1946
Jan. 14
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Feb. 24

IN THE MATTER OF AN AGREEMENT
BETWEEN:

HIS MAJESTY THE KING IN THE RIGHT OF CANADA REPRESENTED BY THE ATTORNEY GENERAL OF CANADA

AND

THE CORPORATION OF THE CITY OF OTTAWA

Crown—Reference under s. 19(g) of The Exchequer Court Act, R.S.C. 1927, c. 34—Answers to hypothetical questions of law concerning liability for taxes to the City of Ottawa of owner of land acquired by the Crown before and after rates levied pursuant to the Municipal Act, R.S.O. 1937, c. 266—The Assessment Act R.S.O. 1937, c. 272.

Held: That if the Crown acquired land in the City of Ottawa in the year 1938 after the 1938 assessment was made pursuant to the Assessment Act, R.S.O. 1937, c. 272, and in 1939 the City passed its by-laws to levy the 1939 rates upon such assessment pursuant to the Municipal Act R.S.O. 1927, c. 266, s. 315, the person who was the owner of the land at the time the assessment was made is not liable to the City for taxes levied upon such assessment.

2. That if the Crown acquired land in the City of Ottawa in 1939 before the City passed the by-laws to levy the 1939 rates upon the assessment made in 1938 pursuant to the Assessment Act, R.S.O. 1937, c. 272, the person who was the owner of the land at the time the assessment was made is liable to the City for taxes levied upon such assessment.

Reference by the Crown and the City of Ottawa under s. 19(*g*) of the Exchequer Court Act.

Argument was heard before the Honourable Mr. Justice Thorson, President of the Court, at Ottawa.

W. R. Jackett for His Majesty the King.

Gordon C. Medcalf K.C. for the City of Ottawa.

The facts and hypothetical questions of law raised are stated in the reasons for judgment.

THE PRESIDENT now (February 24, 1947) delivered the following judgment:

The parties have agreed in writing that certain questions of law should be determined by this Court. The submis-

sions were made under the second part of section 19 (*g*) of the Exchequer Court Act, R.S.C. 1927, chap. 34, which provides:

19. The Exchequer Court shall also have exclusive original jurisdiction to hear and determine the following matters:—

(*g*) . . . any question of law or fact as to which the Crown and any person have agreed in writing that any such question of law or fact shall be determined by the Exchequer Court;

The facts giving rise to the questions of law appear from the recitals of the agreement as follows:

WHEREAS in the City of Ottawa it is not practicable to complete the process of assessment and taxation in one year;

AND WHEREAS in the City of Ottawa the assessment is made in each year under the authority of a by-law pursuant to Section 60 of the Assessment Act (R.S.O. 1937, Chapter 272);

AND WHEREAS the assessment is made in each year on the date the assessment roll is returned by the City Assessor to the City Clerk;

AND WHEREAS it is provided by Subsection 5 of Section 60 of the Assessment Act that the assessment so made shall upon its final revision be the assessment upon which the taxes for the following year shall be levied;

AND WHEREAS Section 315 of the Municipal Act (R.S.O. 1937, Ch. 266) provides in part: "The Council of every municipality shall in each year levy on the whole rateable property according to the last revised assessment roll, a sum sufficient to pay all the debts of the corporation, whether of principal or interest, falling due within the year";

AND WHEREAS during recent years His Majesty has from time to time acquired land in the City of Ottawa;

AND WHEREAS in each year the City has passed by-laws pursuant to Section 315 of the Municipal Act, such as By-laws Numbers 9386, 9387, 9388, 9389, 9390, 9391, 9392 and 9393 hereto annexed, to establish tax rates for the various purposes of the City for the current year, to levy the rates upon the whole rateable property according to the last revised assessment roll, and to authorize the Tax Collector of the City to collect the taxes;

AND WHEREAS Section 318 of the Municipal Act provides that "the rates imposed for any year shall be deemed to have been imposed and to be due on and from the First day of January of such year unless otherwise expressly provided by the by-law by which they are imposed."

AND WHEREAS no by-law of the City imposing rates has provided that the rates should be deemed to have been imposed and to be due on any date other than the First day of January of the year in which such by-laws were passed;

AND WHEREAS in many cases His Majesty has acquired land in the period between the time when the assessment was made pursuant to the provisions of the Assessment Act and the time when the City passed the by-laws pursuant to Section 315 of the Municipal Act to levy the rates upon such assessment;

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AND WHEREAS the Tax Collector of the City has, pursuant to the provisions of the Assessment Act, demanded payment of taxes in such cases from the said assessed former owners;

AND WHEREAS in all such cases the City has taken all steps prescribed by the Municipal Act, the Assessment Act and all other Acts relating to the imposition of municipal taxes to render persons liable for payment of such taxes;

AND WHEREAS questions of law have arisen as to the right of the City to impose, levy or collect taxes from His Majesty's predecessor in title in the said circumstances;

AND WHEREAS it is expedient to determine the said questions of law;

AND WHEREAS where His Majesty and another person have agreed in writing that a question of law shall be determined by the Exchequer Court of Canada the said Court has, under paragraph (*g*) of Section 19 of the Exchequer Court Act (R.S.C. 1927, Ch. 34), exclusive original jurisdiction to hear and determine such question of law;

And the operative portions of the agreement setting out the questions are as follows:

NOW THEREFORE His Majesty and the City hereby agree:

1. That the Exchequer Court of Canada shall determine the said questions of law upon the facts hereinbefore recited by answering the following hypothetical questions.

(*a*) If His Majesty acquired land in Ottawa in 1938 after the 1938 assessment was made pursuant to the Assessment Act and in 1939 the City passed the by-laws to levy the 1939 rates upon such assessment puruant to Section 315 of the Municipal Act, is the person who was the owner of the land at the time the assessment was made liable to the City for taxes levied upon such assessment?

(*b*) If His Majesty acquired land in Ottawa in 1939 before the City passed the by-laws to levy the 1939 rates upon the assessment made in 1938 pursuant to the Assessment Act, is the person who was the owner of the land at the time the assessment was made liable to the City for taxes levied upon such assessment?

2. That the submission of the above questions of law shall be deemed not to raise in any way any question as to the liability direct or indirect, of His Majesty for such taxes.

3. That, notwithstanding any judgment or order which may be made by any court or judicial body respecting costs, His Majesty and the City shall each bear his and its own costs (including all fees and disbursements) of the proceedings launched in the Exchequer Court by the submission of the said question of law, of all proceedings arising out of such proceedings and of all appeals from any decision therein.

It is, of course, obvious that this Court has no jurisdiction to determine the issues of liability raised in the questions as between the City and the person there referred to and that any opinion expressed by it thereon can have no binding effect as between them. Under the circumstances, I had some doubt whether the questions came within the ambit of section 19 (*g*). I suggested to counsel

that the questions contemplated by it must relate to matters in which the Crown had an interest; that the issues raised were between the City and a third person; and that the interest of the Crown in their determination did not appear from the agreement. Counsel for the parties, however, agreed that both the City and the Crown had an interest in the determination of the questions, since it might decide the course of action of the City against the person referred to in the questions, and his liability or otherwise might be a matter of pecuniary interest to the Crown, or affect its policy, in its acquisition of lands in the City. Under the circumstances, I assume that the questions are of the kind contemplated by section 19 (*g*) and proceed to deal with them in their order.

The following statutory provisions are important. Section 60 of the Assessment Act, R.S.O. 1937, chap. 272, after dealing with the alternative manner in which cities may provide for making the assessment by wards or subdivisions and for holding a court of revision for hearing appeals from the assessment and then providing for an appeal from the court of revision to the county judge and requiring that he shall complete his revision by the 20th day of October in each year, then enacts, by subsection (5):

(5) The assessment so made whether or not it is completed by the 20th day of October, shall upon its final revision be the assessment upon which the taxes for the following year shall be levied.

Then section 315 (1) of the Municipal Act, R.S.O. 1937, chap. 266, provides in part:

315. (1) The council of every municipality shall in each year levy on the whole rateable property according to the last revised assessment roll, a sum sufficient to pay all debts of the corporation, whether of principal or interest, falling due within the year, . . .

And section 318 of the Municipal Act provides:

318. The rates imposed for any year shall be deemed to have been imposed and to be due on and from the 1st day of January of such year unless otherwise expressly provided by the by-law by which they are imposed.

In addition, other statutory provisions must also be considered; for example, section 4 (1) of the Assessment Act enacts:

4. All real property in Ontario . . . shall be liable to taxation, subject to the following exemptions:

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1. The interest of the Crown in any property, including property held by any person in trust for the Crown, or . . .

Then Sections 99 and 100 deal with the collection of taxes as follows:

99. The taxes due upon any land with costs may be recovered with interest as a debt due to the municipality from the owner or tenant originally assessed therefor . . . and shall be a special lien on the land in priority to every claim, privilege, lien or incumbrance of every person except the Crown, . . .

and

100. The taxes payable by any person may be recovered with interest and costs, as a debt due to the municipality, . . .

And, in addition, section 125 of The British North America Act, 1867, provides:

125. No lands or property belonging to Canada or any province shall be liable to taxation.

Section 315 (1) of the Municipal Act is in its present form pursuant to section 12 (1) of the Municipal Amendment Act, 1930, Statutes of Ontario, 1930, chap. 44, by which section 306 (1) of The Municipal Act, R.S.O. 1927, chap. 233, was amended. Prior to such amendment, section 306 (1) read as follows:

306. (1) The council of every municipality shall in each year assess and levy on the whole rateable property within the municipality, a sum sufficient to pay all debts of the corporation, whether of principal or interest, falling due within the year, . . .

A number of cases in which section 306 (1) was considered, as it stood prior to its amendment, were referred to by counsel, such as *Sifton* v. *City of Toronto* (1); *Re Kemp and City of Toronto* (2); *City of Toronto* v. *Powell* (3); and *City of Ottawa* v. *Kemp* (4). Without going into the details of these cases, which all deal with municipal income tax assessments and levies, I think I may say that they established that only property which was rateable within the municipality at the time of the levy was subject to it and that if it had ceased to be such between the date of the assessment and the date of the levy, it was not subject to the levy. But counsel for the City pointed out that all the cases referred to dealt with situations prior to the amendment of 1930 and that there was a fundamental change in the Act. By the amendment the assess-

(1) (1929) S.C.R. 484.
(2) (1930) 65 O.L.R. 423.
(3) (1931) O.R. 172 and 495.
(4) (1931) O.R. 753.

ment and levy need no longer be in the same year and the direction to levy is not "on the whole rateable property within the municipality" but "on the whole rateable property according to the last revised assessment roll". The first case to be dealt with under section 306 (1), as amended, was *Re Lyman Bros.* (1). There a company engaged in business upon premises in the City of Toronto was assessed for business tax in 1930. In December of that year it went into liquidation. In 1931 the City sought to levy a tax for business assessment against it, although it had ceased to do business and no longer occupied or used any premises, and to prove for such business tax in the winding-up proceedings. The Master disallowed the City's claim and Grant J. A. dismissed its appeal from the Master's decision. His view was that the expression "rateable property" meant property which the municipality was empowered by law to rate or tax, and that when it was used in conjunction with the expression "the last revised assessment roll" it meant that the property must also appear on such roll, and that merely appearing on the roll, without also being rateable at the time of the levy, was not sufficient. In effect, he held that the 1930 amendment had made no change in the law. Before the Court of Appeal had handed down its judgment on the appeal from his decision, Grant J. A. in *City of Ottawa* v. *Wilson* (2) adhered to the view he had expressed in *Re Lyman Bros.* (*supra*). But when the Court of Appeal delivered its judgment, *Re Lyman Brothers Ltd.* (3), it unanimously allowed the appeal from his judgment and rejected the view expressed by him. At page 168, Masten J. A. said:

> The amendment of sec. 306(1) of the Municipal Act introduced in 1930 whereby the council is directed to levy not on the rateable property which existed in the municipality at the date of the levy, but on the "whole rateable property according to the last revised assessment roll", makes a plain and definite change in the basis of taxation from that which existed at the time of the *Sifton* case, (1929) S.C.R. 484, the *Kemp* case, (1931) O.R. 753, the *Fudger* case, (1931) O.R. 496, and the *Powell* case, (1931) O.R. 172. I think we are bound to give effect to the will of the Legislature as expressed in those words as being so clear and unambiguous that it cannot be disregarded.

On the strength of this decision counsel for the City submitted that under section 315 (1) of the Municipal

(1) (1932) O.R. 419.
(2) (1933) O.R. 21 at 27.
(3) (1933) O.R. 159.

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Act the City must make its levy on all the property which is shown as rateable on the last revised assessment roll whether it exists as rateable property at the date of the levy or not. If the test of whether property is subject to a municipal tax levy is that it is shown as rateable on the last revised assessment roll, then it would seem that counsel's contention should lead him further, namely, that it is so subject regardless of whether it was in fact rateable even at the time of the assessment. But, without carrying the argument that far, it seems clear from the decision that it is no longer necessary that the property should be rateable at the date of the levy if it was such at the date of the last revised assessment roll; there is a presumption of rateability at the date of the levy.

While there can be no doubt that the Legislature may by the creation of such a presumption of rateability cause property to be made subject to a municipal tax levy, notwithstanding lack of rateability as ordinarily understood, it can do so only with respect to property that is within its jurisdiction to tax. The reminder of Masten J. A. in *Re Kemp and City of Toronto* (1) that, while effect must be given to the enactments of the Legislature, there are limits to its legislative powers may well be kept in mind:

> No doubt the Legislature is supreme, and if within the ambit of its jurisdiction it declares that, in Ontario, black shall hereafter be white, the courts are bound to adjudicate in accordance with the law so enacted. But, if the statute is capable of a reasonable and fair interpretation which at the same time accords with reality, such an interpretation is naturally to be preferred by the Court.

Counsel for the Crown contended that the land referred to in the first question, having become the property of the Crown, would not be subject to the levy contemplated by section 315 (1) by reason of section 4 (1) of the Assessment Act which exempts from liability to taxation the interest of the Crown in any property. It was not necessary for the Legislature to pass any such enactment, for the interest of the Crown in any property would be exempt from taxation, in any event, by reason of section 125 of The British North America Act. Property belonging to the Crown derives its exemption from this section and not from any provincial legislation. It would, therefore, not

(1) (1930) 65 O.L.R. 423 at 431.

be competent for the Legislature to make property belonging to the Crown rateable or to authorize a municipality to make a levy on it.

Counsel for the City, however, submitted that if the Ontario Legislature chooses to enact that, notwithstanding that at the date of the tax levy the land is owned by the Crown, the levy shall be made in accordance with the state of facts that existed at some prior date and that a person other than the Crown, who was properly assessed with respect to the land, should be liable to taxation, then that taxation is valid and payment of the same may be enforced and that this is what the Legislature has done in apt words by the enactment of section 315 (1). I am unable to agree. A levy cannot be authorized to be made on Crown property as if it were not such property; and the presumption of rateability enacted by section 315 (1), however wide its applicability may be, cannot be made to extend to property which at the effective date of the levy has become property belonging to the Crown within the meaning of section 125 of The British North America Act. The Legislature cannot presume property to be rateable and subject to a municipal tax levy that is beyond the reach of its taxing power.

Counsel for the City contended that taxation can be levied upon persons in respect of land even although it is owned by the Crown and that the cases under section 125 of the British North America Act support his contention. The section has been before the Courts in many cases, for example, *Calgary & Edmonton Land Co.* v. *Attorney General of Alberta* (1); *Smith* v. *Rural Municipality of Vermilion Hills* (2); *City of Montreal* v. *Attorney General for Canada* (3); *North West Lumber Co., Ltd.* v. *Municipal District of Lockerbie No. 580* (4); *City of Halifax* v. *Fairbanks' Estate* (5); *City of Vancouver* v. *Attorney General of Canada et al* (6). In all these cases the property held to be subject to taxation was either the interest of some person other than the Crown in property belonging to the Crown or in which it also had an interest, or property belonging to some person other than the

(1) (1911) 45 Can. S.C.R. 170.
(2) (1914) 49 Can. S.C.R. 563; (1916) 2 A.C. 569.
(3) (1923) A.C. 136.
(4) (1926) S.C.R. 155.
(5) (1928) A.C. 117.
(6) (1944) S.C.R. 23.

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Crown in which the Crown had an interest. While the cases do, therefore, show that persons have been held liable for taxes imposed in respect of property belonging to the Crown, it is only in respect of the interest such persons have had in such property; there is no case that even suggests that a person may be liable for taxes imposed on property belonging to the Crown in which he had no interest.

Nor am I able to accept the view that, since the taxes imposed under the authority of section 315 (1) have a dual aspect, one real and the other personal, all that happens when property is acquired by the Crown after the date of the assessment and prior to the effective date of the levy is that the City has lost its remedies against the property but retained its right of action against the person appearing as the owner on the assessment roll. The dual aspect of a real property tax as being not only a tax on land but also a tax against the owner was clearly stated by Kerwin J. in *City of Vancouver* v. *Attorney General of Canada* (*supra*). It is also clear that the Legislature may authorize the imposition of taxes on land and continue the personal liability of the owner after he ceases to be such, or make the new owner, or even a stranger, liable for them. So also, the taxes could be imposed on a person with respect to land without creating any lien upon or any remedy against it, and the two aspects of a real property tax could be kept apart. But, we are not concerned with what the Legislature can do, but only with what it has done in the present case. Sections 99 and 100 of the Assessment Act and section 315 (1) of the Municipal Act must be read together. Sections 99 and 100 do not purport to accomplish any personal responsibility for taxes on land without a levy of such taxes on it. Section 315 (1) of the Municipal Act by subjecting the rateable property to the levy authorizes the imposition of taxes on land, and the taxes imposed pursuant to it are taxes on land. Then section 99 makes the taxes due upon the land, and section 100 the taxes payable by any person, recoverable as a debt due to the municipality. It is only in respect of taxes due upon any land or payable by any person that there is any debt due to the municipality, and there cannot be any taxes due or payable unless they have been validly

imposed. The legislative scheme makes the valid imposition of taxes on the land a condition of the personal liability of the owner for them. The debt depends on the levy. The two aspects of the taxes thus co-exist with one another, at least at the outset. If the taxes are levied on land belonging to the Crown in which the former owner had no interest at the effective date of the levy, then no taxes have been lawfully imposed on such land and they can, therefore, never be due or be payable by the former owner or any one else, or be recoverable by the municipality.

These views are in accord with certain statements, admittedly *obiter dicta,* made by members of the Court of Appeal of Ontario in *Montreal Trust Co.* v. *City of Toronto* (1). There the appellant, the assessed owner of land in Toronto, sold it to the Crown. The assessment roll showing the appellant as owner was completed and returned after the date of the agreement for sale but prior to the completion of the sale. An appeal from the Assessment Commissioner to the Court of Revision was dismissed as was also an appeal from its decision to a county court judge. An appeal by way of a stated case to the Court of Appeal was also dismissed. The only question before it was the correctness of the assessment of the appellant as owner. But counsel for the appellant, in the course of his argument, had expressed fear that in the year following the assessment it might be faced with a tax based upon the assessment complained of. With a view, no doubt, to allaying such fears, Robertson C. J. O., with whom Gillanders J. A. agreed, after holding that the appellant properly appeared as the owner upon the assessment roll when it was returned, added, at page 8:

> We are also of the opinion that, the sale having now been completed and the lands vested in the Crown, no taxes can validly be levied upon them in 1944. Not only is the interest of the Crown in any property expressly excepted from the real property in Ontario liable to taxation, by The Assessment Act itself (R.S.O. 1937, c. 272, s. 4, subs. 1), but by s. 125 of The British North America Act no lands or property belonging to Canada or any Province shall be liable to taxation.

And Kellock J. A., at page 15, also added his opinion:

> In my opinion, although the name of the appellant will appear on that roll at the time when the rate is struck in 1944, the appellant will not be liable for any taxes in respect of the lands in question as it

(1) (1944) O.R. 1.

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apparently fears. The sale having now been completed, and the property vested in the Crown, it is exempt from taxation by virtue of s. 125 of The British North America Act, and if anything more be required, by virtue of s. 4 (1) of The Assessment Act itself. While s. 315 (1) of The Municipal Act, R.S.O. 1937, c. 266, authorizes a council to levy on "the whole rateable property according to the last revised assessment roll", "rateable" in this section means "rateable by law": *City of Ottawa* v. *Wilson*, (1933) O.R. 21 at 27, (1933) 1 D.L.R. 273. No taxes are leviable by law upon these lands, now the property of the Crown, regardless of the fact that they appear upon the assessment roll.

Counsel for the City pointed out that the reference to *City of Ottawa* v. *Wilson* (*supra*) was to an opinion expressed by Grant J. A. which had been rejected, as already appears, by the Court of Appeal in *Re Lyman Brothers Limited* (*supra*), but this does not affect the weight of the opinions expressed apart therefrom or the conclusion reached. I have arrived at a similar conclusion on the question before me. In my view, section 315 (1) of The Municipal Act, although couched in terms capable of wide application, should be construed as excluding from the ambit of the tax levy authorized by it property that has ceased to be rateable property since the date of the last revised assessment roll but prior to the effective date of the levy by reason of having become property belonging to the Crown; such an interpretation would avoid any suggestion of repugnancy or invalidity. The alternative would be to hold that the section to the extent that it purported to subject property belonging to the Crown to a municipal tax levy as if it continued to be the property of its former owner, being in contravention of section 125 of The British North America Act, would be invalid.

Under the circumstances the answer to the first question submitted to the Court is—No.

The answer to the second question depends on the construction to be given to section 318 of The Municipal Act. In my opinion, it is free from difficulty. Counsel for the City urged that the rates imposed by the levying by-law passed under section 315 (1) must be regarded as though they had been imposed on the 1st day of January. If they had been imposed on that date the taxes levied would have been validly imposed on the land referred to in the question for it would not then have belonged to the Crown, and the taxes, having been validly imposed, would

then be due and the owner of the land, according to the last revised assessment roll, would be liable to the City for them. Counsel for the Crown, on the other hand, contended that the rates must be imposed before the section deeming them to have been imposed on the 1st day of January can take effect at all, and that at the date of their imposition the land belonged to the Crown and could not be subject to them. In my view, this does not give proper effect to the words of the section; the rates imposed are to be looked at not in the light of the date of their imposition at all but only in that of the 1st day of January. Counsel for the City relied upon *Henderson* v. *Corporation of Stisted* (1), in which the Court had to construe section 364 of the Municipal Act then in force. It was almost identical in terms with section 318 of the present Act. By an amendment of the Assessment Act which came into effect on August 1, 1888, certain property was exempted from taxation. A municipal by-law levying rates was enacted on August 4, 1888, and the question was whether the property referred to in the amendment was subject to the levy. It was held by Galt C. J. that, since the rates were to be considered to have been imposed and to be due on and from the 1st day of January, the property referred to in the amendment was not exempt. This decision is, I think, exactly in point in the present case and fully supports the City's contention. On the 1st day of January the land referred to in the second question was not property belonging to the Crown and the taxes imposed on it were validly imposed.

Under the circumstances the answer to the second question submitted to the Court is—Yes.

Pursuant to the terms of the agreement neither party is entitled to costs against the other.

Judgment accordingly.

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(1) (1889) 17 O.R. 673.