering for the benefit of the purchaser the purchase money plus 10 per cent. Under section 184 (2) of the Assessment Act, when the Treasurer sells land for less than the amount due for taxes at an adjourned sale, the owner can only redeem by paying the full amount due for taxes plus the expenses of sale and 10 per cent. Where the land is, under sub-section 3, bought by the municipality for the entire amount due for taxes, the owner can only redeem by paying the full amount due plus the expenses of sale, but not the 10 per cent. But the period during which redemption may take place remains the same, namely, one year from the day of sale.

Section 11 of 3 Edw. VII., c. 21, amends sub-section 3 of section 184, by providing that the owner, where he desires to redeem land purchased by the municipality, must pay not only the entire amount of the taxes which have accrued upon the property, but also the taxes which would have accrued upon it if it had remained the property of the former owner, and

been liable for ordinary taxation. But no change whatever is made as to the redemption period. It is still a year from the day of sale.

By the Act 3 Edw. VII. c. 86, however (an Act respecting the City of Toronto), the period of redemption was altered to this extent that it provided that any land so sold for taxes which was, at the passing of the Act, still held by the Corporation, might be redeemed by the owner or any mortgagee thereof within three months from the passing of that Act (that is, within three months from the 12th June 1903), on the terms of the owner or mortgagee paying to the Corporation all that would have been necessary to redeem the same within one year from the day of sale, together with all taxes since accrued, for the year or years in which it was not rated, and with a further sum equal to what would have accrued thereon for taxes at the current rate with interest.

The general Act (4 Edw. VII., c. 23) was passed the following year. By the before-mentioned section, it regulates the amount to be paid to redeem where a municipality purchases land for the taxes due on it, but does not in any way alter the periods for redemption, either expressly or by implication, and the construction put upon it by the Plaintiff's Counsel would make it entirely inconsistent with the Assessment Amendment Act, 1898, which, in conjunction with the above-mentioned section 184, requires that the municipality should sell the lands within seven years from the time they acquire them.

As the writ in this action bears date the 21st September 1906, the extended period for redemption had expired before the action commenced.

In the opinion of their Lordships, therefore, the decisions both of the trial Judge and of the Court of Appeal of Ontario were erroneous, and should be reversed. Their Lordships will accordingly humbly advise His Majesty that this Appeal should be allowed, that the judgments of the Court of Appeal and of the High Court should be set aside, and the action dismissed with costs in both Courts.

The Respondent must pay the costs of the Appeal.

