1926

*Oct. 11, 12.
*Dec. 1.

STANDARD TRUSTS COMPANY (PLAINTIFF) ..... } APPELLANT;

AND

MUNICIPALITY OF HIRAM AND W. A. LAMROCK (DEFENDANTS)... } RESPONDENTS.

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

Assessment and taxes—Sale for unpaid taxes—Defects in—Person interested—Absence of notice to—Effect of curative section 44a, Tax Recovery Act, 1919.

A sale and transfer of land for unpaid taxes under the Alberta *Tax Recovery Act* of 1919, even though made prior to January 1st, 1924, can be successfully attacked on the ground that the notice required by s. 42, (amended by 1921, c. 25, s. 13) had not been sent to a "person interested" in the land (in this case a mortgagee), as the curative provision in that Act, s. 44*a* as enacted by 1923, c. 5, s. 26*c*, does not then apply.—The failure to give this notice is a defect so fundamental that it rendered the transfer ineffectual. The statute makes the giving of such notice a condition precedent to the exercise of the power to execute and deliver a transfer, and section 44*a* contains no provision to cover the absence of the notice.

A "person interested" in land sold for taxes has an absolute right to the formal notice prescribed by the Act, even if that person had knowledge, before the expiration of the delay for sending the notice, that the land had been so sold. *Toronto* v. *Russell*, [1908] A.C. 493 dist.

Judgment of the Appellate Division (22 Alta. L.R. 148) reversed.

APPEAL from the decision of the Appellate Division of the Supreme Court of Alberta (1), reversing the judgment of Boyle J. at the trial and dismissing the appellant's action.

The judgment of the trial judge declared a sale of a quarter section of land for taxes to be illegal and void and directed the cancellation of the certificate of title issued to the respondent Lamrock, who was the purchaser at the tax sale. The sale was made for arrears of taxes for the year 1920 and took place on 29th October, 1921. The transfer is dated 30th November, 1923, and registered 21st January, 1924, and the certificate of title was issued some time afterwards. The consideration of the transfer was $75.35 (2). The respondents rely for the support of the sale and

*PRESENT:—Anglin C.J.C. and Duff, Mignault, Newcombe and Rinfret JJ.

(1) (1926) 22 Alta. L.R. 148; [1926] 1 W.W.R. 561.

(2) *Reporter's Note.*—Special leave to appeal to this court was granted, 14th June, 1926.

transfer upon *The Tax Recovery Act* of 1919, c. 20, and *The Tax Sale Relief Act*, 1922, c. 53. The appellant's interest in the land sold is as mortgagee.

G. H. Steer for the appellant.—The giving of the notice required by s. 42 of the Act of 1919 as amended by c. 25, s. 13, 1921, was a condition precedent to the giving of any transfer and the transfer given to the respondent Lamrock was not given pursuant to the Act and therefore did not cure the defects proved in the sale proceedings.

The transfer given to the respondent Lamrock did not come within the terms of the curative section of *The Tax Recovery Act* enacted as s. 26 (*c*) of c. 5 of the statutes of Alberta, 1923.

The transfer not being the transfer referred to in the Act did not have the curative effect set out in the section.

The cases relied on, *Toronto* v. *Russell* (1) and *McCutcheon* v. *Minitonas* (2), should be distinguished from this case.

F. H. Chrysler K.C. for the respondents.—The appellant's claim is barred by the provisions of the section 14*a* of the *Tax Sales Relief Act*, 1922, as enacted by chapter 5, 1923, s. 25, and also by section 44*a* of *The Tax Recovery Act* (1919) as enacted by chapter 5, s. 26, 1923.

The judgment of the court was delivered by

RINFRET J.—This appeal raises the question of the validity of a sale for arrears of taxes for the year 1920, held under the provisions of *The Tax Recovery Act* (c. 20 of the statutes of Alberta, 1919), by the respondent municipality of Hiram. The other respondent, William A. Lamrock, was the purchaser at the tax sale.

The sale took place on the 29th October, 1921. The transfer of the land sold was delivered to Lamrock on the 30th November, 1923, and was registered on the 21st January, 1924. A certificate of title was afterwards issued to Lamrock by the Registrar of the Land Titles District.

The appellant held in the land an interest as mortgagee under a memorandum dated March 17, 1919, and duly registered March 27, 1919. It commenced on the 4th

(1) [1908] A.C. 493.

(2) [1912] 3 W.W.R. 275.

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February, 1925, this action alleging failure to comply with *The Tax Recovery Act*, claiming a declaration that the sale was illegal and void and asking for an order restoring the title to the name of the former registered owner with an endorsement thereon of the appellant's mortgage. This relief was granted by Boyle J., but his decision was reversed by the Appellate Division (Beck J. dissenting).

Under *The Tax Recovery Act* (as amended by statute of Alberta, c. 25 of 1921), the treasurer, assessor or collector of the municipality, to whichever of whom the taxes are payable, submits to the reeve or mayor, on or before the fourteenth of August, in each year, a list in duplicate of all lands liable to be sold for arrears of taxes, with the amount set opposite each parcel of land.

The reeve or mayor forthwith authenticates each of such lists by his signature and by the seal of the municipality, if any. One of these lists is then deposited with the clerk and the other is given to the treasurer with a warrant thereto annexed under the hand of the mayor or reeve and the seal of the municipality, if any, commanding him to levy upon the lands mentioned in the lists for the arrears due. And it is only after having received the list and warrant so authenticated by the signature of the reeve or mayor and the seal of the municipality that the treasurer may proceed to advertise and sell the lands.

In this case, the list was not signed by the reeve, and, although it must be assumed from the record that the municipality had a seal, the latter appeared neither on the list, nor on the warrant.

The Act then provides that the list shall be published for a certain period of time in local newspapers and in *The Alberta Gazette*, together with a notice that the lands will be offered for sale for arrears of taxes at the day, time and place therein stated; and it is claimed that the advertisements published failed in important particulars to comply with certain sections of the Act or to follow the forms by it required.

Finally, by ss. 35 and following, it is enacted that the owner of any land which has been sold for non-payment of arrears of taxes (or his heirs, executors and assigns) may at any time, within one year from the date of the sale, redeem such land by paying the amount of the arrears,

with costs and certain other sums for penalty; and the Act (as amended by s. 13 of c. 25 of 1921) says—and this is important, because it is the only notice to which a mortgagee is entitled—that if the land has not been redeemed at the expiration of nine months from the date of the sale,

the treasurer shall immediately send by registered mail to each person shown by the records of the land titles office to have any interest in such land a notice in form A in the schedule of this Act, or to the like effect, and any such person shall be entitled to redeem the land as agent of the owner of such land, as hereinbefore provided.

By the notice thus required to be sent, the recipient is informed of the fact of the sale on account of non-payment of taxes and he is advised that the year allowed for redemption will expire on a certain date. The notice contains a complete description of the land and adds:—

If you wish to contest the legality of the sale of such lands, you should immediately make application to the judge of the District Court of the judicial district within which the land is situated, for an order staying the issue of a certificate of title to the purchaser of such lands.

It is not proven that this notice was ever sent to the appellant and it is admitted that the appellant never received it.

Under *The Tax Recovery Act,* the notice in this case should have been mailed by the treasurer on or about the 30th July, 1922.

However, on 28th March, 1922, and, therefore, long before the expiration of the period of redemption and more than four months before this notice should have been sent, the legislature passed an Act to provide for the "Relief of Owners of Lands sold at Tax Sales." Under that Act, the owner of any land, which in the year 1920 was sold for non-payment of arrears of taxes, or any person in his name, could redeem it at any time prior to the first day of November, 1922. The procedure to be followed in the exercise of the right of redemption was there given.

By the 15th section of that Act, in the case of any parcel of land which was not subdivided land and was sold at a tax sale in the year 1921, the Lieutenant-Governor in Council was given authority to name a date in the year 1923 (with a proviso not material here)

on which the right of redemption of such parcel shall expire, notwithstanding anything in *The Tax Recovery Act* contained.

It is common ground that this section applied to the tax sale here in question.

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Then follows section 16 whereby the Lieutenant-Governor in Council, when naming such a date, may, among certain other things, give such directions as may seem proper to him, with regard to notices and to the procedure to be followed.

Under the authority of those sections, an Order in Council was passed on the 18th September, 1922, and, for lands sold in the year 1921, it extended the redemption period until the twenty-first day of October, 1923. The Order in Council was to take effect on and from the 6th September, 1922. This was later than the date (30th July of the same year) when the treasurer ought to have mailed his notice to the appellant. His failure to send it on or about that date cannot therefore be excused on any ground derived from the provisions of *The Tax Sale Relief Act* which, in respect of tax sales having taken place in the year 1921, by force of the Order in Council, came into operation only on the 6th September, 1922.

There was in the Order in Council a further direction

> that the procedure to be followed in the exercise of the right of redemption hereby given shall follow, as nearly as circumstances may permit, the procedure set forth in the said *The Tax Sale Relief Act*, with the change of the year 1921 for the year 1920, and of the year 1923 for the year 1922.

Among the sections of *The Tax Sale Relief Act* applicable to the redemption of lands sold for non-payment of taxes in 1920 was the following:—

> 9. In case notice as provided for in sec. 42 of *The Tax Recovery Act* has not been sent out as provided for therein, the treasurer shall before the first day of July, 1922, send out a notice in form A set out in the schedule of this Act, with respect to every parcel of land which is not subdivided land, which was sold for taxes in the year 1920, and has not been redeemed at the date of sending out such notice.
>
> 2. The said notice shall be sent by registered mail to each person shown by the records of the land titles office to have had any interest in such land at the time when notice in form A should have been sent out under the provisions of section 42 of *The Tax Recovery Act*.

The form of the notice, as set out in the schedule, is similar to that already outlined and provided for under section 42 of *The Tax Recovery Act*. The Order in Council of the 30th September, 1922, does not in terms give directions with regard to notices; but it seems a plausible contention that s. 9 is thereby made applicable to the exercise of the right of redemption of lands sold for taxes in the year 1921. The treasurer, however,

made no attempt under s. 9 to remedy the failure to give the notice which, under s. 42 of *The Tax Recovery Act*, should have been mailed on or about the 30th July, 1922.

This is not without importance, for the respondent argued with some force that the appellant became aware of the sale for taxes several months before the expiration of the time for redemption. In fact, the appellant knew as early as May 5th, 1923 that the lands had been sold at the 1921 tax sale and, on the 22nd of the same month, it was informed by the treasurer of the amount necessary to redeem. This, however, was in May, 1923. A month or so still had to run before the expiration of the time for sending the notice, under s. 9. The purpose of this notice was not to warn the appellant of facts which he knew already (as would appear from what transpired on the dates of May 5th and May 22nd already alluded to). The object of this notice was mainly to advise, on or before the 1st July, 1923, any person entitled to redeem that the time allowed for redemption would expire on the 31st October, 1923, and also to inform him that, if he wished to contest the legality of the sale, he should apply to a judge of the District Court for an order staying the issue of a certificate of title to the purchaser of the lands. The knowledge acquired by the appellant, through the correspondence exchanged on the 5th and 22nd May, 1923, did not include these important particulars. The appellant had an absolute right to the formal notice prescribed by the Act. Under no legitimate inference can it be held to have consented to dispense with such notice or to have waived it. The facts are widely different from those in *Toronto* v. *Russell* (1). In that case, moreover, their Lordships of the Judicial Committee were dealing with the debtor of the taxes and not, as here, with the mortgagee of the land sold.

The courts are, as a general rule, anxious to uphold the validity of municipal proceedings, if the circumstances admit of such a result. But, in statutes for the enforcement of taxes and which lead to the forfeiture of rights in property, the steps prescribed are usually considered essential and more particularly must provisions requiring notices be held imperative. Their omission, as in this

(1) [1908] A.C. 493 at pp. 500-501.

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case, is fatal, in the absence of statutory declaration to the contrary.

Apart from the effect of the curative section, we fully concur, therefore, with the view of both the trial judge and the appellate division that the defects proved were sufficient to invalidate the sale.

But the judgment in appeal found these defects to have been cured by s. 44a of *The Tax Recovery Act* as enacted by s. 26c of c. 5 of 1923 and that is the point which remains presently to be examined. (For the purposes of this case at least, s. 14a of *The Tax Sale Relief Act,* introduced by s. 25 of c. 5 of 1923, does not add anything to s. 44a and need not be considered separately.)

Sec. 44a is as follows:—

44a. From and after the first day of January, one thousand nine hundred and twenty-four, every sale of lands for arrears of taxes held under the provisions of this Act and every transfer issued pursuant to the provisions hereof shall, notwithstanding any informality or defect in or preceding such sale, be valid and binding to all intents and purposes except as against the Crown; and every such transfer shall from and after the said first day of January one thousand nine hundred and twenty-four, be conclusive evidence of the assessment and valid charge of the taxes on the land therein described and that all the steps and formalities necessary for a valid sale had been taken and observed as provided by this Act in that behalf; and thereafter any such sale and transfer and any certificate of title issued pursuant to any such transfer shall only be questioned on the following grounds or any of them and no other;

(*a*) that the sale was not conducted in a fair, open, and proper manner; or

(*b*) that there were no taxes whatever in arrears for which the said land could be sold; or

(*c*) that the said land was not liable to be assessed for taxes.

The jurisprudence of this court is not lacking in precedents to the effect that enactments, such as this, will be given a construction which will cover defects so substantial and fundamental as to render the proceedings absolutely null and void, only if their language requires it. *McKay* v. *Crysler* (1); *O'Brien* v. *Cogswell* (2); *Whelan* v. *Ryan* (3); *Heron* v. *Lalonde* (4); *Temple* v. *North Vancouver* (5) might be referred to. Nevertheless these statutes, like all others, must receive their effect and, as was said by their Lordships of the Judicial Committee (*Toronto* v. *Russell* (6)).

(1) (1879) 3 Can. S.C.R. 436.
(2) (1889) 17 Can. S.C.R. 420.
(3) (1891) 20 Can. S.C.R. 65.
(4) (1916) 53 Can. S.C.R. 503.
(5) (1914) 6 W.W.R. 70.
(6) [1908] A.C. 493, at p. 501.

since the main and obvious purpose and object of the legislature * * * 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.

But a careful examination of s. 44a discloses that it does not comprise in the word "sale" the whole of the proceedings taken under the statute up to and including the delivery of the transfer. On the contrary, a clear distinction is there made between the "sale" and the subsequent "transfer," which words are used to mean two separate and successive operations.

It follows that "sale" here is used in the restricted sense of the knocking down to the purchaser at the auction, and not in its wider meaning comprising the whole transaction up to its completion when the treasurer has executed and delivered to the purchaser a "transfer" of the land sold. As a result, by force of s. 44a, any informality or defect in or preceding the auction and knocking down to the purchaser is cured and validated. This covers the failure of the reeve to sign the list, the lack of a seal on the list and on the warrant, the insufficiencies in the forms of advertisement required by the Act, and, generally speaking, any of the proceedings connected with the sale anterior to and in the course of the auction and knocking down.

The section further enacts that, if the transfer is "issued pursuant to the provisions" of the Act, it becomes conclusive evidence that the assessment and charge of taxes were valid and that all steps and formalities necessary for a valid sale have been taken and observed; and the sale (i.e., auction and knocking down), the transfer itself and the certificate of title can thereafter be questioned only on any or all of the three grounds enumerated at the end of the section, none of which—it may be mentioned—has any connection whatever with the transfer proper.

This is equivalent to saying that once the actual transfer has been properly and legally issued, the validity of the assessment and charge of taxes and the regularity of all the steps and formalities attending the tax sale may no longer be challenged, unless either the auction was not

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"conducted in a fair, open and proper manner," or no arrears of taxes were due or the land was not liable to be assessed. But this provision is predicated upon the existence of an effectual transfer. It assumes the transfer to have been executed otherwise pursuant to the power conferred in the Act and obviously such requirement is essential to the applicability of the section.

The failure, in the present case, to give notice to the mortgagee is a defect so fundamental that it rendered the transfer ineffectual. The statute made that notice a condition precedent to the exercise of the power to execute and deliver a transfer and there is nothing in s. 44a to cover the absence of such notice. This precludes the application of the curative section.

The result is that the tax sale cannot stand, for it is impossible to conceive that the statute contemplated a sale which could not be completed by a valid transfer. It is obvious that absence of this notice to the mortgagee would be an absolute answer by the municipality to an action for specific performance by the purchaser at the tax sale. In this respect, the auction and the transfer may not be disconnected and together they form the successive and indispensable steps of a single conveyance or sale. There are no provisions whereby the notice could now be given to the mortgagee, even if it were found possible to cancel the transfer alone and put the parties back where they stood before it was executed.

The illegality of the transfer coupled with the impossibility of its being remedied therefore entails the setting aside of the whole tax sale.

Finally, section 21 of *The Tax Sale Relief Act* ought to be mentioned, because it appeared to some extent to be relied on by the respondent.

Here, the certificate of title was issued and s. 21 is to the effect that all proceedings taken under the provisions of *The Tax Sale Relief Act* with regard to the

obtaining of a certificate of title to lands, shall be good and valid, notwithstanding any want of compliance with the procedure prescribed at any period under the provisions of *The Tax Recovery Act*.

In this case, we think the failure to give notice to the mortgagee was not merely a defect of procedure, but went to the very root of the power to execute and deliver the transfer.

The appeal therefore ought to be allowed and the judgment of the trial judge restored.

Appeal allowed with costs.

Solicitors for the appellant: *Macdonald, Weaver & Steer.*

Solicitors for the respondents: *Auxier & Brennan.*