

IN THE MATTER OF THE BRITISH COLUMBIA "TAX-
ATION ACT," AND OF A SPECIAL COURT OF REVISION
APPOINTED BY THE LIEUTENANT-GOVERNOR IN
COUNCIL, AND OF THE APPEAL BY F. AUGUST
HEINZE FROM AN ASSESSMENT OF CERTAIN LANDS
FOR TAXATION.

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*Feb. 3, 4.

*May 4.

LIDA M. FLEITMANN, ADMINIS-
TRATRIX OF F. AUGUST HEINZE, } APPELLANT;
DECEASED..... }

AND

HIS MAJESTY THE KING.....RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH
COLUMBIA.

*Assessment and taxation—Interest in land—Recitals in agreement—
Validation by statute—Legislative declarations—Construction of
contract—R.S.B.C., 1911, c. 222, s. 47—2 Geo. V., c. 37 (B.C.)—
3 Geo. V., c. 71, s. 5 (B.C.)*

By an agreement, executed in 1898, H. agreed to sell to A. and S. certain subsidy lands of a railway company and it was therein provided that the moiety of the lands should be subsequently conveyed to H. but no formal instrument was ever executed for the purpose of vesting this interest in him. In 1912, an agreement was entered into by all the persons interested in the lands and the Crown for the re-purchase by the Government of British Columbia of the unsold portions of the lands and this latter agreement was validated by the "Railway Subsidy Lands Re-purchase Act," 2 Geo. V., ch. 37 (B.C.) (to which it was annexed as a schedule), which declared that the provisions of the agreement were to be construed as if expressly thereby enacted. The agreement so validated declared, in recitals therein,

*PRESENT:—Sir Charles Fitzpatrick C.J. and Davies, Idington.
Duff and Anglin JJ.

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that H. was entitled to an undivided one-half interest in the lands in virtue of the agreement executed in 1898, that the portions thereof conveyed to the Crown were subject thereto, and that the title should pass to the Crown subject to such estate or interest.

Held, affirming the judgment appealed from (20 B.C. Rep. 99), that, by the effect of the validated agreement as supplemented by the legislative declarations in the "Railway Subsidy Lands Repurchase Act," 2 Geo. V., ch. 37, an interest in the lands became vested in H. which was liable to assessment and taxation under the British Columbia "Taxation Act," R.S.B.C., 1911, ch. 222, sec. 47, as amended by 3 Geo. V., ch. 71, sec. 5. *Angus v. Heinze* (42 Can. S.C.R. 416), referred to.

APPEAL from the judgment of the Court of Appeal for British Columbia (1), affirming the judgment of a special Court of Revision by which the assessment of the appellant's interest in certain lands was confirmed.

In the year 1913, the Government of British Columbia assessed the appellant for the purpose of taxation in respect of a one-half interest in certain lands alleged to have been acquired by him in the manner mentioned in the head-note. On an appeal to a special Court of Revision appointed by the Lieutenant-Governor in Council this assessment was confirmed and the judgment of that court was affirmed by the judgment now appealed from by the Court of Appeal for British Columbia.

The circumstances of the case are stated in the judgments now reported.

Wallace Nesbitt K.C., and *Wallace K.C.*, for the appellant.

E. Lafleur K.C. for the respondent.

THE CHIEF JUSTICE.—I am of opinion that this appeal should be dismissed for the reasons given in the notes of Mr. Justice Idington.

DAVIES J. concurred with Duff J.

IDINGTON J.—This is an appeal resting upon section 41 of the “Supreme Court Act” relative to the assessment for taxation of a certain interest which the original appellant was alleged to have had, in 1913, in certain lands in British Columbia.

The original appellant, now dead and represented by present appellant, owned the entire stock of the Columbia and Western Railway Company which had earned a large land subsidy under 59 Vict., ch. 8, of the Statutes of British Columbia and also owned a number of other properties. He, in February, 1898, entered into an agreement with Messrs. Angus and Shaughnessy to sell them these other properties and said stock of said company for the price or consideration of eight hundred thousand dollars and their agreement that the moiety of said land subsidy should be conveyed to him, Heinze, when and how he should direct and the other moiety should be the property of the said company.

The agreement provided by many details for securing the payment of the liabilities of the company and the charges against the said other properties.

The agreement was so framed that the other properties and stock should be acquired free from liability and without being in any way complicated by the provisions dealing with the land subsidy and division thereof. That land subsidy was free from taxes

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in the hands of the company for ten years, which did not expire till October, 1911, and the original appellant, for that very obvious reason, did not desire to have them sooner transferred to him than he desired.

For some reason or other Angus and Shaughnessy, who it is alleged (and the sequel shews) represented the Canadian Pacific Railway Co. did not desire to keep the matter open so long. And they attempted to bring about a partition, by a partition suit, and therein amongst other things to terminate their trust. The Court of Appeal for British Columbia held that neither form of relief could thus be granted under the said agreement against the will of the said Heinze.

This court, on appeal thereto, in 1909 (*Angus v. Heinze*(1)), maintained that position.

Because of what, I respectfully submit, was either an unfortunate expression of the reasons given by the only judge in this court assigning reasons for the dismissal of the said appeal, or misapprehension of these by the courts below, it was when the time came that these lands, or any interest therein, might properly be taxed, alleged that this court had declared that said original appellant had no equitable interest in the moiety of the undivided land subsidy.

The courts below apparently accepted that interpretation put upon said judgment and assumed that he had none but such as depended upon the legislative enactment I am about to refer to.

Said Angus and Shaughnessy having failed in said partition suit, the said railway company and the Canadian Pacific Railway Company, which Angus and Shaughnessy seem to have represented, and the British

(1) 42 Can. S.C.R. 416.

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Columbia Southern Railway Company, on the 31st January, 1912, entered into an agreement with respondent whereby, amongst other things, the unsold part of said lands earned as subsidy by the Columbia and Western Railway Company, which had been granted to said company should be, pursuant to a statutory option relative thereto, reconveyed to the respondent for the price or sum of forty cents an acre to be computed on the basis of one-half of the total area so reconveyed but subject nevertheless to the rights of said Heinze in the other moiety of said lands.

The Crown by virtue of said agreement, and an Act of the Legislature of British Columbia confirming same, acquired said lands subject to the interest of said Heinze therein under the said agreement first mentioned.

It is the said interest of said Heinze in said lands which has been assessed by virtue of an Act passed by said legislature and known as "Taxation Act Amendment Act, 1913," and from that assessment this appeal has been taken.

The judgment of the Court of Appeal for British Columbia on appeal to it from the Court of Revision, maintained the assessment.

The section providing for that assessment is as follows:—

(2) Where the title of any land has become vested in His Majesty in right of the province, subject to any estate or interest therein of any person, or where the title to any lands is vested in His Majesty and it appears that any person had, prior to the vesting of such title in His Majesty, acquired or had such a right, whether legal or equitable, to an interest in such lands as would be enforceable against a private individual if such title were vested in a private individual, and such person has such right though he may not have actually acquired such interest, it shall be lawful for the as-

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essor to assess the interest of such person or the right of such person to an interest in such lands by estimating the value of the whole of said lands at their cash value per acre, and the proportion thereof representing the value of the interest or of the right to an interest of such person shall be set down by the assessor upon his roll.

This seems to have been designed to meet the very case of Heinze's interest in the lands in question.

There never could have been a doubt of Heinze having acquired or rather retained an equitable interest in the said lands under the first mentioned agreement, but for the possibly arguable question of the capacity of the company to become bound in such way as sought to be accomplished thereby.

I should, however, feel inclined to hold that the absolute owner of a company might, where no other claims of any kind existed in or against the company, and no one in existence to be injured by or to complain of such a mode of dealing, stipulate with his vendees for the reservation to himself of part of the lands of the company and that a court of equity could and would so long as no third party had acquired any right against the company hold the vendees had thereby become his trustees and enforce the agreement accordingly.

It is the constant habit of courts of equity in looking at the ordinary transactions and relations of vendors and vendees to treat the vendee as the equitable owner and the vendor or other possessor of the legal estate as trustee for him.

The owner of such an equity can so long as he discharges his own obligations depend upon the courts of equity protecting him without his being driven to an action for damages as his only remedy.

But to put that beyond peradventure it is admitted,

as part of this case, that in April, 1906, the said company and the said Angus and Shaughnessy signed a notice to Heinze expressly acknowledging that said lands had been then granted by the Crown to said company and recognizing the right and interest therein of said Heinze under the said agreement of 1898, and that he was entitled to a moiety of said lands as provided therein and proposing a partition of said land so as to give him his said moiety.

His reply thereto, also made part of the admissions in the case, shews that his only objection to acceding thereto was the possibility of his being taxable therefor in case of a division; whereas the company could not be so taxable.

I am, therefore, unable to understand how it ever could have been supposed that Heinze had no equitable interest in said lands.

Such an interest I conceive may become the subject of taxation and of direct taxation of land within the province.

I can understand how by reason of their having been no joint interest either legal or equitable and no clear right in Angus and Shaughnessy or any one else to insist on the termination of the relationship created by the agreement till, within the terms thereof, he, Heinze, had expressed how and when it should terminate and its determination might have been to his detriment any such right could not be asserted by way of a partition suit.

The denial of that relief by way of partition was all that was involved in the decision relied upon save the minor question of the trustee passing his accounts.

I may reiterate once more that a decision of any

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court relative to what is before it for judicial determination is what binds as authority and not the possibly irrelevant reasons assigned for coming to such decision.

In justice to myself I may be permitted to add that the report of the case does not correctly represent me. The records shew I filed no opinion or concurrence and only one other judge than he writing appears of record to have concurred therein, in the usual mode when intending to agree in the reasons as well as result.

The result is, I am sure, a misapprehension for which I may not be blameless in failing to file a memorandum expressing how I desired to treat the opinion in question.

I have no doubt of the legislative power to declare, as I think the confirming Act does, Heinze entitled or to declare him assessable in the manner the later Act sets forth.

His non-residence might prevent steps being taken to collect the rates abroad, but that cannot affect the undoubted right of the legislature to limit his rights in claiming from the Crown the recognition by grant or otherwise of his interest and charging it with the amount of the taxes as provided by the statute.

I think the appeal should be dismissed with costs.

DUFF J.—I have come to the conclusion that the appellant's rights originating in the agreement of the 11th of February, 1891, are now assessable as constituting an interest in land under the British Columbia Statute, 1913, ch. 71, sec. 2.

By chapter 8 of the statutes of British Columbia

for 1896, the Lieutenant-Governor in Council was empowered to aid the construction of the Columbia and Western Railway by a land grant. Section 8 of that chapter exempted this land grant from taxation until the expiration of ten years from the date of the acquisition of it by the company or until alienated by lease, agreement for sale or otherwise by the company.

The Columbia and Western Railway was divided into six sections. Sections one, three and four were constructed, but there was no construction on sections two, five and six. In respect of sections one and three the company earned 1,603,312 acres, of which 794,440 acres were granted on or about the 17th day of April, 1908. To these lands the exemption applies.

The residue of the subsidy earned, namely, 808,872 acres, could not be granted under the Act of 1896 as the lands were not designated and surveyed within seven years from the passing of the Act, as required by section 5.

This state of affairs led to the passing of chapter 9 of the statutes of 1906 whereby the Lieutenant-Governor in Council was empowered to grant and did grant to the company this residue of 808,872 acres. By section 3 of that statute the exemption of these lands from taxation expired on the 3rd October, 1911.

In February, 1898, F. August Heinze, owned or controlled the capital stock of the Columbia and Western Railway Company. Messrs. Angus and Shaughnessy, acting in the interests of the Canadian Pacific Railway Company, acquired this property from Heinze under an agreement executed in that month.

It was part of the arrangement between the parties that the benefit of an undivided half of the land sub-

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sidy earned at the date of the transfer should be secured to Heinze. The stipulations for securing this are a little complicated and in some respects perhaps not easy to comprehend; but while Heinze no doubt had in view the condition imposed by the subsidy Act that the exemption from taxation should cease upon alienation in any manner of the subsidy lands by the company, still the agreement provided clearly enough that either the company or Heinze should be entitled to a partition of any portion of the subsidy lands affected by the agreement as soon as such portion should be granted to the company by the Crown. The Columbia and Western Railway Co. was not a party to the agreement. In *Angus v. Heinze*(1), an action by Messrs. Angus and Shaughnessy for a partition was dismissed, this court taking the view that under the agreement of February, 1898, alone, Heinze had acquired neither a legal nor an equitable interest in the lands in question.

It would, I think, not be open to doubt that Heinze's rights under the agreement constituted an interest in the lands if it had appeared that they had been vested in Messrs. Angus and Shaughnessy for the purpose of enabling them to carry out the agreement. We are not informed whether this was done and it may be assumed that, when the agreement of 1912 was executed, Heinze was not in possession of any "interest" within the meaning of the statute of 1913.

The agreement of 1912 was made a schedule to chapter 37 of the statutes of that year; and to ascertain the effect of them they must be read together. I

(1) 42 Can. S.C.R. 416.

reproduce the statute in full and the material parts of the agreement:—

STATUTES OF BRITISH COLUMBIA, 1912.

Chapter 37.

An Act Respecting the Repurchase by the Crown of Certain Railway Subsidy Lands.

(27th February, 1912.)

Whereas by the "Railway Subsidy Lands Re-purchase Act," being chapter 198 of the "Revised Statutes of British Columbia, 1911," the Lieutenant-Governor in Council was empowered to enter into conditional agreements to acquire for the province, by re-purchase, exchange, or otherwise, any lands theretofore or thereafter granted by the Crown in the right of British Columbia in aid of the construction of railways:

And whereas, pursuant to the provisions of the said statute, a conditional agreement has been entered into between His Majesty's Government and the Canadian Pacific, British Columbia Southern, and the Columbia and Western Railway Companies for the re-purchase by the Crown of certain unsold portions of the lands granted in aid of the construction of the British Columbia Southern and the Columbia and Western Railways:

And whereas it is expedient to ratify the said agreement pursuant to the provisions of the said "Railway Subsidy Lands Re-purchase Act":

Therefore, His Majesty, by and with the advice and consent of the Legislative Assembly of the Province of British Columbia, enacts as follows:—

1. The agreement, a copy of which forms the schedule to this Act, made between His Majesty the King, represented by the Honourable the Premier of British Columbia and the Canadian Pacific Railway Company, the British Columbia Southern Railway Company and the Columbia and Western Railway Company is hereby ratified and confirmed and declared to be legally binding, according to the tenor thereof, upon the parties thereto; and the said parties to the said agreement are hereby authorized and empowered to do whatever is necessary to give full effect to the said agreement, the provisions of which are to be taken as if they had been expressly enacted hereby and formed an integral part of this Act.

SCHEDULE.

* * * * *

And whereas, by agreement bearing date the 11th day of February, 1898, and made between F. August Heinze of the one part, and Richard B. Angus and Thomas G. Shaughnessy of the other part,

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the said Heinze became entitled to an undivided one-half interest in certain portions of the said Crown grants to the Columbia and Western Railway Company, containing approximately 615,600 acres, and detailed in the document hereunto annexed, marked "Schedule B" hereto, and signed by the parties hereto.

* * * * *

2. The Columbia and Western Railway Company agrees to sell and convey to the Crown in right of the Province of British Columbia, and the Crown in right of the Province of British Columbia agrees to purchase, all those portions of the lands of which the Columbia and Western Railway Company has obtained Crown grants or of which it is entitled to Crown grants, as set out in the recitals hereto, and which the said company has not sold or contracted to sell at the date of this agreement, reserving, however, to the said company all timber upon the lands covered by timber permits in force at the date of this agreement and during the existence of each respective timber permit, particulars of which are shewn in the statement hereto attached, marked "Schedule C" hereto, and signed by the parties hereto, but so that, with the expiration of each respective timber permit, the timber remaining upon the land in such permit comprised shall revert to the Crown in right of the Province of British Columbia; and subject to the estate and interest held by F. August Heinze under the agreement bearing date the 11th day of February, 1898, hereinbefore mentioned, in portions of the said lands containing approximately 615,600 acres, the details whereof are shewn in Schedule B hereto. The lands to be conveyed under this paragraph being estimated to contain approximately 1,514,832.66 acres.

* * * * *

4. The Crown in right of the Province of British Columbia agrees to pay to the said Columbia and Western Railway Company compensation at the rate of forty cents per acre for all the lands to be sold and conveyed by the said company to the Crown pursuant to paragraph 2 hereof, excepting from the computation of the amount payable under this paragraph one-half of the total area in which the said F. August Heinze is entitled to an undivided one-half interest, as detailed in Schedule B hereto, under the terms of the agreement hereinbefore mentioned; the said compensation to be payable on the execution and delivery of conveyances of the said lands, subject to the interest of the said F. August Heinze therein, and otherwise free from encumbrances.

* * * * *

6. The Crown in right of the Province of British Columbia agrees to accept the conveyance of the lands mentioned in paragraph 2 hereof, subject to the estate and interest of the said F. August Heinze, his heirs and assigns, therein; and so that the estate and

interest of the said F. August Heinze, his heirs and assigns, in the said lands and his right to a conveyance or partition thereof shall not be impaired by the execution and delivery of this agreement, and the Crown will not refuse or neglect to grant, convey or partition the interest of the said Heinze in the said lands upon proof of right, title and interest.

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If Heinze had been a party to this agreement of 1912 it would hardly be susceptible of dispute that his rights in relation to the lands in question under the agreement of February, 1898, had become binding on the Crown or that they constituted an "interest" in those lands in the sense of the Act of 1913. It is argued and this argument raises the substantial point for decision that the declarations touching Heinze's rights and the stipulations contained in the clauses quoted above must be read as contractual stipulations in an agreement *inter partes* and intended to have no other effect; and that it is only as contractual stipulations that the statute recognizes and sanctions them. It follows, of course, if this be accepted, unless it could be argued that the Canadian Pacific Railway Company or the Columbia and Western Railway Company were trustees for Heinze in entering into the contract (of which there is no evidence) that these provisions having legal effect only as contractual stipulations *inter partes* confer no rights upon Heinze who was not a party to them.

Read literally the words

the provisions of which (of the agreement) are to be taken as if they had been expressly enacted hereby and formed an integral part of this Act

would seem to give the force of statutory declarations to the recitals,

the said Heinze became entitled to an undivided one-half interest in certain portions of the said Crown grants;

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and to import a declaration that portions of the lands conveyed to the Crown were "subject to" an estate or interest

held by F. August Heinze under the agreement bearing date the 11th February, 1898,

as well as a further declaration that the title passed to the Crown

subject to the estate and interest of the said F. August Heinze, his heirs and assigns therein.

And the words quoted from the statute, literally read and applied to paragraph 6 of the schedule, involve a declaration that Heinze had at the time of the passing of the statute an interest in the lands in question. It is urged, however, that, treating the agreement as an integral part of the statute and as "expressly enacted" thereby, it still must be read as an agreement and the various provisions of it interpreted and given effect to as the provisions of an agreement.

The argument has considerable force. But this construction does, I think, deprive the words of the Act of some part of their literal effect and when the statute is read, as it must be read, in light of the documents and the other facts mentioned in the statute and the agreement themselves, I think it is a construction which cannot be accepted.

We must assume that the parties to the agreement had in view the protection of the interests, on the one hand of Heinze and on the other of Messrs. Angus and Shaughnessy. These last mentioned gentlemen had entered into covenants with Heinze by which they were personally bound, but concerning the fulfilment of which there could, of course, be no doubt so long as the lands remained under control of the Canadian

Pacific Railway Company. These lands were now to be transferred to the Provincial Government. An effectual way of protecting at one and the same time the interests of these gentlemen as well as the interests of Heinze was to provide that the title acquired by the Crown should be charged with the obligations that had been entered into by Messrs. Angus and Shaughnessy.

I think the passages quoted above from the agreement of 1912 do sufficiently declare that the title of the Crown is burdened with these obligations and that paragraph 6 is intended to be a specific declaration that the Crown assumes that burden. The purpose of the parties being to protect the interests mentioned it would be a singular thing if they had set about doing it by means of contractual declarations and stipulations of which neither Heinze on the one hand nor Messrs. Angus and Shaughnessy on the other, not being parties to the contract, could avail themselves.

I think the proper inference is that the statute is intended to take effect according to the literal meaning of the words used.

ANGLIN J.—I concur in the judgment of Mr. Justice Duff.

Appeal dismissed with costs.

Solicitors for the appellant: *Hamilton & Wragge.*

Solicitors for the respondent: *Elliott, Maclean & Shandley.*

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