

25,951

No. 42 of 1950.

# In the Privy Council.

UNIVERSITY OF LONDON  
W.C.1

12 NOV 1956

ON APPEAL  
FROM THE SUPREME COURT OF CANADA

INSTITUTION FOR ADVANCED  
LEGAL STUDIES

30729

BETWEEN

BENNETT & WHITE (CALGARY) LIMITED - *Appellants*

AND

MUNICIPAL DISTRICT OF SUGAR CITY No. 5 *Respondents.*

## Case for the Respondents

RECORD.

10 1. This is an appeal from a judgment, dated the 30th March, 1950, of the Supreme Court of Canada (Kerwin, Taschereau, Rand, Estey and Locke, JJ.) allowing an appeal from a judgment, dated the 24th June, 1949, of the Appellate Division of the Supreme Court of Alberta (Harvey, C.J.A., Ford and Macdonald, JJ.) dismissing an appeal from a judgment, dated the 21st April, 1949, of the Trial Division of the said Court (Shepherd, J.). By the last-mentioned judgment the Trial Division quashed the assessment of the Appellants to tax in respect of personal property made by the Respondents for 1947, ordered that the Respondents strike the Appellants' name off the tax roll in respect of personal property for 1947, and dismissed the Respondents' counter-claim, by which the Respondents claimed a declaration that the said assessment was properly imposed and judgment for the amount of the tax.

pp. 242-265.

pp. 225-227.

pp. 211-221.

p. 220, l. 23.

p. 221, l. 2.

2. The Appellants carry on business as a construction company in the Province of Alberta. The Respondents are a municipal district constituted under the Municipal District Act (Revised Statutes of Alberta, 1942, cap. 151), exercising wide powers and bearing heavy responsibilities under that Act over a large area in Southern Alberta.

30 3. On the 22nd July, 1946, the Appellants entered into a contract with His Majesty the King, represented by the Minister of Agriculture of Canada, whereby the Appellants undertook to construct two tunnels being part of what was known as the St. Mary Dam project. The relevant parts of this contract read as follows :—

pp. 110-172.

### THE PREAMBLE.

The Company "has agreed . . . to do furnish and perform the works, materials, matters and things required to be done, furnished, and performed . . ."

1. "Work or Works" shall mean the whole of the work and materials, matters and things required to be done, furnished and performed by the Contractor, as above described, under this contract.

3. The Contractor shall, at his own expense, (except as in this contract otherwise specifically provided) provide all and every kind of labour, superintendence, services, tools, implements, machinery, plant, materials, articles and things necessary for the due execution and completion of all and every the works set out or referred to in the specifications hereto annexed and in any special specifications referred to therein, and set out or referred to in the plans and drawings prepared and to be prepared for the purpose of the work, and shall forthwith (or within seven (7) days from the execution hereof) commence the works and diligently execute and fully complete the respective portions thereof, and shall deliver the works complete in every particular to His Majesty, on or before the date or dates following,

Diversion Tunnel—April 24, 1947

Irrigation Tunnel—April 23, 1948

5. The work shall be commenced, carried on and prosecuted to completion by the Contractor in all its several parts in such manner and at such points and places as the Engineer shall, from time to time, direct, and to his satisfaction, but always according to the provisions of this contract, and if no direction is given by the Engineer, then in a careful, prompt and workmanlike manner.

6. The several parts of this contract shall be taken together, to explain each other and to make the whole consistent . . .

12. The description or descriptions of the work and materials or any portion of the works, set out or referred to in or covered by any item or items for which a price or prices are given in clause 34 of this contract, include not only the particular kinds of work or materials mentioned in the said item or items, but also all and every kind of work, labour, tools, plant, materials, equipment, articles, and things whatsoever necessary for the full execution, completion, and delivery, ready for use, of such respective portions of the works, in accordance with the plans, drawings and specifications to the satisfaction of the Engineer. The said price or prices, as a whole, shall cover not only the particular descriptions of work and materials mentioned therein, but also all and every kind of work, labour, tools, plant, materials, equipment, articles and things whatsoever, necessary for the full execution, completion and delivery, ready for use, of the entire work as herein contracted for, in accordance with the plans, drawings and specifications, to the satisfaction of the Engineer. In case of dispute as to what work, labour, tools, plant, materials, equipment, articles and things are so included or covered, the decision of the Engineer shall be final and conclusive with respect thereto.

14. Should the Contractor use or employ or intend to use or employ, any material, plant, tools, equipment, articles or things, which in the opinion of the Engineer are not in accordance with the

provisions of this contract, or in any way unsuitable for the works or any part thereof, or should the Engineer consider that any work is, for any reason, improperly, defectively or insufficiently executed or performed, the Engineer may order the Contractor to remove the same, and to use and employ proper materials, plant, tools, equipment, articles and things, or to properly re-execute and perform such work, as the case may be, and thereupon the Contractor shall immediately comply with such orders, and if the Contractor fail to comply with such orders within twenty-four hours the Engineer may, at any time thereafter, execute or cause to be executed, the orders so given, and the Contractor shall, on demand, pay His Majesty all costs, damages and expenses incurred in respect thereof, or occasioned to His Majesty by reason of the non-compliance by the Contractor with any such orders, or His Majesty may, in the discretion of the Minister, retain and deduct such costs, damages and expenses from any amounts then or thereafter payable to the Contractor.

15. All machinery, tools, plant, materials, equipment, articles and things whatsoever, provided by the Contractor or by the Engineer under the provisions of sections 14 and 16, for the works, and not rejected under the provisions of section 14, shall from the time of their being so provided become and, until the final completion of the said work, shall be the property of His Majesty for the purpose of the said works and the same shall on no account be taken away, or used or disposed of, except for the purposes of the said works, without the consent in writing of the Engineer. His Majesty shall not, however, be answerable for any loss, or damage, whatsoever, which may at any time happen to such machinery, tools, plant, materials, equipment, articles or things. Upon the completion of the works and upon payment by the Contractor of all such moneys, loss, costs and damages, if any, as shall be due from the Contractor to His Majesty, or chargeable against the Contractor, under this contract, such of the said machinery, tools, plant, materials, equipment, articles and things as shall not have been used and converted in the works or disposed of by His Majesty under powers conferred in this contract, shall, upon demand, be delivered up to the Contractor in such condition as they may then be in.

16. If the Engineer shall at any time consider the number of workmen, horses, quantity of machinery, tools, plant or equipment, or of proper materials, articles or things respectively, employed or provided by the Contractor on or for the said works, to be insufficient for the advancement of such works or any part thereof toward completion within the time limited in respect thereof, or that the works are, or some part thereof is, not being carried on with due diligence, then and in every such case the Engineer may, in writing, order the Contractor to employ or provide such additional workmen, horses, machinery, tools, plant, equipment, materials, articles and things, as the Engineer may think necessary and in case the Contractor shall not within three days or such other longer period as may be fixed by any such order, in all respects

comply therewith, the Engineer may employ and provide such additional workmen, horses, machinery, tools, plant, equipment, materials, articles and things respectively as he may think proper, and may pay such additional workmen such wages and for such additional horses, machinery, tools, plant, equipment, materials, articles and things respectively, such prices as he may think proper, and all such amounts so paid shall, on demand, be repaid to His Majesty by the Contractor or the same may be retained and deducted from any sum that may then or thereafter be or become due from His Majesty to the Contractor. The Contractor shall employ 10  
the additional workmen, horses, machinery, tools, plant, equipment, materials, articles and things, so provided and employed, by the Engineer, in the diligent advancement of the works, the workmen and horses so provided shall, however, be thereafter subject to discharge by the Contractor, but only with the consent and approval of the Engineer.

18. In case the Contractor shall make default or delay in commencing or in diligently executing, any of the works . . . the Engineer may give a general notice to the Contractor requiring him to put an end to such default or delay, and should such default 20  
or delay continue for six days after such notice shall have been given by the Engineer to the Contractor . . . all materials, articles and things whatsoever, and all horses, machinery, tools, plant and equipment and all rights, proprietary or otherwise, licenses, powers and privileges, whether relating to or affecting real estate or personal property, acquired, possessed or provided by the Contractor for the purpose of the works, or by the Engineer under the provisions of this contract, shall remain and be the property of His Majesty for all purposes incidental to the completion of the works, and may be used, exercised and enjoyed by His Majesty as fully, to all 30  
intents and purposes, connected with the works as they might theretofore have been used, exercised and enjoyed by the Contractor, and the Minister may also, at his option, on behalf of His Majesty, sell or otherwise dispose of, at forced sale prices, or at public auction or private sale or otherwise, the whole or any portion or number of such materials, articles, things, horses, machinery, tools, plant and equipment at such price or prices as he may see fit, and retain the proceeds of any such sale or disposition and all other amounts then or thereafter due by His Majesty to the Contractor on account of, or in part satisfaction of, any loss or damage which His Majesty 40  
may sustain or have sustained by reason aforesaid.

29. The Contractor shall promptly pay for all labour, services and materials in or about the construction of the works, and all payments for such purposes shall be made by the Contractor at least as often as payments are made to the Contractor by His Majesty under this contract . . .

34. His Majesty . . . will pay to the Contractor . . . price or several prices following :— . . . with an additional ten per cent. thereon for the use of tools, Contractor's plant . . . etc.

## SPECIFICATIONS.

6. *Construction Programme.*

The Contractor's construction operations shall be subject at all times to the approval of the Engineer. The capacity of the Contractor's construction plant, sequence of operations, and methods of operation shall be such as to ensure the completion of the work within the period of time specified . . .

7. *Materials furnished by the Government.*

10 The Government will furnish all cement and admixtures required for concrete, mortar and grout ; all steel reinforcing bars and rods, bent to shape and generally cut to length, as well as inserts to receive threaded dowels. All material furnished by the Government will be delivered to the Contractor f.o.b. cars at Spring Coulee, Alberta. The Contractor shall haul all of the materials from the point of delivery to the site of the work ; shall provide suitable warehouses or other means of protection satisfactory to the Engineer for such of the materials as, in the opinion of the Engineer, require storage protection ; and will be charged for any materials lost or damaged after delivery, except as otherwise specifically provided, the same amounts that the materials cost the Government at the point of delivery to the Contractor. The contractor shall be responsible for the prompt unloading of materials delivered on cars and for proper care of the materials, and will be held liable for any demurrage charges incurred due to failure to unload cars promptly. The Contractor shall report to the Engineer, in writing, within twenty-four (24) hours after unloading, any shortage in or damage to materials when delivered. The cost of unloading, hauling, storing and caring for all material furnished by the Government shall be included in the prices bid for work to which they are appurtenant, as determined by the Engineer. The Contractor shall return to the Government at the site, as directed by the Engineer, all unused materials and will be charged for any materials not used and not returned the same amount that the materials cost the Government at the point of delivery to the Contractor.

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8. *Materials to be furnished by the Contractor.*

40 The Contractor will be required to furnish all materials and supplies necessary for the satisfactory completion of the contract except such items as are specially mentioned in section 7 and elsewhere in these specifications. The cost of hauling, storing, processing, handling and caring for all materials and supplies furnished by the Contractor shall be included in the prices bid in the Schedule for the work for which the materials and hauling are required.

21. *Temporary Timbering in Tunnels.*

Temporary timbering, including lagging, may be used where such temporary timbering is necessary to support the roof and the

sides of the tunnels ; Provided that such timbering shall be removed by the Contractor before the concrete lining is placed. Payment will be made to the Contractor for such timbering, as is required by the Contractor and approved by the Engineer, only for such items as appear in the schedule, and at the prices fixed for such items. All other or further costs connected with temporary timbering shall be borne by the Contractor.

All salvage materials from temporary timbering for which the Contractor has been paid under the provisions of this section, shall be neatly piled at a point near the site designated by the Engineer 10 and shall remain the property of the Government.

26. *Plant.*

Plant, labour, tools, appliances and materials, except cement and admixtures, for proportioning, mixing, and placing concrete shall be provided by the Contractor. Materials will be tested and if found defective must be removed from the work and replaced at the Contractor's expense.

49. *Extra Work.*

For any extra work done or material or things provided under the written orders of the Engineer for which no price or prices 20 are named herein, the Government will pay to the Contractor the actual and reasonable cost, as determined by the Engineer, of such extra work, materials and things, with an additional 10% thereon for the use of tools, Contractors plant, superintendence and profits.

4. The Appellants duly started work under this contract, and for this purpose brought into the territory of the Respondents plant, equipment and building materials. On the 22nd September, 1947, the Respondents sent to the Appellants an Assessment Slip, giving notice that the Appellants' plant, equipment and personal property at the St. Mary River Dam had been assessed at the value of \$183,147. 30

5. This assessment was imposed under the Assessment Act (Revised Statutes of Alberta, 1942, cap. 157), and a by-law passed by the Respondents Council, in accordance with the terms of that Act, on the 3rd April, 1947. The relevant parts of that Act, of the Municipal District Act (R.S.A. 1942, cap. 151), and of certain other Acts are set out in the joint appendix of Statutes.

6. On the 15th October, 1947, the Appellants, through their solicitors, lodged with the Court of Revision a Complaint (Ex. 16) that their property had been improperly assessed, on the following grounds :—

- (i) that the property was only temporarily in the District ; 40
- (ii) that the assessment covered a number of motor vehicles ;

(iii) that the assessment was " made only in relation to the personal property of the undersigned " and was an attempt to discriminate against construction companies, there being no intention of making a general assessment of personal property ;

p. 190.

p. 172.

p. 192.

(iv) that the assessment was too high.

On the 25th October, 1947, the Appellants' solicitors wrote to the Respondents, giving the additional ground of objection that the assessed property belonged to the King under section 15 of the contract, set out in paragraph 3 hereof. p. 193.

7. On the 1st November, 1947, notice was sent to the Appellants that the Court of Revision had affirmed the assessment at the figure of \$184,162. By notice dated the 6th November, 1947, the Appellants appealed to the Alberta Assessment Commission, on the same grounds as had been put forward before the Court of Revision. The Commission held that the property had been rightfully assessed, but reduced the assessment to the figure of \$124,450. p. 195.  
p. 196.  
p. 197, l. 23.  
p. 199, l. 11.

8. On the 15th April, 1948, the Appellants issued their Statement of Claim in these proceedings, alleging that they had been wrongfully assessed for the following reasons:— pp. 1-5.

(i) that in doing work under the contract they were agents of the King; p. 3, l. 20-p. 4, l. 12.

(ii) that the property assessed belonged to the King;

(iii) that the Appellants' right to return of machinery, etc., on completion of the works was a chose in action, so exempt from taxation; 20

(iv) that certain of the articles assessed were "motor vehicles";

(v) that the Appellants had no assessable interest in the property.

The Appellants asked for an order striking their name off the tax roll and setting aside the assessment, and certain other relief. p. 5, ll. 19-23.

9. By their Defence and Counter-claim, delivered on the 7th May, 1948, the Respondents denied the allegations set out in paragraph 8 hereof. Alternatively, they alleged that; if the King had some right, title or interest in the property assessed, the Appellants also had some interest in it, and had at all material times been in legal possession of the property. The Respondents also alleged that, because of the proceedings before the Court of Revision and the Alberta Assessment Commission, the questions raised in the action were res judicata. By their counter-claim, the Respondents asked for a declaration that the said assessment was properly imposed and certain other relief. pp. 6-19.  
p. 16, ll. 22-27.  
p. 17, ll. 25-33.

10. The action was heard by Shepherd, J., on the 10th February, 1949, and the learned judge delivered judgment on the 16th April, 1949. Having set out the facts, he held, on the authority of the judgment of the Appellate Division of the Supreme Court of Alberta in *In re Northern Transportation Co., Ltd. and Village of McMurray* (1949), 1 W.W.R. 338, that the proceedings before the Assessment Commission did not make the question of assessability res judicata. He said that, in view of the terms of the contract, the property was not in the legal possession of the Appellants. Having considered sections 15, 12 and 18 of the contract, and authorities on the meaning of similar words in other contracts, the pp. 211-219.  
p. 213, l. 23-  
p. 214, l. 35.  
p. 215, ll. 12-18.  
p. 215, l. 19-  
p. 219, l. 18.

p. 211, l. 29-  
p. 212, l. 33.

p. 219, ll. 19-31.

p. 219, ll. 34-36.

learned judge said the object of section 15 was to guarantee the provision of adequate equipment and its availability to the Crown if the contractor made default, and to prevent seizure of the equipment by creditors of the contractors or by a taxing authority. He held that the property assessed was property of the Crown, and found it unnecessary to deal with the point on "motor vehicles." The learned judge ordered that the Appellants' name be struck off the tax roll and the assessment be set aside.

pp. 222-224.

p. 227, ll. 9-12.

p. 225, ll. 15-18.

p. 225, ll. 19-40.

11. From this judgment the Respondents appealed to the Appellate Division. The appeal was heard by Harvey, C.J.A., Ford and Macdonald, JJ., on the 14th and 15th June, 1949, and judgment was given on the 23rd June, 1949. Ford, J. (in whose judgment the other members of the Court concurred) expressed no opinion whether the property assessed was the property of the Crown. Proceeding on the view that the Respondents had an interest in the property and were in physical possession thereof, he held that the property was not subject to taxation; because the power given was to tax personal property, not persons in respect of an interest therein, and the interest of the King in this property prevented the Respondents from seizing and disposing of it, and seizure and sale were consequences of taxability. The assessment was invalid, under section 5 (1) (o) of the Assessment Act, because the King undoubtedly had an interest in the property. The learned judge said he agreed with Shepherd, J., that the decision of the Assessment Commission did not create *res judicata*. The appeal was dismissed. 10

p. 226, ll. 1-10.

p. 226, ll. 11-13.

p. 242, ll. 14-17.

p. 242, l. 23-  
p. 243, l. 4.

12. From this judgment the Respondents appealed to the Supreme Court of Canada. The appeal was heard by Kerwin, Taschereau, Rand, Estey and Locke, JJ., on the 25th, 26th and 27th October, 1949, and judgment was given on the 30th March, 1950. The Court unanimously allowed the appeal, and held that the Respondents were entitled to a declaration that the assessment and taxation of all the property, except certain "dumptors," were properly made and imposed, but the Respondents were not entitled to seize any of the property so long as it was subject to the contract. 30

pp. 251-266.

p. 253, ll. 30-34.

p. 254, l. 2-  
p. 255, l. 21.

p. 255, l. 22-  
p. 257, l. 24.

13. Rand, J., delivered a judgment in which Taschereau, Estey and Locke, JJ., concurred. Considering section 15 of the contract, the learned judge said the Appellants remained in legal possession of the property while not in default, and retained the beneficial interest and the risk of loss or damage. After considering sections 29, 18 and 12, he held that what vested in the Crown was only a group of rights and powers over the property, which remained the property of the Appellants. Considering the judgment of Ford, J., the learned judge held that there was no practical difference between assessment of property and assessment of persons in relation to property; the Crown's interest in the property was an interest *ad rem*, but not a taxable interest; goods which were not subject to distress might yet be assessable, and the Crown's interest in this property did not affect the title, but merely prevented distress on goods while subject to the contract. In the absence of any provision in the statute, the taxes could not be recovered by suit. It was no objection that the interest of the Crown had been included in the assessment, because that interest was not taxable, and the Appellants had always retained the value of the 40 50

p. 257, ll. 25-33.

p. 257, l. 34-  
p. 258, l. 2.



user. The learned judge then considered the question of the "motor vehicles." He held that the expression did not cover self-propelled equipment, the main purpose of which was either haulage or work other than conveying, or vehicles running on rails. Of the equipment in question, therefore, only three "dumptors," assessed together at \$18,000, were exempt from taxation. Turning to the question of *res judicata*, the learned judge said that taxation was essentially an administrative function. The assessor had an administrative duty to ascertain the value of property with due regard to statutory objections, but his judgment on an exemption

10 was different from a judicial determination of the question. On appeal, both the Court of Revision and the Commission had only the administrative authority which the assessor had; they had no authority to deal judicially with civil rights. Considering the cases, the learned judge held that *Hagersville v. Hambleton* (1927), 61 O.L.R. 327, insofar as it decided that the Commission had an exclusive jurisdiction to determine the fact of residence, was inconsistent with later decisions. The Commission had only the jurisdiction of an administrative body, and the judicial interpretation of exemptions was for the Courts. If the legislature purported to set up a special provincial court to interpret legislative provisions, the

20 question of *ultra vires* would arise, and an interpretation raising that question should not be inferred.

14. Kerwin, J., based his judgment solely on the point of *res judicata*. After stating the facts, he said that in *In re Northern Transportation Co. Ltd.*, on which Shepherd, J., had relied, the Appellate Division had followed the decision of the Privy Council in *Toronto Railway Co. v. Toronto* (1904), A.C. 809, and certain other decisions. The *Toronto* case was fought on the Ontario Assessment Act; and after the decision in that case the section conferring jurisdiction on the Court of Revision had been amended, and as amended was practically the same as section 53 of the Alberta Act.

30 Under the amended Act, the Court of Appeal of Ontario had decided that the confirmation of an assessment by the Court of Revision precluded the taxpayer from contending in an action that he was not taxable because he did not reside in the area of the taxing authority (*Village of Hagersville v. Hambleton* (1927), 61 O.L.R. 327). After considering other cases, which in his opinion were not applicable, the learned judge held that the legislature, in the Alberta Act, had in unmistakable language given the Commission jurisdiction to determine whether any things were assessable or any persons were legally assessed; and the Appellants, having appealed to that jurisdiction, could not be heard to raise the same point again. The

40 Respondents were entitled to a declaration that the assessment and taxation were properly made and imposed; they were not entitled to judgment for the amount of the tax, nor were they entitled to seize any of the property while subject to the contract.

15. The Respondents submit that the property assessed was not the property of the Crown. By section 15 of the contract, it was to be "the property of His Majesty for the purpose of the said works." The Respondents submit that there can be no limited ownership, such as estates or remainders, in personal property; and the effect of these words, together with other provisions of the contract by which the Appellants

50 had to provide all machinery, materials, etc. (section 3), could dispose of the property with the written consent of the engineer (section 15), were

p. 258, l. 3-  
p. 259, l. 32.

p. 260, l. 9-  
p. 261, l. 12.

p. 261, l. 13-  
p. 262, l. 41.

p. 263, l. 1-  
p. 265, l. 41.

p. 266, ll. 1-19.

pp. 244-251.  
p. 247, l. 11-  
p. 249, l. 22.

p. 250, ll. 21-  
42.

p. 251, ll. 2-27.

entitled to have the remaining property delivered up to them on completion of the works (section 15), had to pay promptly for all materials, etc. (section 29), and were entitled in certain circumstances to an extra 10 per cent. for use of "Contractor's plant" (section 34), is to leave the ownership of the property in the Appellants, but to make the ownership subject to certain temporary rights of the Crown. The object of the Crown was to obtain certain temporary rights over the property as security for the due performance of the contract, not to purchase and re-sell second-hand machinery.

16. The Respondents submit that, whether the title to the property 10 vested in the Crown or not, the Appellants were at all material times "owner" within the meaning of section 2 (n) of the Assessment Act, because they were in legal possession of the property. It was clear, from the evidence of the assessor, and the admissions made upon examination for discovery, that the property was at the material time in the possession of the Appellants. The contract clearly contemplates and requires that the property should be in the Appellants' possession, and there is no justification for Shepherd, J.'s view that the possession of the Appellants was not legal.

p. 104, l. 43-  
p. 105, l. 27.

p. 237, ll. 31-38.

p. 240, l. 26-  
p. 241, l. 14.

p. 215, ll. 17-18.

17. The Respondents submit that the fact that they were not entitled 20 to seize the property (while subject to the contract) in default of payment did not mean that the property was exempt from taxation. It is well settled that the right to tax may exist where the enforcement provisions are inoperative. The Respondents would, however, have been entitled to enforce payment by distress upon any other goods of the Appellants within the Province: Municipal District Acts, 310 (4) (a).

18. The Respondents submit that, even if some interest of the Crown was included in the property assessed, the assessment is not thereby 30 invalidated. Whatever the interest of the Crown may have been, the Appellants had some interest in the property, and this interest was taxable under section 4 of the Assessment Act. This interest remained taxable in spite of the parallel interest of the Crown: thus, for example, the interests both of a lessor to the Crown and of a lessee from the Crown of land have been held to be taxable. In similar cases, it has been held that a person or his interest may be taxed according to the actual value of the land, although part of the value is the value of the Crown's interest; and on the same principle this property was rightly assessed at its full value.

19. The Respondents submit that the decision whether a particular thing is or is not a motor vehicle must on any view be within the jurisdiction of the Assessment Commission, and the Appellants should not have been 40 allowed to argue this point in these proceedings. Alternatively, the Respondents submit that "motor vehicles" are self-propelled carriages designed to run on ordinary roads, and intended for the carriage of persons or goods. It is clear from the illustrations exhibited that none of the articles in this case are "motor vehicles" in this sense.

pp. 203-210.

20. The Respondents respectfully submit that on the question of res judicata the judgment of Kerwin, J., is right. Section 53, in plain language confers a very wide jurisdiction upon the Commission. The Appellants having appealed to that jurisdiction and a decision having been

rendered covering the issues between the parties, the matter is *res judicata* and the Appellants cannot be heard to raise the same issues again. Moreover, it is submitted that as the Appellants in their pleadings did not question the jurisdiction of the Commission, they are precluded from raising the point now. The intention of the legislature was to allow the taxpayer to have his liability to taxation decided by this tribunal, and it was open to the legislature to provide for an appeal to an administrative body. The function of deciding whether a person is properly assessed is one function, whether it be called administrative or judicial, and it is plainly conferred upon the Commission. On the view of Rand, J., the existence of the Court of Revision and the Commission would have no purpose, for almost all questions before them affect civil rights, and a party who failed before the Commission could always proceed to an action in the Courts. The Respondents submit that Kerwin, J., was right in following *Hagersville v. Hambleton*. The later cases to which Rand, J., referred were cases in which no appeal had been taken to the assessment tribunals, action being taken immediately in the Courts. These cases are not authority for saying that a taxpayer who has chosen to go to the assessment tribunals, and has had his case decided there, can afterwards raise the same complaint in the Courts. It is also submitted that as the Attorney-General for the Province of Alberta was not made a party to these proceedings under the Judicature Act of Alberta, the question of whether section 53 is *ultra vires* or *intra vires* the Alberta Legislature is not in issue.

21. The Respondents respectfully submit that the judgment of the Supreme Court of Canada is right and should be affirmed, for the following (amongst other)

### REASONS

- (1) BECAUSE none of the property assessed belonged to the Crown; what His Majesty had under the contract was "a group of rights and powers" which did not amount to ownership.
- (2) BECAUSE in any event the Appellants retained some "interest" in the plant and equipment, and, under the Assessment Act, that interest was assessable.
- (3) BECAUSE at the least, the Appellants were in "legal possession" of the plant and equipment and by virtue of the Assessment Act were assessable.
- (4) BECAUSE, apart from the foregoing, the Appellants invoked the jurisdiction of the Court of Revision and the Alberta Assessment Commission and therefore, under section 53 of the Assessment Act, the whole matter was *res judicata*.
- (5) BECAUSE the jurisdiction of the above tribunals is not in issue in the present proceedings.
- (6) BECAUSE of the other reasons given in the respective Judgments in the Supreme Court of Canada.

A. G. VIRTUE.

J. G. LE QUESNE.

In the Privy Council.

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**ON APPEAL**  
*from the Supreme Court of Canada.*

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BETWEEN

**BENNETT & WHITE**  
**(CALGARY) LIMITED** *Appellants*

AND

**MUNICIPAL DISTRICT**  
**OF SUGAR CITY NO. 5** *Respondents*

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**Case for the Respondents**

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