1945

*Oct. 11
*Dec. 21

PETER BERUBE (PLAINTIFF)..... APPELLANT;

AND

ANNIE J. E. CAMERON AND OTHERS (DEFENDANTS) ..... RESPONDENTS.

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

Landlord and tenant—Real property—Tenancy at will—Quieting possession—Payment of taxes only by tenant—Whether paid as rent—Whether prevents running of statute of limitation—Proper inference from the agreement—Limitation of Actions Act, R.S.A. 1942, c. 133, ss. 29, 30.

*PRESENT:—Rinfret C.J. and Hudson, Taschereau, Rand and Estey JJ.

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Since 1921 or 1922, the appellant had been a tenant of a quarter section of land situated not far from the city of Edmonton under an informal arrangement with a bank's manager, apparently acting as agent for the respondents who lived in Scotland, such land having been in the possession of one John Cameron until his death some time prior to 1920. The certificate of title had been since 1906 in the name of the respondents, executors of the estate of one Lewis A. Cameron. In 1931, after the death of the manager, on interviewing the bank's assistant-manager as to what he should do about the land, the appellant was told "to stay with it and pay the taxes." He thereafter paid the taxes each year direct to the municipality, disregarding the bank, and has had undisturbed possession of the land ever since. The appellant, in 1943, sued for a declaration that he had acquired the right to ownership under the *Limitation of Actions Act* and for a judgment that he be quieted in possession of the land. The trial judge held that the agreement created a tenancy at will, that there was no agreement that the payment of taxes was a payment of rent, that the provisions of the statute of limitation operated and the appellant was entitled to the relief claimed. The Appellate Division reversed that decision and, though agreeing with the trial judge that there was a tenancy at will, held that on the facts it should be inferred that the taxes were to be paid as rent and that their payment each year interrupted the running of the limitation period under the Act.

Held, affirming the judgment appealed from ([1945] 2 W.W.R. 243), Hudson and Taschereau JJ. dissenting, that under the circumstances the proper inference to be drawn from the agreement was that the payment of the taxes each year was in effect a payment of rent in an amount equal to the taxes and that upon the occasion of each payment the appellant admitted ownership to rest in the respondents. Therefore such payment interrupted the running of the limitation period.

Per Hudson J. (dissenting).—Payment by the appellant of the taxes each year under the circumstances cannot be construed as a payment of rent, and the judgment of the trial judge should be restored.

Per Taschereau J. (dissenting).—There must be a formal agreement, or a state of facts known to the parties from which an agreement may be inferred, that the taxes are paid as rent. Failing these requirements, there is no acknowledgment of title and the statute operates. In the present case, there is no evidence of such an agreement.

APPEAL from the judgment of the Appellate Division of the Supreme Court of Alberta (1), reversing the judgment of the trial judge, Hugh John Macdonald J. (2), and dismissing the appellant's action.

H. G. Johnson for the appellant.

F. C. Jamieson K.C. for the respondents.

(1) [1945] 2 W.W.R. 243; [1945] 3 D.L.R. 336.
(2) [1945] 1 W.W.R. 377; [1945] 3 D.L.R. 336.

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Rinfret C.J.

THE CHIEF JUSTICE.—This is an appeal from the Appellate Division of the Supreme Court of Alberta which set aside the judgment of Mr. Justice H. J. Macdonald on the trial of the action in which the plaintiff claimed title to a quarter section of land by reason of adverse possession. The learned trial judge gave judgment for the plaintiff-appellant; but the Appellate Division reversed the trial judge's decision and dismissed the appellant's action.

The quarter section in question is situated not far from the city of Edmonton. It had been in the possession of John Cameron until his death some time prior to 1920. The certificate of title has stood in the name of the present respondents since it was issued in the year 1906.

Some time in either 1921 or 1922, the appellant rented this quarter section from Mr. Buchanan, the manager of the Canadian Bank of Commerce, Edmonton South, who apparently was acting as agent for the respondents, and from year to year thereafter he continued to rent this land from Mr. Buchanan and later from Mr. Clarke who succeeded Mr. Buchanan as manager of the branch of the bank.

The Bank represented first Lewis Alexander Cameron, of Inverness, Scotland, deceased, and later the executors of the latter's estate who were registered as owners. Neither the deceased nor any of the executors ever were in Alberta.

The rental varied from time to time. Each year up to and including 1931, the rent was paid to the manager of the Bank as agent for the owners.

In 1930 and 1931 the amount of rental paid approximated the taxes payable.

After the death of bank manager Clarke in 1931, so the appellant says, he went to see the assistant-manager because Mr. Clarke was gone and asked him "what I should do with the place" and "he told me to keep it, pay the taxes". This statement was repeated several times by the appellant during his testimony at trial and on examination for discovery which was used by the respondent at trial as part of his case.

The appellant occupied the land and paid the taxes down to the date of the trial.

The appellant's action is for a declaration that he has acquired the right to ownership under the *Limitation of Actions Act*.

The judgment in the trial court for the appellant held that no inference could be made that there was an agreement to pay the taxes not merely as taxes but as rent.

The issue therefore was as to the meaning of the words used by the assistant manager in 1931.

The respondent's position is that the appellant agreed to pay and did pay such taxes as rent, thus preventing the operation of the statute of Limitation.

In his judgment, MacDonald J. had said:

> I think that parties may agree that the rent payable for the use of lands shall be the payment of taxes direct to the taxing authorities and, in such a case, my view is that taxes so agreed to be paid and paid should for all purposes be regarded as rent.

Speaking for the Appellate Division, Ford J.A. approved that language.

Applying the principles of law so stated to what took place between the appellant and the assistant manager, it is quite clear that the agreement between them was

> that taxes so agreed to be paid and paid, shall for all purposes be regarded as rent.

If the appellant had not agreed to pay the taxes, he would not have been allowed to stay on the land. (See Weaver, "Limitations of Actions" p. 67).

As pointed out by Ford J.A., the taxes were a compensation or "retribution" having all the attributes of rent.

And under those circumstances, the payment of taxes became "an acknowledgment made by the tenant to the lord of his fealty for forfeiture". (See Woodfall, 23rd ed., p. 491).

I agree with the Appellate Division that the proper inference is that the agreement was that the taxes were payable as rent. The payment was a periodical one and cannot be accounted for upon any ground other than that it was to be paid as compensation for the use of the land and to create or continue the relationship of landlord and tenant. (*East* v. *Clarke* (1); *Sullivan* v. *Sweeney* (2)).

(1) (1915) 33 O.L.R. 624, at 629, 630.

(2) (1908) 4 E.L.R. 492, at 494.

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It follows that the payment of taxes prevented the operation of the statute of Limitation.

The appeal should be dismissed with costs.

HUDSON J. (dissenting).—The defendants respondents are the registered owners of a quarter section of land in the province of Alberta. The appellant commenced this action on the 8th of April, 1943, alleging that since prior to the 1st of January, 1933, he had been and still was in continuous and uninterrupted possession of the said lands, and that such possession had at all times been adverse to the defendants, and that no proceedings had been taken by the defendants to recover the lands and that the right and title of the defendants thereto had been extinguished. He claimed a declaration that he was entitled to the exclusive right to use the lands and a judgment that he be quieted in possession.

The defendants pleaded among other defences, not now in question, that the plaintiff held the said lands as their tenant from year to year and he had continued to pay rent under the terms of such tenancy.

The action was tried before Mr. Justice H. J. MacDonald and in his judgment he has stated the facts as follows:

> The plaintiff first went into possession of the land in either 1921 or 1922, having made an agreement to rent the premises from the Canadian Bank of Commerce at South Edmonton, which bank was agent for the owners. The renting was done in an informal manner, and there was no written lease.
>
> The rental for some years was in a fluctuating amount, depending on the crops. Each year up to and including 1931 the rent was paid in cash to the manager of the Canadian Bank of Commerce at South Edmonton as agent for the owners. In 1930 and 1931 the amount of rental paid approximated the taxes against the land.
>
> For the first few years of the tenancy one Buchanan was the bank manager and he was succeeded by one Clark, who died in 1931.
>
> After the death of Clark the plaintiff went to the Bank in 1931 to see about the land. He spoke to the assistant manager, Illingworth, who apparently could not locate the records respecting the land. Of that interview the plaintiff states on discovery: "I went to the bank and ask them what I am going to do with the land and they told me to stay with it and pay the taxes." Following that interview the plaintiff paid the taxes each year direct to the municipality and completely disregarded the Bank. Illingworth did not give evidence at the trial.

The plaintiff has had exclusive and undisturbed possession of the land since 1931.

Previous to 1931 the tenancy was a yearly one, but in 1931 the tenancy became, in my view, a tenancy at will.

On these facts the learned judge took the view that the arrangement created a tenancy at will, that the payment of taxes by the plaintiff was not a payment of rent and that, for this reason, the provisions of the statute of Limitation of Alberta operated and the plaintiff was entitled to the relief claimed.

On appeal to the Appellate Division, this decision was reversed, the judgment of the Court being given by Mr. Justice Ford. He also held that there was a tenancy at will and did not differ from the trial judge as to the interpretation of the statute but held that on the facts it should be inferred that there was an agreement that the taxes should be paid as rent, and as the evidence showed that the plaintiff had paid the taxes in each year the defendants' right had not been extinguished.

The relevant statute is *The Limitation of Actions Act*, chapter 133, R.S.A., 1942, and sections 18, 29 and 30 are as follows:

18. No person shall take proceedings to recover any land but within ten years after the time at which the right to do so first accrued to some person through whom he claims (hereinafter called "predecessor") or if the right did not accrue to a predecessor then within ten years next after the time at which the right first accrued to the person taking the proceeding (hereinafter called "claimant").

29. Where any person is in possession of any land or in receipt of the profits thereof as tenant from year to year, or other period, without any lease in writing, the right of the claimant or his predecessor to take proceedings to recover the land shall be deemed to have first accrued at the determination of the first of such years or other periods, or at the last time (prior to his right to take proceedings being barred under any other provisions of this Act) when any rent payable in respect of the tenancy was received by the claimant or his predecessor of the agent of either, whichever last happens.

30. (1) Where any person is in possession of any land or in receipt of the profits thereof as tenant at will, the right of the claimant or his predecessor to take proceedings to recover the land shall be deemed to have first accrued either at the determination of the tenancy, or at the expiration of one year next after its commencement, at which time, if the tenant was then in possession, the tenancy shall be deemed to have been determined.

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With these should also be read section 45 (3) of the Act, as follows:—

45. (3) The receipt of the rent payable by any tenant at will, tenant from year to year or other lessee, shall, as against such lessee or any person claiming under him, but subject to the lease, be deemed to be the receipt of the profits of the land for the purposes of this Act.

In Woodfall on Landlord and Tenant, 24th ed. p. 283, referring to the corresponding sections of the English Act, it is stated:

It will be observed that this section (corresponding to Alberta sec. 30 (1)) says nothing of the payment or non-payment of rent by the tenant at will, and verbally operates in favour of such tenant although he may have been paying rent during the whole tenancy at will. The judicial opinion has been expressed that so absurd a result may be avoided by construing each successive payment of rent as an acknowledgment of title in the landlord, and the suggestion has also been made that the Legislature assumed that no rent is paid. Either of these solutions, however, is open to objection; the former because it is only an acknowledgment in writing which operates in favour of the landlord; the latter because the *casus omissus* in a statute cannot be supplied.

The difficulty referred to in Woodfall is only partially removed by the introduction into the Alberta Act, sec. 45 (3), of the words "tenant at will". However, the general effect of the provisions, I think, can be taken to be stated adequately in a judgment of the Judicial Committee of the Privy Council in the case of *Day* v. *Day* (1). This was an appeal from New South Wales, where the English statute had been adopted. In the judgment of the Committee, at p. 761, it is stated:

When the Statute has once begun to run, it would seem on principle that it could not cease to run unless the real owner, whom the Statute assumes to be dispossessed of the property, shall have been restored to the possession. He may be so restored either by entering on the actual possession of the property, or by receiving rent from the person in the occupation, or by making a new lease to such person, which is accepted by him.

I think it is clear from this statement of the Privy Council and the wording of the relevant sections of the statute that it is *the receipt of rent by the owner,* and not merely a payment by the person in occupation, which interrupts the running of the statute. A mere acknowledgment by the tenant, not in writing as required by the statute, is insufficient.

There must be a positive reciprocal recognition of the continuance of the relationship.

(1) (1871) L.R. 3 P.C. 751.

The question then is: did the defendants receive rent from the plaintiff subsequent to the year 1932?

Nothing was paid to the owners, nor to anyone authorized to act on their behalf. The arrangement with the bank was of an indefinite and tentative character. The facts stated by the learned trial judge should be supplemented by a further statement in the evidence of Bérubé at the trial, as follows:,,

Q. Did you go back to the bank?—A. I did.

Q. For what purpose?—A. Well, I went in to see the assistant manager, because Mr. Clark was gone, and I asked him what I should do with the place, and he told me to keep it, pay the taxes. I asked him if he had any record of the owner or something like that, to see if we could get something out of them, but he said they had no record of any kind; the manager, the assistant manager of the bank.

There is no evidence that the defendants were advised of this conversation or that it received their approval. In any event, there was no obligation imposed upon them. The plaintiff had no security of tenure. He was liable to ejectment at any time, with no more than a right to remove his chattels and probably the emblements.

In 1932 and each year thereafter the plaintiff received tax notices from the municipality. He was not under a personal liability to the municipality to pay these amounts but, if the taxes were not paid, the municipality had a right to distrain on his chattels on the farm.

The relevent provisions of the *Municipal Act* applicable during the period in question are found in the *Municipal District Act* of Alberta 1926, chap. 41, secs. 355, 356 and 357 (1) (*b*), as follows:

355. Where taxes are due in respect of any land occupied by a tenant the secretary-treasurer may give such tenant notice in writing requiring him to pay to him the rent of the premises as it becomes due from time to time the amount of the taxes due and unpaid and costs; and the secretary-treasurer shall have the same authority as the landlord of the premises would have to collect such rent by distress or otherwise to the amount of such unpaid taxes and costs; but nothing in this section contained shall prevent or impair any other remedy for the recovery of the taxes or any portion thereof from such tenant or from any other person liable therefor.

356. Any tenant or purchaser may deduct from his rent or moneys payable under his contract of purchase, any taxes paid by him which as between him and his landlord or vendor (as the case may be) the latter ought to pay.

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357. (1) In case taxes which are a lien upon the land remain unpaid for one month after the mailing of the tax notice hereinbefore provided for, the secretary-treasurer may levy the same with costs by distress as a landlord may recover rent in arrears upon

* * *

(*b*) the interest of any taxable person or any occupier in any goods or chattels found on the land, including his interest in any goods or chattels to the possession of which he is entitled under a contract for purchase or any contract by which he may become the owner thereof upon performance of any condition.

In the statutes of 1941 there were some additional provisions creating a lien for taxes on growing crops. They are all incorporated in the Revised Statutes of Alberta 1942, chap. 92.

The plaintiff paid the taxes each year and the question is whether or not such a payment under the circumstances can be construed as a payment to the defendants of rent. Section 2 (*h*) of the statute contains a definition of rent as follows:

rent means a rent service or rents received upon a demise.

This definition does not greatly aid in answering the question which, after all, is in the nature of a question of fact. I have not been able to satisfy myself that the learned trial judge was wrong in holding that there was no rent received by the defendants from the plaintiff and, for that reason, would allow the appeal and restore the judgment at the trial, with costs here and below.

TASCHEREAU J. (dissenting).—The Appellate Division of the Supreme Court of Alberta, setting aside the judgment of the Honourable Mr. Justice H. J. MacDonald, dismissed the appellant's action, in which he claimed title to a quarter section of land by reason of adverse possession.

This piece of land which is situate near the city of Edmonton, had been in the possession of John Cameron until 1920, but the certificate of title is, since 1906, in the name of the respondents, who are the executors of the estate of the late Lewis Alexander Cameron.

In 1921, the appellant rented this quarter section from Mr. Buchanan, who was then manager of the Canadian Bank of Commerce, and who was obviously acting for the

respondents who lived in Scotland. Later, when Mr. Buchanan left the Bank, the appellant dealt with his successor Mr. Clarke, until the time of his death in 1931.

The amount of the rent varied from year to year, depending on the condition of the land and the value of the grain, and certain years, it happened that it was approximately equal to the amount of the taxes.

In 1931, when Mr. Clarke died, the appellant interviewed Mr. Illingworth, the assistant-manager of the Bank, in order to know what should be his future guidance. Here is the conversation that took place:—

> Well, I went in to see the Assistant-Manager because Mr. Clarke was gone, and I asked him what I should do with the place, and he told me to keep it, pay the taxes. I asked him if he had any record of the owner, or something like that, to see if we could get something out of them, but he said they had no record of any kind.

Up to that time, the appellant had paid his rent to the manager of the Bank, but did not bother with the payment of taxes, which of course, was the owner's concern. But, following the conversation he had with Mr. Illingworth, he went to the offices of the municipality and the school district, and paid the taxes directly to them, and continued each year thereafter. From that time to the date of the present action the appellant has remained in exclusive and uninterrupted possession of the land.

It is the contention of the respondents that the payment of the taxes by the appellant amounted to an acknowledgment of their title and must be considered as a rental for the occupation of the land. There is no doubt, as the learned trial judge said, that parties may agree that the rent payable for the use of lands may be the payment of taxes direct to the taxing authorities, and in such a case, the taxes, so agreed to be paid and paid, must for all purposes be regarded as rent.

The cases that have been cited may be distinguished from this one, because the facts were different. But the concensus of opinion clearly points to the necessity of an agreement, or to a state of facts known to the parties, from which an agreement may be inferred, that the taxes are paid as rent. Failing these requirements, there is no acknowledgment of title and the statute operates.

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Taschereau J

But in the present case I fail to see such an agreement, which may prevent the statute from running in favour of the appellant. When Mr. Illingworth and the appellant met at the office of the Canadian Bank of Commerce, there was no agreement that the taxes should be paid *as rent*. There was not even an agreement as to the terms of the lease between the appellant and the respondents or an authorized agent on the latter's behalf. Mr. Illingworth had no knowledge whatever of the matter, and he surely could not change an agreement to pay a fluctuating rent, dependent on the value of grain, to an agreement to pay taxes as rent. The most that may be gathered from the interview between Mr. Illingworth and the appellant is a suggestion by the former, that the latter should keep possession of the land and pay the taxes.

The appellant had no other alternative but to do so. Although he was under no personal obligation, the chattels and the crop were subject to distress, and the necessary condition of his occupancy was to make the payments that he has made.

In the conversation that took place with Mr. Illingworth, I cannot find the necessary ingredients of a bilateral agreement binding upon the appellant and the respondents.

I should allow the appeal with costs throughout.

RAND J.—The appellant claims title to a quarter section of land under the provisions of the *Limitation of Actions Act*, chap. 133, R.S.A. 1942 and on the basis of the following facts. From 1922 until 1931 he occupied the land for which he paid a fluctuating rent related somewhat to the crop harvested and at times ranging about the amount of taxes payable. The occupancy was arranged through the Bank of Commerce at Edmonton representing the owners in the United Kingdom. On the death in 1931 of the manager who had dealt with the matter, the appellant raised the question with the assistant manager as to "what I should do with the place" and he was told "to keep it, pay the taxes." From then on he continued to farm the land and to pay the taxes direct. From 1931 to 1936 the assessments were made in the name of the registered owner and notices sent to the bank: but from 1936 to 1943 the

name of the appellant was added to the assessment roll, and notices of assessment and of taxation were sent only to him. That imposed no liability on him for the taxes.

The following excerpts from his evidence show the mode in which the arrangement from the beginning was carried out:

Q. How long were you to be in possession? Was it one year, two years?—A. Well, one year at a time, I guess.

Q. One year at a time. How did you pay the rent?—A. Well, now I don't remember exactly how I did it. I know some years I paid in the Spring of the year, with paying taxes, and the rest in the Fall.

* * *

Q. Do you know how much the rent was the first year?—A. No, I don't.

Q. You would not be able to give me an approximate idea?—A. Well, I know some years I only paid about the taxes.

* * *

Q. What year did you last pay rent to the Bank?—A. Well, last year I think it was 1929. '29, yes.

Q. The last year that you paid rent?—A. Paid the rent, except—well, some of the taxes, you see.

Q. Who did you pay the amount of the taxes to?—A. To Mr. Clarke.

Q. To Mr. Clarke?—A. Yes.

Q. And you think that in 1930 you paid the amount of the taxes to Mr. Clarke?—A. About that, yes.

Q. To Mr. Clarke, yes?—A. Yes, to Mr. Clarke.

Q. What about 1931?—A. About the same thing; because the grain wasn't worth anything.

Q. What year did Mr. Clarke die, do you know?—A. If I remember right it was 1931.

* * *

On those facts I agree with Ford J.A. that the appellant in 1931 was allowed in effect to continue his relation to the land which had been going on for nine years, and to pay for the use of it on the basis of the taxes for each year. He cannot now be heard to say that the taxes which were thereafter paid were not as against him a payment of rent, made on the landlord's request to his creditor. In that view the statute is unavailing to him: *East* v. *Clarke* (1).

I would therefore dismiss the appeal with costs.

ESTEY J.—The appellant (plaintiff) asks a declaration for exclusive use and quiet possession of the Northwest quarter of Section 7, Township 51, Range 23, West of the

(1) (1915) 33 O.L.R. 624.

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4th Meridian, under the provisions of the *Limitation of Actions Act*, 1942, R.S.A., ch. 133. Section 18 of this Act reads:

> No person shall take proceedings to recover any land but within ten years next after the time at which the right to do so first accrued to some person through whom he claims (hereinafter called "predecessor") or if the right did not accrue to a predecessor then within ten years next after the time at which the right first accrued to the person taking the proceeding (hereinafter called "claimant").

The respondents (defendants) are the executors of the late Lewis Alexander Cameron, who reside in Scotland and have been registered owners of this land since the 13th of November, 1906.

The appellant alleges that he has been in continuous and uninterrupted possession of these said lands since 1921 or 1922 and that since January 1st, 1933, he has held the land under circumstances that entitle him to claim the land under the above mentioned statute.

In the year 1921 or 1922 he rented this land through the Canadian Bank of Commerce in Edmonton, as agent for the registered owners. In each year up to and including 1931 his practice was to call at the bank and agree upon the amount of the rent for the following year. He has no record of these yearly payments but said they varied. He deposed in part:

> Q. Do you know how much the rent was the first year?—A. No, I don't.
>
> Q. You would not be able to give me an approximate idea?—A. Well, I know some years I only paid about the taxes.
>
> Q. About the amount of the taxes?—A. Some years and some years I paid more. It depends what shape the land was, and the price of the grain.

Then in 1929 or 1930 he wanted to drop it altogether "because you see there was no money for me", but Mr. Clarke, then manager of the bank, "said to work on it, it would not cost you anything only the taxes". In 1931 Mr. Clarke died and the appellant interviewed the assistant manager, who told him "to stay with it and pay the taxes", and added that he (the assistant manager) had no record of the matter.

The assistant manager was not called as a witness. Upon the appellant's evidence as to the conversation between himself and the assistant manager it is obvious that the

latter knew nothing thereof and acted entirely on what the appellant told him. As a consequence, he said: "keep it, pay the taxes". He used in effect the same terms as Mr. Clarke. The inference appears unavoidable that they were but continuing the terms arranged with Mr. Clarke under which the appellant admits he was a tenant from year to year. As to the payment of taxes prior to 1931 the appellant deposes as follows:

Q. Now, when Clark and Buchanan were handling this land for the plaintiff you did not pay the taxes direct to the Municipality or the school? —A. I don't think so.

* * *

Q. * * * Did you ever pay the taxes to the Municipality before 1931? —A. I don't think so. I don't remember, anyhow.

Q. You have no recollection?—A. I don't think I did for that quarter.

In view of this evidence on the part of the appellant himself I do not think the place of payment can be accepted as an important factor in this case.

The secretary-treasurer establishes the fact that throughout the period the taxes were assessed to the respondents as registered owners, as indeed the provisions of the *Municipal Districts Act* (1942), R.S.A. ch. 151, required. The Act does not impose any direct personal liability upon the tenant for these taxes. It does provide that these taxes shall constitute a lien upon the crops and if recovery be had thereunder the tenant may deduct the amount he pays from the rent. A further provision gives to the Municipal District the right after notice to require the tenant to pay the rent up to the amount of the taxes to the Municipal District. These provisions, however, were never invoked as the appellant in each year until 1944 paid the taxes but he was never personally liable therefor to the Municipal District.

The appellant admits that prior to his conversation with the assistant manager in 1931 he was a tenant from year to year. Thereafter whether he continued, as the courts below held, a tenant at will under section 30, or whether the annual payments made him a tenant from

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year to year under section 29 makes no difference under the facts of this case. Section 45 (3) of the Act reads as follows:

45. (3) The receipt of the rent payable by any tenant at will, tenant from year to year or other lessee, shall, as against such lessee or any person claiming under him, but subject to the lease, be deemed to be the receipt of the profits of the land for the purposes of this Act.

Therefore the statutory period never did commence in favour of the appellant if the payment of the annual taxes constituted a payment of rent, as such a payment on his part would be an acknowledgment of ownership in the executors.

In reality the parties have carried on under much the same arrangements except that no conversation has taken place in each year with respect to the amount of the rent. The important factors appear to be that prior to 1931 the appellant had paid at different years only the amount of the taxes, and was not sure that he may not have paid even in some of those years these taxes direct to the Municipal District. In all of those years he admits he was a tenant from year to year. Moreover, he was never personally liable for the taxes while the respondents have at all times material been personally liable therefor.

These factors distinguish this from many of the cases cited by the appellant. In *Finch* v. *Gilray* (5) the rent was $6 per month and the taxes, and the tenant was assessed as owner for the taxes. In *Bowman* v. *Watts* (1), the tenant was assessed as owner for the taxes. In *Boone* v. *Martin* (2), the tenant agreed to pay an amount of money as rent and the taxes.

In paying the taxes he was discharging his obligation to the respondents and in turn their obligation to the Municipal District. The appellant's position in this case is that of the tenant in *East* v. *Clarke* (3) and *Sullivan* v. *Sweeney* (4).

The cases where rent is reserved and in addition covenants for the payment of taxes are quite distinguishable from the present case where taxes only are specified as compensation for the use of the land. Under the circum-

(1) (1909) 13 O.W.R. 481.
(2) (1920) 47 O.L.R. 205.
(3) (1915) 33 O.L.R. 624.
(4) (1908) 4 E.L.R. 492.
(5) (1889) 16 O.A.R. 484.

stances of this case, particularly where the obligation to pay the taxes rested at all times upon the owner, the only reasonable construction is that as between the parties they have agreed to pay an amount equal to the taxes.

Then too, the onus of proof rests upon the appellant to establish his right to this land under the statute, *Handley* v. *Archibald* (1). Upon the appellant's own evidence, reviewed in the light of the relationship that obtained between the parties throughout, the payment of the taxes in each year was in effect a payment of rent in an amount equal to the taxes and that upon the occasion of each payment he admitted ownership to rest in the respondents.

In my opinion the appeal should be dismissed with costs.

Appeal dismissed with costs.

Solicitors for the appellant: *Duncan, Cross & Johnson.*

Solicitors for the respondents: *Rutherford, Becker & Newton.*