Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of McConnell v. *Beatty and another, from the Court of Appeal for Ontario; delivered the 10th December* 1907.

Present at the Hearing:

LORD ROBERTSON.
LORD COLLINS.
SIR ARTHUR WILSON.
SIR HENRI ELZÉAR TASCHEREAU.
SIR ALFRED WILLS.

[*Delivered by Sir Arthur Wilson.*]

The controversy out of which this Appeal arises relates to two parcels of mining land in the district of Algoma, Ontario.

In the year 1887 the lands in question were undoubtedly vested in fee simple in William H. Beatty. But in that year, the taxes payable upon the lands having fallen into arrear, the lands were put up for sale by the proper Government Officer, in order to realise the arrears. A number of properties were sold at about the same time, under similar circumstances, the sales being held on 11th November and 14th December 1887. The lands now in question were sold on the 14th December, and one Thomas H. Bull became the purchaser of these lands and of a large number of other lots.

The law governing the matter was the Act of 1887, Rev. Stat. Ontario 1887, c. 23. Sections 10 and 17 authorised and directed the sale, by the officer to whom the duty was assigned, of lands in Algoma and Thunder Bay where the taxes due were in arrear for three years. The proceedings at and after the sale

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and their effect were prescribed by the subsequent sections :—

"20. The Treasurer, after selling any land for "taxes, shall give a certificate under his hand to the "purchaser, stating distinctly what part of the land "has been sold, and describing the same, and also "stating the quantity of land sold, the sum for which "it has been sold, and the expenses of the sale, "and further stating that a deed conveying the same "to the purchaser or his assigns will be executed by "the Treasurer on his or their demand, at any time "after the expiration of one year from the date of the "certificate, if the land be not previously redeemed.

"21. The purchaser shall, on receiving the Treasurer's certificate of sale, become the owner of the "land, so far as to have all necessary rights of action "and powers for protecting the same from spoliation "or waste, until the expiration of the term during "which the land may be redeemed ; but he shall not "knowingly permit any person to cut timber growing "on the land or otherwise injure the land, nor shall "he do so himself, but he may use the land without "deteriorating its value.

"22. From the time of payment to the Treasurer "of the full amount of the redemption money, required "by this Act, the purchaser shall cease to have any "further right in or to use the land in question.

"25. The owner of land which may be sold for "taxes, under the provisions of this Act, for non-"payment of taxes thereon, or his heirs, executors, "administrators or assigns, may at any time within "one year from the day of sale (exclusive of that day) "redeem the land sold by paying to the Treasurer, "for the use and benefit of the purchaser or his legal "representatives, the sum paid by him, together with "ten per cent. thereon, and the Treasurer shall give "the party paying such redemption money a receipt "stating the sum paid, and the object of payment, and "the receipt shall be evidence of redemption.

"26. If the land be not redeemed within the period "so allowed for its redemption, being one year "exclusive of the day of sale, as aforesaid, then on "demand of the purchaser or his assigns, or other "legal representatives, at any time afterwards, and "on payment of $1 the Treasurer shall execute and "deliver to him or them a deed of sale in duplicate "of the land sold."

Bull duly received the certificates provided for by section 20 in respect of all the lots purchased by him, including the two properties now in dispute. These were not redeemed under section 25 within the year allowed for the purpose by that section. Bull appears subsequently to have sent these certificates with others to the Treasurer's office, for the purpose of obtaining in exchange deeds of sale as directed by section 26.

In 1889 an incident occurred, the details of which seem to have become forgotten by the parties concerned, until they came to light during the trial of the present case. So far as has been traced, the facts were the following.

On the 26th January 1889 Bull wrote to the proper official in the Treasurer's office, "Please "hand to Mr. T. D. Ledyard all my tax "certificates relating to any part of section 8 "in 8th Concession McTavish" (which included the lands in question). "I do not require "any deeds of this land, as I have agreed to "assign it, so please do not make them out." The reply on the 28th January was, "The "deeds already prepared embraced some of "the subdivisions of eight in 8th McTavish. "However, upon receipt of $38 * * new deeds "will be prepared by the authority of the "Treasurer, and the certificates referred to "returned."

On the 31st January Ledyard appears to have received the certificates referred to, for on that day he gave a receipt for them to the official in the Treasurer's office. Ledyard is a friend of Bull, and was acting for him, if for anybody. Ledyard appears to have made over the certificates in question to Leys, a barrister of Toronto, in an envelope addressed originally in Ledyard's handwriting to "John Leys, Esq., M.P.P.," but of which the address was altered in the handwriting of Leys by striking out the

direction to Leys, and writing below "W. H. Beatty, Esq." It has been held, and their Lordships accept the finding, that Leys acted for W. H. Beatty in obtaining these certificates from Ledyard, or from Bull through Ledyard, and that Beatty paid some money to Leys. After 1889 or 1890 the certificates remained in Beatty's possession with the title-deeds of the properties.

By a deed bearing date the 29th October 1903 W. H. Beatty purported to convey the properties in question to his brother Joseph Walker Beatty, the now Respondent. The nature of that conveyance will have to be considered later. That deed was registered on the 6th November 1903.

On the 14th December 1903 the Treasurer executed a deed of sale, including the properties in question, in favour of Bull, purporting to do so in pursuance of the tax sale of 14th December 1887, and on the 12th January 1904 Bull conveyed the lands in question to McConnell, the present Appellant. The sale deed to Bull was registered on the 18th December 1903, and the conveyance to McConnell on the 14th January 1904.

The present suit was instituted on the 13th July 1904. The Plaintiff was Joseph Walker Beatty, with whom was afterwards joined the Attorney-General for Ontario, on the relation of Joseph Walker Beatty. The Defendants were McConnell, Bull, and one Gregory.

The statement of claim set out Beatty's title. It alleged that Bull's tax deed of the 14th December 1903 had been obtained by the Defendants by misrepresentation and suppression of facts, such as to amount to a fraud upon the Crown; and it prayed that the tax deed should be cancelled and set aside, and that the registration of that deed, and of the grant by Bull to McConnell, should be removed from the

Registry Office as a cloud on the Plaintiff's title. Other relief was also asked for.

The charges of fraud, misrepresentation, and suppression of facts have failed, and the suit has been finally dismissed, so far as it affects Bull and Gregory, who are no parties to this Appeal. The question that remains is, whether, on the facts established at the trial, the Plaintiff has shown good title in himself as against McConnell.

Street, J., who tried the case, held that Beatty had shown no title to any relief. The Court of Appeal, however, reversed that decision, and granted to him, as against McConnell, substantially the relief asked for; hence the present Appeal.

As to the effect of the Act of 1887, there appears to their Lordships to be no doubt. The purchaser at a tax sale, on obtaining his certificate under section 20, becomes by section 21 the owner of the land for certain limited purposes. The original owner has, by section 25, a year within which to redeem. But if he does not redeem within that year his right of ownership is gone, and the only effective ownership that remains is that of the purchaser, who, under section 26, has an absolute right at any time afterwards to claim a deed of sale from the Treasurer and so to perfect his title.

As to the principal question discussed on the argument of the appeal, their Lordships agree with the trial Judge, where he says:—"If Beatty "was not entitled to a conveyance from Bull, "then Bull was entitled to obtain his convey-"ance from the Crown"; and if Beatty was so entitled as against Bull, it must be by virtue of some transaction, duly effected according to law, by which either Beatty's original title was recovered and re-established, or else a new title was acquired by contract from Bull.

The case was argued upon both these grounds. It was first contended that what

happened in 1889 amounted to a redemption of the properties within the meaning of the Act, and so rehabilitated the title of Beatty as it existed before the sale.

Their Lordships are of opinion that, assuming the correctness of all the inferences which have been drawn from the few facts actually proved, there is still no room for the application to the case of any doctrine of redemption. The power to redeem given by the Act was limited to the term of twelve months. After that period had elapsed, Beatty was a stranger to the land, and had nothing to redeem. Bull's right was not of the nature of an incumbrance upon, or limitation of, Beatty's former title; it was an adverse title superseding Beatty's altogether.

It was argued, secondly, that what occurred in 1889 amounted to a contractual transfer by Bull to Beatty of the rights which the former had acquired by virtue of the sale and of the certificates issued to him. And if Beatty's right can be supported at all, it must, in their Lordships' opinion, be upon this ground.

But there is a fatal difficulty in the way. The interest supposed to have been dealt with was clearly an interest in land, and under the Statute of Frauds the supposed transaction required to be evidenced in writing; whereas, not only has no such writing been produced, but there is no ground for supposing that anything of the kind ever existed.

For the foregoing reasons their Lordships are of opinion that the alleged title of W. H. Beatty as against Bull, and therefore the title of J. W. Beatty, so far as depends upon the devolution of that of his brother, has not been established.

Another question remains to be considered. Section 31 of the Act already referred to incorporates several sections of the Assessment Act,

Rev. Stat. Ont., c. 193, and applies them to sales by the Treasurer. Of these, section 183 prescribes the form of the sale deed.

Section 184 (1) says that—

> "The deed shall be registered in the registry office of the registry division in which the lands are situate, within eighteen months after the sale, otherwise the parties claiming under the sale shall not be deemed to have preserved their priority as against a purchaser in good faith who has registered his deed prior to the registration of the deed from the warden and treasurer."

The sale deed to Bull was not registered, nor indeed executed, for years after the sale to him, and Beatty's conveyance to his brother was registered before Bull's deed. It was contended that J. W. Beatty was a purchaser in good faith from his brother, and was, therefore, protected by the section just cited against Bull and anyone claiming through Bull. If he was a purchaser, there is no question of his good faith.

Street J., the trial Judge, decided against this contention, while some of the learned Judges on appeal expressed an opinion in favour of it. It is, therefore, necessary that their Lordships should express their opinion.

The evidence as to the circumstances of the conveyance by the one brother to the other is neither full nor clear. But it is certain that at that time there was outstanding an option of purchase granted by W. H. Beatty in favour of one Langworthy at a price of $7,560, an option which was ultimately abandoned, and that J. W. Beatty gave to his brother a promissory note for $7,560, and the brother indorsed this note on to his wife, giving her at the same time a letter, dated the 25th November 1903, which ran :—

> Toronto, November 25th, 1903.
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> My dear Charlotte,—I asked you some days ago to be a guarantee for an amount of $50,000 I owed George Gooderham and agreed to secure you against

any loss on that, as well as for some $4,000 or $5,000 I now owe you, some $6,000 or $7,000 that I require in addition, and as security therefor I hand you J. W. Beatty's note for $7,560.00 connected with a land deal in the township of McTavish, Thunder Bay, and also assign to you an account of some $6,000 to be paid to me by Louise and Jim which is payable when Jim comes of age, and in consideration of this advance, as well as the guarantee you are giving for me, I hereby agree to execute a mortgage to secure you for all the above in such form as may be necessary under the laws of the Province of Quebec to properly charge my one-third interest in a property at Verdun, being No. 4679 on official plan and book of reference for the Parish of Montreal, containing 68—41 arpents lying between the Lower Lachine Road and the aqueduct and 42, 58 arpents lying between the aqueduct and cadastre or plan No. 3912.

I enclose you a copy of the agreement entered into between yourself, George Gooderham, and myself extending the payment of that $50,000 for 10 years, $5,000 payable each year. You cannot be called upon to pay any part of this $50,000 until Mr. Gooderham has exhausted my estate, which I trust is good enough for it anyway. And I further agree that any time you demand it I will transfer and assign to you my claim against the estate of T. F. Worts as further security for all the above.

Yours,
W. H. BEATTY.

The claim of J. W. Beatty to be regarded as a purchaser has been put at different times in two different ways. It has been said that he was a purchaser in his own right, by reason of the promissory note which he gave to his brother. But the trial Judge found that it was never intended that that note should be paid, and that it was, in fact, destroyed when Langworthy's option was abandoned. Those conclusions do not seem to have been dissented from, nor could they on the evidence well be questioned. And they are sufficient to show that J. W. Beatty was a volunteer, and in no sense a purchaser, so far as his personal interest was concerned.

It has been contended, secondly, that J. W. Beatty was a purchaser as trustee for his brother's wife, that he took the property for her benefit to secure her against loss on the guarantee for her husband mentioned in his letter of the 25th November 1903. The conveyance itself contains no declaration of trust, and, if trust there be, it must be looked for in the letter of the 25th November. But that letter, while it refers to the wife's guarantee, and to the brother's promissory note indorsed over to her, and while it expressly charges or promises to charge certain properties as security against the guarantee, contains no words purporting to charge the properties now in question. The contention, therefore, that J. W. Beatty was a purchaser, as trustee for his brother's wife, appears to their Lordships to fail.

Their Lordships will humbly advise His Majesty that this Appeal should be allowed, that the judgment of the Court of Appeal should be discharged with costs to be paid by the Respondent Beatty, and the judgment of Street J. restored. The Respondent Beatty will pay the costs of this Appeal.