Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of The Toronto Railway Company v. *The Corporation of the City of Toronto, from the Court of Appeal for Ontario; delivered the 5th August* 1904.

Present at the Hearing:

LORD DAVEY.
LORD ROBERTSON.
SIR ARTHUR WILSON.
SIR HENRI TASCHEREAU.

[*Delivered by Lord Davey.*]

The principal question on this Appeal is whether the cars used by the Appellants on their system of electric tramways in the City of Toronto and adjoining municipalities are liable to be taxed as real estate. There is another question whether the matter is *res judicata* between the parties.

The cars are the ordinary electric cars used on electric railways and receive their motive power from an electric current passing through an overhead trolley wire. The power is transmitted to the motors below the trucks by means of a wheel at the end of a trolley pole on the top of the car body, which wheel is pressed up against the trolley wire by a spring. No part of the car is of course fixed in any sense either to the tram rails below or the trolley wire above.

The Assessment Act which was in force in the Province of Ontario was Chapter 224 of the Revised Statutes of Ontario, 1897. By Section 39 (2) of that Act the personal property of the Appellant Company is exempt from assessment. And

by Section 2 (9) of the same Act "land," "real property," and "real estate" respectively include all buildings or other things erected upon or affixed to the land and all machinery or other things so fixed to any building as to form in law part of the realty.

By the assessment made in 1901 for 1902 the real property of the Appellants consisting of rails, poles, tires, wires, cars, and other plant and material being part of its railway system in and upon the streets, roads, and other public places and elsewhere in the City of Toronto was assessed at $1,247,281. It is admitted that the cars in question are included in this assessment.

The Council of the Respondents in June 1902 taxed the Appellants the sum of $8,775 in respect of the agreed value of the cars.

The Appellants refused to pay this tax, and commenced the present action in which they claimed a declaration that the cars were personal estate, and that the Plaintiffs were not liable for the above sum of $8,775, and an injunction to restrain the Respondents from taking any proceedings for the collection of the said taxes. The Respondents pleaded that in 1901 the street cars were legally assessable as real estate and also relied on a decision of the Court of Appeal dated the 28th of June 1902 as *res judicata* between the parties.

The action was dismissed by Mr. Justice Ferguson, and an Appeal from his Judgment was also dismissed by the Court of Appeal on the 15th May 1903. The present Appeal is from the Order then made.

No reasons were given either by Mr. Justice Ferguson or the Court of Appeal, as it was admitted that the point of law as to the assessability of the cars as real estate was indistinguishable from the point decided by the Court of Appeal in the previous year. That

decision appears to have been given on the authority of a case of *The Bank of Montreal* v. *Kirkpatrick* decided by the same Court of Appeal in 1901, and reported 2 Ontario L. R. 113.

That was the trial of an inter-pleader issue between execution creditors of an electric street railway company and trustees for debenture holders of the same company. The property purporting to be charged by the debentures in question included the rolling stock of the company but the debenture deed was not duly registered as a chattel mortgage. The learned trial Judge held that the rolling stock was an essential part of the railway, the latter being useless for any purpose without it, and therefore that it was real property covered as such by the mortgage. The Court of Appeal affirmed this Judgment. Osler, J., who delivered the Judgment of the Court, held that the rolling stock of the electric railway really constituted part of one great machine confined to a particular locality for which it was specially constructed and fitted. Detached from the rails (he said) it was incapable of use, and upon the principles laid down in certain well known cases on the law of fixtures he was of opinion that, as regards its liability to be taken in execution, it may properly be regarded as part of the corpus of the entire machine, and therefore in the nature of a fixture and passing with the land over which it ran.

In their case on this Appeal, the Respondents submit that "the cars are so actually or con-"structively affixed to land or buildings as to "render them real property and assessable as "such," and this was the point argued before their Lordships. Kirkpatrick's case is not a direct authority in this case, which depends on the construction to be put on the Assessment

Act, but the Court below evidently considered that the reasons given for the Judgment in Kirkpatrick's case were equally applicable to the present one.

Their Lordships are always disposed to treat with great respect an unanimous decision of the Court of Appeal in Ontario on the construction of one of their own Statutes, but they cannot accede to the argument addressed to them, or adopt the reasoning of Mr. Justice Osler in Kirkpatrick's case without doing violence to the English language and to elementary principles of English law. It does not appear to them to advance the argument to describe the Appellants' system of electric traction as a great machine, or by any other metaphorical expression. The subject of assessment is not the Appellants' system or undertaking, but only that part of it which can properly be described as real estate. The cars are no doubt adapted for use in connection with the railway and trolley wires, but they are not part of the railway, and are not fixed in any sense whatever to anything which is real estate. Their Lordships cannot attach any legal meaning to the expressions "in the nature "of fixtures," or "constructively affixed," except as an admission that the articles in question are not in fact fixtures or actually affixed. They are, therefore, of opinion that the cars remain and are personal estate only and are unassessable.

The decision of the Court of Appeal, which is said to be *res judicata*, arose out of a proceeding under the sections in the Assessment Act relating to the Court of Revision. By Section 62 a Revision Court of three persons is constituted, the jurisdiction of which is defined by Section 68, as follows:—

"At the time or times appointed, the Court "shall meet and try all complaints in regard to "persons wrongfully placed upon or omitted from

" the roll, or assessed at too high or too low a " sum." By Sections 75 and 84, there is an appeal from the Court of Revision to the County Court Judge, or where a person has been assessed to an amount aggregating $20,000, to a Board consisting of the Judges of the Counties which constitute the County Court district, and from that Board to the Court of Appeal. The Act provides that the Appeal shall be heard by three or more Judges of the Court of Appeal, and the decision of such Judges, or a majority of them, shall be final.

The Appellants appealed to the Court of Revision against the assessment of 1901 on the ground amongst others that the property enumerated was not liable to assessment as real property. The Court of Revision dismissed the Appeal and their decision was affirmed by the County Court Judges and subsequently by the Court of Appeal.

It appears to their Lordships that the jurisdiction of the Court of Revision and of the Courts exercising the statutory jurisdiction of appeal from the Court of Revision is confined to the question whether the assessment was too high or too low, and those Courts had no jurisdiction to determine the question whether the Assessment Commissioner had exceeded his powers in assessing property which was not by law assessable. In other words, where the assessment was *ab initio* a nullity they had no jurisdiction to confirm it or give it validity. The Order of the Court of Appeal of the 28th June 1902 was not, therefore, the decision of a Court having competent jurisdiction to decide the question in issue in this action, and it cannot be pleaded as an estoppel.

This point was not argued in the Court of Appeal in the present case as that Court only followed its own decision in the Appeal from the

Revision Court in the previous year. It is, therefore, a satisfaction to their Lordships to know that their decision is in accordance with the opinions expressed by learned Judges in the Court of Appeal for Ontario and and in the Supreme Court in other cases. In *Nickle* v. *Douglas*, 37 U.C., Q.B. 51, the exact point arose. The Appellant had unsuccessfully appealed to the Court of Revision, and it was held, after an elaborate examination of the previous authorities in the English and Canadian Courts, that that Court had no jurisdiction to decide any question whether particular property was assessable, and also that the party was not estopped by having previously appealed to the Revision Court. In *London Mutual Insurance Company* v. *City of London* (15 Ont. Ap. Rep. 629) the decision of the County Court Judge was treated as final, because the question was within the jurisdiction of the Assessor, but Hagarty C. J., held that if the property had not been assessable, that would have shown that *ab initio* the assessor and the appellate tribunals had been dealing with something beyond their jurisdiction and their confirmation of the Assessor's act would go for nothing, and Paterson J.A., expressed himself to the same effect. In the *City of London* v. *Watt and Sons*, 22 Su. Co. Can. 300, the Chief Justice said : " I agree with the Court of Appeal in holding " that the 65th section of the Ontario Assessment " Act does not make the roll as finally passed by " the Court of Revision conclusive as regards " question of jurisdiction. If there is no power " conferred by the statute to make the assessment " it must be wholly illegal and void *ab initio* and " confirmation by the Court of Revision cannot " validate it."

Their Lordships will, therefore, humbly advise His Majesty that the Order of the Court of

Appeal for Ontario of the 15th May 1903 should be reversed, and instead thereof a declaration should be made and an injunction granted as claimed by the Statement of Claim, and the Respondents should pay the costs in both Courts. The Respondents will also pay the costs of this Appeal.