THE CANADIAN BAR REVIEW

VOL. VII. TORONTO, JUNE, 1929. No. 6

MUNICIPAL TAXATION OF INCORPOREAL RIGHTS.

A matter which obviously and urgently calls for reform is the condition of the law of Ontario as it relates to Municipal taxation with respect to easements and incorporeal rights in land.

Rights of way and other easements, as well as such quasi-easements as restrictive covenants as to user of lands, are often of the highest importance and value, and where they exist almost always enhance to a very substantial degree the value of the lands to which they are appurtenant, and they very often, though not always, depreciate the value of the lands by which they are burdened. It is, of course, elementary law, that such rights can have no legal existence, apart from the lands to which they are appurtenant, and of which, in contemplation of the law, though not physically, they actually form a part.

Being rights of property well known to and recognised by the law, it is quite natural and proper that, like corporeal rights in land, they should be the subject of municipal taxation, although it has been held in England that easements as such are not rateable or taxable. Examples of cases where this has been held are as follows: *Assessment Committee of the Doncaster Union* v. *Manchester Sheffield and Lincolnshire Railway Company*;[1] *The King* v. *Company of Proprietors of the Mersey and Irwell Navigation*;[2] *The King* v. *The Undertakers of the Aire and Calder Navigation*;[3] *The King* v. *Thomas*;[4] *Metropolitan Ry.* v. *Fowler*.[5]

[1] 10 T.L.R. 567; 71 L.T. 585; [1895] A.C. 133n.
[2] 9 B. & C. 95; 109 E.R. 36.
[3] 9 B. & C. 820; 109 E.R. 305.
[4] 9 B. & C. 114; 109 E.R. 43.
[5] [1893] A.C. 416.

But whatever the position of such rights, as regards taxation thereof, may be in England, there can be no doubt that it was the intention of the Legislature, that in Ontario, they should be the subject of municipal taxation.

That this is so will plainly appear upon a reference to the enactments about to be mentioned.

The Municipal Act, R.S.O. (1927), c. 233, s. 1(*f*), in defining "land" makes it include "lands, tenements and hereditaments and any estate or interest therein *and any right or easement affecting them.*"

The interpretation section of the Assessment Act, R.S.O. (1927), c. 238, s. 1(*b*), refers to "Land" "Real Property" and "Real Estate" as synonymous terms and states that these terms shall include certain things which are merely physical aspects of land and makes no reference to easements or incorporeal rights in land. This clause is obviously not intended to contain an exhaustive definition of land but in any case, for the purposes of this Act, "land" is to have the meaning given the word by the interpretation clause (sec. 1(*f*)) of the Municipal Act, it being so provided by sec. 33 of The Interpretation Act, R.S.O. (1927) c. 1, which extends the application of such interpretation clauses to all Acts relating to municipal affairs.

The Assessment Act, s. 4, makes "all *real property* in Ontario" except as to certain exemptions therein mentioned, subject to taxation; and s. 97 provides that the taxes due upon any "land" shall be a special lien thereon in priority to every claim, privilege, lien or encumbrance of every person other than the Crown.

The "Conveyancing and Law of Property Act," R.S.O. (1927) c. 137, s. 1(*b*), defines "land" as including incorporeal as well as corporeal hereditaments, and s. 14(1) provides that *every conveyance of land* shall, unless specially excepted, include, *inter alia,* all easements and appurtenances of every nature, and a tax deed being obviously a conveyance, there seems no logical reason why it should not have been held to be governed by this provision equally with every other species of conveyance, yet, as the context will presently indicate, such is not the case.

The foregoing will indicate, that "land," which by the Common Law and by other legislation, includes every species of real property, incorporeal as well as corporeal, was quite obviously intended by the laws relating to municipal taxation to have the like meaning, yet by a series of judicial decisions, this intention, illogically

as it may seem, has been so perverted and distorted that by nothing short of an overruling decision of the Supreme Court of Canada or of the Judicial Committee of the Privy Council, or by a Legislative amendment of the laws can the matter be restored to what was obviously intended to be its original and proper condition. It seems hardly conceivable that the Legislature when first enacting the laws now under discussion deliberately intended that they should have the effect which the Appellate Division of the Supreme Court of Ontario has said that they have.

The law of Ontario having made all "land," including easements and other incorporeal rights, the subject of taxation, it would at once strike the mind of the ordinary man, that, as they can have no independent existence, the proper way to tax such rights would be to tax them as a part of the dominant tenement to which they are appurtenant, and that being so, they obviously ought not to be taxed as a part of the servient tenement from which they have divorced, since that would be to tax them twice. If property is to be taxed, it is self evident that the only fair way is to tax it in the hands of its real owners and not in the hands of strangers. And yet this is the unfair and illogical result which follows from the construction which the Appellate Division of the Supreme Court of Ontario has placed upon the Assessment Act, that the existence of easements and incorporeal rights in the nature of easements is absolutely ignored, or treated as being ignored by the Act. This is unfair for two reasons, firstly, that the owner of the servient tenement is assessed as if the owner of property not burdened by any easement or other like property right and so pays a larger tax than he ought to pay, while the owner of the dominant tenement escapes payment of any tax on the incorporeal part of his property, and secondly, the owner of the dominant tenement, not having it brought to his attention that his easement is really being taxed in the hands of his neighbour, is lured into a false sense of security and does not appreciate the necessity of seeing that his neighbour's taxes are kept paid, so that the protection, theoretically afforded him by the provisions contained in the Act for public advertisement of a municipality's intention to sell in default of payment of arrears of taxes is entirely illusory. It is all very well to say, in the words of the legal maxim, that every one is presumed to know the law and so be able to protect his legal rights, but in actual practice, that is not so. No man can possibly know all the law, and only the few know very much of the law, and where Courts

and judges differ in opinion, as they have done and do, as to what the law is about the matter now under discussion, how can the mere layman, as the average owner of land is, appreciate the possibility of his property rights being jeopardised because his neighbour may neglect or refuse to pay his taxes?

As already indicated, an examination of the relevant legislation discloses no logical reason why the property units for taxation purposes should not be, as they are for all other purposes recognised by the law, the dominant tenement plus the incorporeal rights appurtenant thereto and the servient tenement minus such incorporeal rights, and the decisions of the higher Ontario Courts might, it is respectfully submitted, with better logic and with far more justice, have been exactly the reverse of what they were.

Should the hereinafter suggested changes in the law be made, they will, as already pointed out, remove a positive injustice, without in the least degree prejudicing the position of municipal taxing bodies. Rights of the nature now under discussion will still be taxed as they now are, but taxed as they ought to be in the hands of, and the tax paid by, their actual owners. It will be necessary only that in assessing lands, enquiry be made as to the existence of easements or other like rights which may enhance or detract from the value thereof and an addition made to or a deduction made from the assessed value accordingly.

Coming now to a discussion of the Court decisions relating to this matter, the first reported Canadian case where the question is discussed, whether an easement was or was not extinguished by a tax sale, appears to be *Essery* v. *Bell.*[6]

Chancellor Boyd, one of the ablest of our Judges, decided this case upon another point, but he was impressed by the obvious injustice of the defendant's contention that the easement there in issue had been destroyed by a tax sale. He says at pages 78 and 79 after referring to the provisions which now appear in the Assessment Act, s. 97, the Municipal Act, s. 1(*f*) and the Conveyancing and Law of Property Act, s. 14(1):

> This was in force during the period of assessment before the sale. The argument is, that when taxes were imposed upon the land owned by the plaintiff, it must be taken that such taxes were imposed in right of this easement, which was expressly attached to the lot by prior conveyances running from the common owner of this and the defendant's lot, and that there could be no sale as for arrears, because all these taxes had been paid. . . . It would be interesting to know upon what principle the taxation

[6] (1909) 18 O.L.R. 76.

was based on this particular ten feet. Was the soil alone taxed, or was regard had to the easement? Or was the easement taken into account with regard to either tenement, the dominant or the servient? Our law seems to be silent on the subject of taxing easements. In the United States the method of procedure is said to be as follows: When they are appurtenant to the realty, they are to be taxed as part of the land to which they belong; . . . . Certainly it would be an extraordinary state of the law, if, by the sale of the servient lot, the title to the easement could be extinguished, and that without any notice to the person who uses it, or any opportunity given for him to exonerate the land by the payment of taxes.

The next case is *Re Hunt and Bell.*[7] The question for decision there was whether or not restrictive covenants analogous to easements were extinguished by a tax sale. Middleton, J., was impressed by the same considerations which had influenced Boyd, C., in *Essery* v. *Bell* (*supra*) and held that they were not. In *Re Hunt and Bell* (*supra*), he said at pp. 259-260.[8]

Where, as here, there was a building restriction applicable to a considerable territory, it would certainly be most anomalous that the whole building scheme should be upset, and full and unrestricted right of building up to the street line should be given by a tax sale. I should hesitate long before giving such a wide effect to any language not absolutely plain and unambiguous.

His judgment, it is submitted, is far more consonant with reason and justice, than that of the Appellate Division, by which it was reversed; Garrow, J.A., at p. 264, could see no legislative intention to place the rights of the owner of a dominant tenement on a higher basis than those of the wife of an owner in respect of dower, of an execution creditor or of a mortgagee, but these are rights all of which relate to or are a charge upon the identical real property rights of the delinquent taxpayer himself, while the rights of the owner of the dominant tenement are of an entirely different and independent nature, relating to a different real property right carved out of and being entirely superior to the rights of the owner of the servient tenement and of all persons claiming through or under him. The judges of the Appellate Division seem to have quite overlooked the fact that the word "land" as used in the Assessment Act was obviously intended to bear all the various meanings so well known to the law of real property and not to be restricted in its application to the mere soil itself.

The next and most recently reported Ontario case is *Reach* v. *Crosland.*[9] In that case Sir William Mulock, C.J.O., then C.J. Ex.,

[7] (1915) 34 O.L.R. 256; 24 D.L.R 590.
[8] 34 O.L.R.
[9] (1918) 43 O.L.R. 209, 635; 45 D.L R. 140.

followed, as he was perforce bound to do, the ruling of the Appellate Division in *Re Hunt and Bell* (*supra*). The obvious fallacy of that ruling—to the reasoning on which it is founded, he makes reference at p. 212[10]—is that because the easement was not physically a part of the dominant tenement, it could not be assessed therewith, and must, therefore, be assessed with the servient tenement. It is submitted, that this does not necessarily follow. The easement being an interest in land and being taxable as such, could quite as easily be assessed with the dominant as with the servient tenement. This fallacy arises from construing legislation such as sec. 97 of the Assessment Act making taxes a lien upon "land" as having regard to land only in its purely primary and physical sense of soil, with its contents, mineral or otherwise and superincumbent structures, for which narrow construction there is warrant, neither in logic nor reason, nor in the statutory meaning given to the word by the Assessment Act as modified by the Interpretation Act and the Municipal Act. On appeal, the trial judgment was, of course, affirmed by the Appellate Division, which was itself bound to follow its own judgment in *Re Hunt and Bell* (*supra*), but that it did not feel quite happy in doing so appears from the language of Sir William Meredith, C.J.O., where he says, at p. 636:[10a]

> It may be that . . . the proper way to assess is to assess the dominant tenement for the added value given to it by the right to the easement which appertains to it, and that the owner of the soil over which the easement exists should be assessed for a sum less by what has been assessed in respect of the dominant tenement. Assuming that, the difficulty here is that that course has not been followed; the land itself has been assessed, that assessment has been confirmed, and there is a provision in the statute making it binding notwithstanding that no notice has been given to the parties affected Then, in addition to that, an Act[11] has been passed declaring the sale and the conveyance made in pursuance of it to be valid. This is fatal to the appellant's case.

In the case of *Bank of British North America* v. *London Saskatchewan Investment Co. Ltd.*,[12] the Saskatchewan Court of Appeal had under discussion a Saskatchewan taxing Act (The City Act). Sec. 2(10) of this Act defined "lands" as including easements and like the Ontario Assessment Act, this Act made taxes levied a special lien upon land. The Court held that in the special circumstances of that case a tax sale had effected an extinguishment of a right of way,

[10] 43 O.L.R.; 45 D.L.R. 142, 144.
[10a] 43 O.L.R.
[11] 3 Edw. VII c. 86, s. 8; 7 Edw. VII., c. 95, s. 9.
[12] 46 D.L.R. 90.

but suggested that the result might have been otherwise, had the unsuccessful litigant pursued the appropriate remedy of an action against the municipality to set aside the tax sale as invalid because the right of way had not been assessed to its proper owner.

In practically all of the cases under review it is quite apparent that the Courts, or many of the judges composing the Courts, were impressed with the feeling that the incorporeal rights in issue ought to have been assessed with the dominant tenement, but that not having been so assessed, and the relevant legislation containing provisions which confirmed the assessments on failure of the aggrieved persons to take certain prescribed procedure to attack the assessments, within certain limited periods or the assessments and tax sales having been later confirmed by special legislation[13] they were constrained to hold that under such circumstances the easements had been extinguished.

The most recent case is *Hutchings* v. *Campbell, Wilson and Horne, Ltd.*,[14] where the Alberta Appellate Division had under consideration the effect of secs. 31 and 54 of the Calgary Charter (N.W. T. 1893, chap. 33), which in substance are the same as secs. 1(h) and 97 of the Ontario Assessment Act, and after considering the recent Ontario decisions, refused to accept the reasoning contained in them as a proper exposition of the law, and coming to an exactly opposite conclusion, held that a tax purchaser must take subject to an easement. Hyndman, J.A., at p. 302, said:

> Apart from the statute, it must strike the average mind as unreasonable, that in the circumstances such as we find in this case, default in payment of the taxes, which it has already been held the servient owner in this case ought to pay, should have the effect of destroying an interest or right of the dominant tenement which is absolutely essential to the enjoyment of the last mentioned tenement, and upon which latter all taxes have been paid in full. If the easement is a part of, annexed and appurtenant to, not the person, but the ownership of the land, it is then surely something connected with or a part of the title to the land which can only be got rid of by clear statutory authority.

After referring to the contention that the tax sale had extinguished the easement, he says:

> Certainly this would be a strange situation which one can scarcely think the Legislature intended to so seriously affect.

He then continues:

> Taxing Acts should always be construed strictly in favour of the subject. The estate which passes to purchasers is only that which the statute provides

[13] E.G. 18 George V. (Ont.), c. 88, s. 7.
[14] [1924] 2 D.L.R. 299.

shall pass. The right to sell is merely a method of enforcement of payment of taxes by the owner or party who ought to discharge them. . . I am of opinion that a sale of the servient tenement for taxes does not extinguish the easement annexed to the adjoining dominant tenement in the absence of express and clear language to that effect.

And Clarke, J.A., at p. 304, said:

It is quite clear that an easement is not subject to assessment for taxes in connection with the servient tenement.

At p. 308, he said:

On what principle can it be argued that the interest of one who is not liable at all for the taxes should be sold for the taxes properly payable by the person assessed? I think that the Act recognises the right of the court to protect interests not in default by confining the sale to the interest of the parties in default.

For the foregoing reasons it is urged that the law ought to be amended to bring it into consonance with the principles of reason, equity and justice as voiced by the language of Boyd, C., of Middleton, J., and of the Alberta Court in the cases above-mentioned. Herewith is a suggested draft bill which would, it is believed, bring about this greatly to be desired reform, and remove from the Ontario Assessment Act a reproach, under which it was surely never intended that it should rest when this legislation was originally enacted.

No. BILL. 1930.

AN ACT TO AMEND THE ASSESSMENT ACT.

HIS MAJESTY, by and with the advice and consent of the Legislative Assembly of the Province of Ontario, enacts as follows:—

1. The Assessment Act is amended in the following manner:—

(a) By inserting the following section, immediately after section 4:—

"4a (1) Where lands are subject to or have appurtenant thereto, any right of way, right of drainage or other easement of any kind, or any incorporeal right in the nature of or analogous to an easement, all assessments of such lands for purposes of municipal taxation shall be deemed to be subject to and to include all such easements and incorporeal rights;

(2) The existence of all such easements and incorporeal rights shall be taken into consideration in fixing the value of lands for the purposes of such assessments."

(b) By inserting the following section immediately after section 42:—

"42a (1) Where land is laid out and used as a lane or as a means of access to two or more parcels of land, and is subject to such rights of way as may prevent any beneficial use thereof by the owner thereof other than as

a means of access to other lands it shall not be assessed but the value of such land shall be apportioned and a rateable proportion of such value shall for the purposes of assessment, be added to the value of each of the parcels of land to which a right of way over the same, is appurtenant.

(2) In the case of lands not assessed under the provisions of subsection (1) the assessor shall enter in the assessment roll in respect thereof the words "Private lane—not assessed."

(c) By inserting the following section immediately after section 160:—

"160a. Lands sold for taxes, shall, notwithstanding such sale, and whether or not so expressed in the tax deed, continue to be subject to and to have appurtenant thereto all such easements and incorporal rights in the nature of or analogous to easements as may be lawfully existing at the time of the tax sale."

(d) By inserting immediately after the word "and" in the fourth line of section 177 the words "subject to the provisions of section 160a".

(e) by inserting at the commencement of section 182 the words, "Subject to the provisions of Section 160a".

ARTHUR E. LANGMAN.

Toronto.