Privy Council Appeal No. 42 *of* 1950

Bennett and White (Calgary) Ltd. - - - - - *Appellants*

v.

Municipal District of Sugar City No. 5. - - - - *Respondents*

FROM

THE SUPREME COURT OF CANADA

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 23RD JULY, 1951

Present at the Hearing:

LORD SIMONDS
LORD NORMAND
LORD REID
LORD RADCLIFFE
LORD ASQUITH OF BISHOPSTONE

[*Delivered by* LORD REID]

This is an appeal against a judgment of the Supreme Court of Canada dated 30th March, 1950. By that judgment the Supreme Court reversed a judgment of the Appellate Division of the Supreme Court of Alberta dated 28th June, 1949, which had affirmed a judgment of Shepherd, J. of 21st April, 1949.

The appellants are a company incorporated under the Companies Act of the Province of Alberta, and the respondents are a municipal district in that Province. By the judgment of the Supreme Court of Alberta it was declared that the assessment of the appellants for personal property made by the respondents for the year 1947 was invalid, and that assessment was quashed and set aside.

In 1946 the Dominion Government were carrying out in the southern part of the Province of Alberta a large irrigation scheme which included the construction of diversion and irrigation tunnels at St. Mary Dam in the respondents' municipal district. On 22nd July, 1946, the Minister of Agriculture for the Dominion, acting on behalf of the Crown, entered into a contract with the appellants for the construction of those tunnels. That contract is hereafter referred to as "the contract". The value of the work to be done by the appellants under the contract was in the region of $800,000 and the work was to be completed by April, 1948. It will be necessary later to examine closely certain of the provisions of the contract, but at this point it need only be stated that the appellants were bound to provide the plant and equipment necessary for carrying out the contract and that they did provide, at the site of the works, a large variety of plant and equipment which remained there during the year 1947.

The respondents are authorised by the Assessment Act and the Municipal Districts Act of the Province to make assessments and levy taxes in respect of personal property in their district, and in June, 1947, their assessor visited the site of the appellants' works and spent three days in making a detailed valuation of those parts of the plant and equipment brought there by the appellants which he thought were taxable under those Acts as personal property. The assessor's valuation of this property was $183,147. On 22nd September, 1947, the respondents sent to the appellants an assessment slip which was a notice that the appellants were assessed for the year 1947 in respect of $6,140 for buildings and improvements, and $177,007 for personal property, making in all the sum of $183,147. It is admitted by both parties that nothing turns in this case on the distinction between buildings and personal property and that the assessment can be regarded as if it were entirely an assessment in respect of personal property. The appellants lodged a complaint against this assessment and this complaint was dealt with by the Council of the respondents' district sitting as a Court of Revision on 31st October. The Court of Revision increased the assessment by $1,000. The appellants then appealed against this decision to the Alberta Assessment Commission on the following, among other, grounds:—

> "1. The personal property which comprises $178,022 of the said assessment is the property of His Majesty in the right of the Dominion of Canada and therefore the appellants cannot be assessed with regard thereto.
>
> "2. The said assessment contains a considerable number of motor vehicles which are exempt from taxation."

This appeal was heard by the Commission and, after written briefs had been submitted, the Commission, on 13th January, 1948, gave their decision, in which it was stated:—

> "After due consideration of these briefs and the evidence submitted, the Commission is of the opinion that the property in question has been rightfully assessed to Bennett & White (Calgary) Limited. The Commission, however, feels that the assessments are excessive and should be reduced to amounts as follows:—
>
> | | |
> |---|---|
> | "Personal property ... ... | $119,980 |
> | "Buildings and Improvements ... ... | $4,470 |
>
> and it is so ordered."

The respondents then demanded from the appellants a sum of $3,915.27 as tax and penalty in respect of the assessment as altered by the Alberta Assessment Committee, and in answer to this demand the appellants raised the present action against the respondents on 15th April, 1948.

In order to understand the nature of the present action it is necessary to have in mind the scheme for the taxation of personal property contained in the Assessment Act and the Municipal District Act (which are directed by section 3 of the Assessment Act to be read together), and it is also necessary to have in mind certain provisions of the contract.

As regards assessment, section 4 of the Assessment Act provides that, subject to certain exceptions which are not material in this case—

> "All property and every interest therein in a municipality which is subject or liable to taxation by an Act of the Province, save and except only such property as is declared by this Act to be exempt, shall be liable to assessment and taxation by the Municipality."

The exemptions are contained in section 5 and those material in this case are—

> "(*o*) Every right, title and interest of His Majesty in any property whatsoever; and
>
> "(*z*) All motor vehicles."

Section 8 provides—

> "(2) The Board of a school district which collects its own taxes and the council of any municipality may provide by by-law, passed

not later than the 1st day of May in any year, that in the said year all personal property within a school district or municipality, as the case may be, shall be liable to assessment and taxation. In a municipality this assessment may be made for municipal purposes or for school purposes or for both.

"(3) In any school district or municipality in which personal property is liable to assessment and taxation it shall be assessed at its actual cash value as it would be appraised if taken in payment of a just debt."

The respondents passed a by-law on the 3rd of April, 1947, to the effect that—

"Under authority of section 8 of the Assessment Act, being chapter 157 of the revised Statutes of Alberta, 1942, and subject to the various provisions of the said Act, the Council of the Municipal District of Sugar City No. 5 enacts that within the boundaries of Sugar City No. 5 all personal property shall be liable to assessment and taxation for both municipal and school purposes."

Section 24 provides that the assessor of the Municipality shall make a return to the Secretary-Treasurer of the assessments made by him, and section 26 directs the Secretary-Treasurer immediately to prepare an assessment roll in which he shall set forth as far as his then information permits—

"(*l*) the name of the person who is the owner or of the person who is in legal possession of assessable personal property or the names of both such persons;

"(*m*) the assessed value of all assessable personal property."

Section 26 (3) further provides that the Secretary-Treasurer shall include in the assessment roll the name and address of every person who is assessed in respect of such property and particulars of the property assessed and the assessed value thereof, but section 26 (4) states that failure to enter any of these particulars shall not invalidate the assessment nor affect the liability of any person to pay taxes if the correct description and the assessed value of the property appear upon the assessment roll. Section 27 directs the Secretary-Treasurer to mail to every person whose name appears on the roll an assessment slip.

If any person whose name appears on an assessment roll wishes to complain, section 35 makes provision for his complaint being made to the Court of Revision and such complaint may be in respect of, *inter alia*,

"(*b*) any assessment alleged to be too high or too low;

"(*c*) any property or business in any way wrongfully assessed;

"(*d*) the name of any person alleged to be wrongfully entered upon or omitted from the assessment roll."

A further Appeal from a decision of the Court of Revision is provided by section 47, which enacts—

"(1) Any person who or the assessment of whose property is affected by the decision of the Court of Revision or of the person or persons from time to time designated by the Minister as the person or persons to deal with complaints may appeal to the Alberta Assessment Commission against the decision and may also appeal against the omission, neglect or refusal of the Court to hear or decide a complaint made to it, and in hearing all such appeals the Commission shall be governed by the provisions of this Act and the Alberta Municipal Assessment Commission Act."

The Municipal Districts Act makes provision in part VII for the levying of taxes. Section 288 authorises a levy for ordinary municipal purposes upon the assessed value of all lands, improvements and personal property set out in the assessment roll of a tax at a certain rate, and section 291 directs the Secretary-Treasurer to enter in the assessment

and tax roll a statement of all taxes against each parcel or personal property assessed upon the roll. Section 295 directs the Secretary-Treasurer to mail to each person whose name appears on the assessment roll notice of the amount of taxes due by him in respect of the property or business for which he is assessed, and section 297 provides that all taxes levied under the provisions of this Act, except as otherwise provided, shall be deemed to be due on the 1st January in the year in which they are imposed and shall be payable at the office of the Secretary-Treasurer.

The provision in the contract on which the appellants chiefly rely in contending that the property assessed was the property of His Majesty is Clause 15, which is in these terms—

> "All machinery, tools, plant, materials, equipment, articles and things whatsoever provided by the contractor or by the engineer under the provisions of section 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 purposes 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 monies, 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."

Relying on this Clause the appellants, in their Statement of Claim, contended that they had been wrongfully and illegally assessed because the personal property in respect of which the assessment was made was at all relevant times the property of His Majesty and that they could not be in law assessed or placed on the tax roll in relation thereto. Alternatively, the appellants relied on the exception of motor vehicles in section 5 (z) of the Assessment Act and contended that certain types of vehicles specified were motor vehicles within the meaning of this exception and were exempt from taxation.

The respondents in their Defence and Counterclaim contended that the decision of the Alberta Assessment Commission against the appellants was a final decision and that the appellants were precluded by it from taking exception to the assessment and taxation of which they complain. The respondents further sought a declaration that the appellants are liable to the said assessment and taxation.

Shepherd, J., decided that the appellants were not precluded from maintaining this action and that the appellants are entitled to succeed on the ground that the assessment for personal property made against them for the year 1947 is invalid. He therefore quashed and set aside this assessment. The Appellate Division of the Supreme Court of Alberta reached the same decision but on somewhat different grounds. The case was then appealed to the Supreme Court of Canada where the decision of the Courts of Alberta was reversed and the appellants' action was dismissed. The decision of the Supreme Court of Canada was unanimous, but judgments of Kerwin, J., and Rand, J., were based on different reasons. The decision of Rand, J., was concurred in by Taschereau, Estey and Locke, JJ. Rand, J., held that the appellants were not precluded by the decision of the Alberta Assessment Commission from maintaining this action but that they failed in this action because the property assessed was not the property of His Majesty but was throughout owned and possessed by the appellants. The majority, however, held that certain of the subjects assessed came within the statutory exception of motor vehicles

and the course which they took to give effect to this finding gives rise to a difficulty which their Lordships will later examine. Kerwin, J., was of opinion that the appellants were precluded from maintaining this action on the ground that the decision of the Alberta Assessment Commission is *res judicata*. Their Lordships think it proper to deal with this matter first as it involves a question of jurisdiction.

Questions of a somewhat similar character have arisen not infrequently in the past and it may be well, before examining the statutory provisions which are relevant in this case, to consider the earlier cases. *Toronto Railway Co.* v. *Toronto Corporation* 1904 A.C. 809 has for long been regarded as the leading authority. In that case under the Assessment Act of Ontario personal property of the Company was exempt from assessment and the question was whether the Company's tramway cars in Toronto were within this exception or were liable to taxation as real estate. The Corporation assessed these cars. The Assessment Act provided for an appeal to a Court of Revision which was empowered to "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". That Court decided against the Company on their appeal. The Act provided for further appeals first to a board of County Court Judges and then to three or more Judges of the Court of Appeal; and it provided that the latter appeal should be final. The Company appealed unsuccessfully to the board and then to the Court of Appeal. Then the Corporation sought to tax the Company on the value of the tramway cars. The Company refused to pay and raised an action in which they claimed a declaration that the cars were personal estate and that they were not liable to pay the tax in respect of them which the Corporation demanded. The Corporation pleaded *inter alia* that the decision of the Court of Appeal was *res judicata*. Their Lordships held that the Court of Revision and the Courts exercising the statutory jurisdiction of appeal from it "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". Their Lordships pointed out that this decision was in accordance with earlier Canadian authorities.

In *City of Victoria* v. *Bishop of Vancouver Island* 1921 2 A.C. 384 the land upon which St. Andrews Cathedral stands had been assessed for several years under the Municipal Act of British Columbia and the Corporation sought to recover from the Bishop taxes in respect of these years. The Act exempted every building set apart and in use for the public worship of God, and the question was whether the site of the Cathedral fell within this exemption. The Corporation contended that it was too late to raise this question. The Act provided that every person complaining of an "error or omission in regard to himself" as having been wrongfully placed upon the assessment roll had a right of appeal to a Court of Revision and that the assessment roll as revised confirmed and passed by the Court of Revision except in so far as amended on appeal by one of the tribunals mentioned in the Act should be deemed valid and binding on all persons concerned. The Bishop had taken no objection to the assessment rolls for the years in question and they were duly passed and confirmed, but it was held by their Lordships that this did not prevent him from maintaining later that no taxes had been lawfully imposed on the land on the ground that the sections to which reference has been made "are merely machinery sections dealing with irregularities mistakes and errors occurring in the drawing up shaping and forming of the assessment rolls and do not by any means empower the Corporation or its officers to assess and tax any kind of property expressly or impliedly exempted from taxation by the provisions of these very Statutes from 1914 to 1918 both inclusive. To hold that they did so would amount to holding that the Corporation and its officers had the power of repealing express provisions of these Statutes".

These cases were followed by the Supreme Court of Canada in *Donohue* v. *St. Etienne de la Malbaie* 1924 S.C.R. 511. In that case Anglin J. said, " The inclusion of non assessable property is simply ineffectual. Such property though included in the roll cannot be made the subject of taxation ". In *Donohue's* case the Supreme Court in their Lordships' judgment rightly distinguished the case of *Shannon Realties* v. *Ville de St. Michel* 1924 A.C. 185. In the *Shannon* Case the Company sought to have the entire assessment roll for several years quashed and annulled. This claim failed, but it appears from a passage in the judgment of Duff J. which was approved by their Lordships that it was open to the Company to question the roll in answer to a claim for taxes.

The case on which the respondents in this appeal chiefly relied was *Hagersville* v. *Hambleton* (1927) 61 O.R. 327 in which the decision of a Court of Revision was held to be *res judicata*. The Ontario Assessment Act had been amended after the decision in *Toronto Railway Co.* v. *Toronto Corporation* so as to give to the Court of Revision jurisdiction to determine the amount of any assessment and also all questions as to whether any persons were assessable or had been legally assessed, and Middleton J.A. stated that the Act as amended " gives to the Assessment Roll as finally revised a binding and conclusive effect as to all matters that were or might have been raised upon an appeal to the Court of Revision ". Their Lordships are unable to agree with this as a general statement of the law. In the first place the *Hagersville* case was complicated by an admission that jurisdiction was legally and effectively vested in the Court of Revision, and it was held at least by some of the learned judges that it followed from this that a decision of the Court of Revision was *res judicata*. Riddell J. having stated the general rule that in order to oust the jurisdiction of the ordinary Courts it is necessary, in the absence of a special law excluding it altogether, to plead that jurisdiction exists in some other Court, said, " Here the plea has been properly made: the jurisdiction in the other Court, the Court of Revision, is admitted, and the matter must be held concluded ". And secondly their Lordships are unable to reconcile the statement of the law by Middleton J.A. with later Ontario cases. In *Sifton* v. *City of Toronto* 1929 S.C. R.484 an assessment was made on a person who had ceased to reside in Toronto. The assessment was made by simply taking the previous year's assessments. The person aggrieved had resided in Toronto during that year and had then no reason to appeal. The next year he had no opportunity to appeal in the manner provided by the Act because of the procedure adopted in making the assessment: the only possible appeal was to the Court. That being so the Supreme Court distinguished the *Hagersville* case and held that appeal to the Court was competent. Their Lordships recognise that this is a possible distinction but they are unable to find any sufficient distinction between the *Hagersville* case and the next case decided in Ontario, *City of Ottawa* v. *Wilson* 1933 O.R. 21. In that case the taxpayer had removed from the City before he was assessed, so the City had no right to assess him. He could have exercised the rights of appeal under the Assessment Act but he did not do so. Instead he raised the matter in Court and he was held entitled to do so. The only substantial difference between this case and the *Hagersville* case appears to be that in the *Hagersville* case the person aggrieved had appealed unsuccessfully to the Court of Revision before raising the matter in the ordinary Courts whereas in *Wilson's* case he had not. This could only be a valid distinction if the law were that a person aggrieved by an assessment has an option either to appeal in the manner provided by the Act or to raise the matter in the ordinary Courts. Their Lordships have seen nothing in the Act from which an intention to create such an unusual option could be inferred.

In their Lordships' judgment the effect of these authorities is that a taxpayer called on to pay a tax in respect of certain property has a right to submit to the ordinary Courts the question whether he is taxable in respect of that property unless his right to do so has been clearly and validly taken away by some enactment, and that the fact that the Statute which authorises assessment allows an appeal or a series of appeals against

assessments to other tribunals is not sufficient to deprive the taxpayer of that right.

As has already been stated a person who objects to an assessment under the Assessment Act of the Province of Alberta is entitled under that Act to complain to a Court of Revision on any of the grounds set out in section 35: those grounds include a complaint that any property has been wrongfully assessed or that the name of any person has been wrongfully entered upon the assessment roll. If dissatisfied with the decision of that Court he can, under section 47, appeal against that decision to the Alberta Assessment Commission. So there are three stages at which a person might plead in an action in the ordinary Courts that he had been illegally assessed and was not bound to pay tax levied in consequence of that assessment. He might do so without having exercised his right to complain to the Court of Revision; or he might do so after having complained unsuccessfully to the Court of revision but without having exercised his right to appeal to the Assessment Commission; or he might do so after having appealed unsuccessfully to the Assessment Commission. It is necessary to examine each of these possible cases in turn. The relevant provisions of the Act in the first case are sections 32 and 45. Section 32 provides

> "Where any person was at the time of the assessment taxable in respect of any property business trade or profession or in respect of any share or interest therein in respect of which his name was entered upon the assessment roll and there has been no complaint to the Court of Revision in accordance with the provisions of this Act then upon the expiration of the time hereinafter limited for the lodging of complaints the assessment of the property business trade or profession or any share or interest therein entered opposite his name shall be deemed incontestably to be the proper lawful and final assessment of the property business trade or profession or of his share or interest therein".

Section 45 provides:

> "Upon the termination of the Sittings of the Court of Revision or where there are no complaints upon the expiry of the time for complaining thereto the secretary-treasurer shall over his signature enter at the foot of the last page of the roll the following certificate filling in the date of the entry 'Roll finally completed this day of 19 ' and the roll as thus finally completed and certified shall be the assessment roll for that year subject to amendment on appeal by the Alberta Assessment Commission and to any amendment that may be necessary to bring the roll into conformity with the assessment of the municipality made by the Commission and any directions of the Commission with respect thereto and subject to any further amendment as herein provided and shall be valid and bind all parties concerned notwithstanding any defect in or omission from the said roll or mistake made in or with regard to such roll or any defect error or misstatement in any assessment slip or notice or any omission to deliver or to transmit any assessment slip or notice."

It is to be observed that the initial words of section 32 "Where any person was at the time of the assessment taxable in respect of any property . . ." govern the whole section. So, if a person was not taxable in respect of property entered against his name in the roll, this section does not purport to make that assessment incontestable or final. Section 45 only makes the roll final and binding notwithstanding defects, omissions or mistakes in it, and it is plainly only what their Lordships in *City of Victoria* v. *Bishop of Vancouver Island* referred to as a "machinery section". Accordingly there is nothing in the Act which could prevent a person who had failed to complain to a Court of Revision from pleading after the roll had become final that he was not taxable in respect of the property entered against his name in the roll.

The position at the next stage is the same. The relevant sections are then sections 33 and 45, and the provisions of section 33 are the same

as those of section 32 *mutatis mutandis*. Section 33 also begins with the words " When any person was at the time of the assessment taxable . . .". So an unsuccessful complaint to the Court of Revision does not prevent the person aggrieved from later raising in Court the question whether he is taxable, and the decision of the Court of Revision is not *res judicata*.

The respondents contend that the position is different if the person aggrieved appeals from the decision of a Court of Revision to the Alberta Assessment Commission before raising the matter in the ordinary Courts, and that a decision of the Assessment Commission dismissing such an appeal is *res judicata*. If that contention is right the effect is that a person aggrieved by a decision of a Court of Revision has an option either to take the matter to Court or to appeal to the Assessment Commission, so that if he appeals to the Assessment Commission and gets an adverse decision from them he cannot thereafter be heard to raise the same matter again in Court.

This contention is based entirely on section 53 of the Assessment Act which is in these terms, " In determining all matters brought before the Commission it shall have jurisdiction to determine not only the amount of the assessment but also all questions as to whether any things are or were assessable or persons were properly entered on the assessment roll or are or were legally assessed or exempted from assessment." The argument is that jurisdiction has been conferred on the Commission to determine whether persons were legally assessed and no appeal from the Commission's decision has been provided, and that a decision of a tribunal which has jurisdiction to make that decision must be *res judicata*. But their Lordships are of opinion that section 53 is not unambiguous. No doubt it could have the meaning for which the respondents contend: but it can also mean that the commission has jurisdiction to determine the matters mentioned in so far as it is necessary for it to determine these matters in order to carry out its statutory duty to determine whether the assessment roll should be amended, but only for that purpose. The Court of Revision must have jurisdiction to determine those matters for that purpose because the grounds on which the Act allows a complaint to be made to that Court may involve those matters, and the statutory function of the Commission is only to hear and determine appeals from Courts of Revision. There is no indication in section 45 or elsewhere that an entry in the assessment roll which has been upheld by the Commission is in any different position from any other entry in the roll or is any less subject to challenge in the Courts. Some indication that the scope of section 53 is not unlimited may also be got from the fact that it only confers jurisdiction to deal with questions of assessment and is silent as to questions of liability to taxation, whereas sections 4 and 5 which are the leading sections in the Act deal with liability to and exemption from both assessment and taxation. Moreover their Lordships think it not irrelevant to note that originally, when appeals from Courts of Revision went to the District Judge and not to the Commission, the Act provided that the decision and judgment of the judge should be final and conclusive in every case, but that after the Commission was set up to hear appeals that provision was repealed. The jurisdiction of the Courts to determine questions of liability to taxation can only be ousted by clear words and in their Lordships' judgment it is far from clear that section 53 was intended to have that effect. Accordingly their Lordships agree with the majority of the learned Judges of the Supreme Court of Canada in holding that the decision of the Assessment Commission is not *res judicata* against the appellants. There being, then, no substance in the plea that the mere decision of the Assessment Commission is final and conclusive in favour of the assessment, their Lordships proceed to consider whether that assessment was, on its merits, valid or not.

First, it is necessary to determine whom, or what property, in the present case the relevant Provincial legislation purports to assess to personal

property tax. It may be convenient to recall at this point the relevant statutory provisions although some of them have already been indicated.

These provisions are contained in the Alberta Assessment Act, Cap. 157 of the Revised Statutes of Alberta as amended: and in the Alberta Municipal Districts Act, Cap. 151 of the Revised Statutes of the Province, also as amended. Statutes of this kind can, in the case of land, in which successive or concurrent "estates" can exist, assess the persons entitled to these limited interests in proportion to their respective value. When, however, personal property (which is defined in the Assessment Act as "goods and chattels") is involved, the law knows nothing of successive estates in such property, nor do the Provincial Statutes pretend to assess "limited interests" therein. Whoever is liable to pay the tax must pay it on the full cash value of the personal property assessed (see, for instance, section 8 (3) of the Alberta Assessment Act).

The person who is to be assessed and who is to pay is the person whose name is entered on the assessment roll under the provisions of section 26 of the Assessment Act; and this person, in the case of personal property, is either the "owner" or the person who is "in legal possession" of the property, or both such persons (section 26 (1) (L)). While the section speaks of the "owner" or "a person in legal possession", the definitions section—section 2—provides that "owner" in relation to property other than land means "the person who is in legal possession" thereof, and seemingly, here, no one else. (What effect this small discrepancy has when the ownership of chattels is in X and the legal possession in Y, is obscure but of no practical importance in this case.) By section 5 of the Assessment Act the following property is exempt from taxation:—

> "(*o*) every right, title and interest of His Majesty in any property whatsoever;
>
> "(*z*) all motor vehicles."

By section 125 of the British North America Act, 1867, "No lands or property belonging to Canada or to any Province shall be liable to taxation".

The first inquiry must, as indicated earlier, be, whether the Alberta legislation (which has not been challenged on the ground that it is *ultra vires*) purports to make either the property in question in this case, or the appellants in respect of that property, assessable.

This involves the further inquiry, whether the appellants were, in 1947—

(*a*) "owners" or

(*b*) persons "in legal possession"

of the chattels in questions within section 26 (1) (L). Clearly, if they were neither—as, for instance, they would be if the Crown were both—the appellants are exempt.

(*a*) Their Lordships are of opinion that the Crown was at all material times the owner of the articles in question. Clause 15 of the contract provides:—

> "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. . . ."

The English decided cases have dealt not infrequently with clauses of this type. (See cf. *Brown* v. *Bateman* 1862 L.R.2 C.P. 272: *Blake* v. *Izzard* (1867) 16 W.R. 108: *Reeves* v. *Barlow* (C.A. 1884) 12 Q.B.D. 436: *Keen* v. *Keen* 1902 1 K.B. 555: *Hudson Building Contracts* 7th Edn. 396, 420: *Hart* v. *Porthgain Harbour* 1903 1 Ch. 690.) In some of these cases a distinction has been drawn between clauses which provide that as and when plant or materials are brought to the site they shall be "considered" or "deemed" to become the property of the building owner; and, on the other hand, clauses which provide that they are to "be and become" his

property. In the former case it has sometimes been held that the clause was ineffective to achieve its aim and that the property remained in the builder, at the mercy of his creditors and trustee in bankruptcy (see cf. *Keen* v. *Keen* 1902 1 K.B. 555). When, as in *Reeves* v. *Barlow* 12 Q.B.D. 436, a decision of the Court of Appeal and perhaps the leading decision in the field, the formula is " be and become " or its equivalent, that case decides that the clause means what it says, operates according to its tenor, and effectively transfers the title. In *Hart* v. *Porthgain Harbour* 1903 1 Ch. 690, Farwell, J. (as he then was), seems to have thought it immaterial which formula was used: but on any view " be and become " is effective, and the same must hold good of " become and be "—the wording employed in this case. It is true that apart from the case of bargain and sale of goods (and sale of goods is not here in question) either a deed, or a delivery (actual or constructive), is necessary to transfer the title to chattels *inter vivos*. But in the present case there was delivery on a site owned and occupied by the building owner—the Crown—and on the English cases this has been held sufficient. (It has been assumed that the words " as and when provided " in Clause 15 mean " as and when delivered on the site ": indeed, they can hardly mean anything else.)

If this reasoning is well founded the plant, equipment and materials became the property of the Crown as and when so delivered.

But the Provincial Statute purports to make not only the owner but any persons in legal possession of the personal property assessable. Their Lordships will, for the time being, postpone consideration of the arguments (1) that this tax falls on " property " only and not on persons in respect of that property: (2) that by section 125 of the British North America Act " property belonging to the Crown is exempt from taxation "; and treat first, without recourse to these possible grounds of exemption, the question whether the Crown or the Appellants were at the material time " in legal possession " of the relevant property. It is certainly arguable, though not in their Lordships' considered opinion more, that as and when the chattels were delivered on the Crown site, the Crown acquired and as from then retained not only dominion, but legal possession of them. The following arguments under this head deserve consideration :—

(1) While it is true that the earlier part of Clause 15 makes no express provision that possession is to reside in either party, yet the latter part of the Clause provides that the respondents—the Crown—must, when the contractual work has been completed, deliver up the property to the builders. This, it is argued, is unmeaning unless there has been in the first instance a delivery the other way round—by the builders to the Crown—and such a delivery would vest the legal possession in the Crown and divest the builders thereof at the material time.

(2) A rule has sometimes been propounded in English decisions that where the contract is silent or ambiguous as to what party is to have possession, there arises a presumption that possession " runs with " the ownership (see per Lord Esher in *Ramsay* v. *Margrett* 1894 2 Q.B. 18, at p. 25).

(3) There must be a term implied in this case that (notwithstanding the property has passed to the Crown) the builders shall be entitled to use and handle their plant and materials. Such an implication is, in the strictest sense, " necessary to the business efficacy of the contract "—a building contract—for without it the builders could not build; but, it is contended, it is wrong to imply more than is strictly necessary; and here the necessities of the case would be satisfied by the implication of a licence, without the further implication of legal possession.

(4) It is further argued that the essence of legal possession is exclusive control and that this cannot have been intended to remain in the builders because of the very wide powers of control vested by Clause 11 of the contract in the Crown's engineer.

These arguments have been most carefully considered. They commended themselves to the trial Judge. But although not lacking in formal plausibility, they seem to their Lordships, when weighed, deficient in substance and reality. Argument (4) for instance would seem to confuse control of operations with control of the physical instruments by which the operations are to be carried out. These may well be in different persons.

The true position, in their Lordships' view, is that while the delivery on the Crown site was a delivery to the Crown and vested the ownership in the Crown, there was a notional or actual bailment or redelivery of possession to the builders for the purpose of carrying out the building contract.

If, therefore, no other considerations were involved than those considered so far, the appellants might be judged to have been validly assessed qua persons in legal possession.

There are, however, at least two other factors to be taken into account—

A. The first of these is based on the express exemption under section 5 (1) (z) of the Assessment Act, of "all motor vehicles". In the assessment were included certain articles the character of which qua "motor vehicles" within the meaning of this head of exemption is not challenged in these proceedings—viz., three motor vehicles of a type called "dumptors". They were not an insignificant component of the total subject matter of the assessment. The Assessment Commission reduced the assessed values standing in the assessment as it emerged from the Court of Revision; but as their Lordships read the Commission's decision it merely scaled down the amounts without excising or varying any items against which these amounts were tabled. The Supreme Court of Canada on the other hand dealt with this situation by deleting the three "dumptor" items as items and approving the reduced assessment subject to this deletion. Their Order was—

> "AND this Court did further order and adjudge that the appellant is entitled to a declaration that the assessment and taxation of all the personal property in question in this action, except the dumptors were properly made and imposed."

With great respect to the Supreme Court, their Lordships feel bound to express their view that the course adopted by that Court was not open to it. When an assessment is not for an entire sum, but for separate sums, dissected and earmarked each of them to a separate assessable item, a Court can sever the items and cut out one or more along with the sum attributed to it, while affirming the residue. But where the assessment consists of a single undivided sum in respect of the totality of property treated as assessable, and when one component (not dismissable as "de minimis") is on any view not assessable and wrongly included, it would seem clear that such a procedure is barred, and the assessment is bad wholly. That matter is covered by authority. In *Montreal Light Heat & Power Consolidated* v. *City of Westmount* 1926 S.C.R. 515, the Court (see especially per Anglin C.J.) in these conditions held, that an assessment which was bad in part was infected throughout, and treated it as invalid. Here their Lordships are of opinion, by parity of reasoning, that the assessment was invalid in toto.

B. This would be a sufficient reason for allowing the Appeal: but their Lordships think it desirable to deal with a second ground on which the assessment was impeached, having regard to the elaborate argument which was directed to it.

It has been noted that section 125 of the British North America Act, 1867, provides that "No property or land belonging to Canada or to any Province shall be liable to taxation". A solution of the present problem tempting in its simplicity is to say that the chattels in question in this case belong to the Crown in right of the Dominion of Canada and cannot be the subject matter of taxation, whoever may be in legal posses-

sion of them: that there is no subject matter on which a Provincial taxing statute can operate. The appellants hesitated to put their case as high as this: feeling that it would be difficult to reconcile such a submission with a number of decided cases including some decisions of this Board, where the subject was taxed although the ownership was in the Crown. Much argument was directed to the question whether the present tax or assessment was of " property ", or of " persons in respect of that property ": the first alternative favouring this extreme contention open to the appellants. On this point the following considerations seem to their Lordships relevant :—

(1) Of course no tax literally falls on " property " only as opposed to " persons ". All taxes are physically paid by persons.

But (2) This particular tax cannot be exacted as a debt from the person on the assessment roll. Provisions for exacting taxes on land as debts due from the person assessed (see section 305 of Municipal Districts Act) are not reproduced when it comes to taxes on personal property.

(3) The Provincial Acts in this connexion in some passages speak of tax on personal property or tax on persons in respect of their personal property, almost interchangeably ; but it is perhaps not without importance that the actual charging section in the present case —section 288 of the Municipal Districts Act—speaks of a tax " on the assessed value of all . . . personal property ". The section reads as follows:—

> " 288. Upon the completion of the estimate of probable expenditure the council shall proceed to make an estimate of the probable revenue of the municipal district for the year to be derived from business taxes and sources of revenue other than taxation, and shall by by-law authorize the secretary-treasurer to levy for ordinary municipal purposes upon the assessed value of all lands, improvements and personal property set out in the assessment roll, a tax at such uniform rate on the dollar as the council deems sufficient to produce the amount of the expenditures as estimated by the council less the amount of the estimated probable revenue from business taxes and sources other than taxation, due allowance being made for the amount of taxes which may reasonably be expected to remain unpaid, and for the offset of business or improvement tax as hereinafter provided for."

It may well be, therefore, that the tax is properly to be regarded as a tax on property and on property only. There is as against this the following circumstance to be taken to account:—In cases, at least where *land* has been concerned, it has been held that if the language of the Provincial Statute is sufficiently explicit and compelling, A may be taxed in respect of property " belonging " to B. Even where B is exempt, e.g. where B is the Crown, property belonging to B may be taken as a fictional measure of the tax to be exigible from A, provided always the Act makes this intention perfectly clear.

Their Lordships have not in mind the case often cited in this connexion of *Halifax* v. *Fairbanks* 1928 AC. 117 because in that case the special legislation provided that land let by the subject to the Crown should be treated as still occupied by the subject. This is clearly not a case of property " belonging " to the Crown at all. The property " belonged " to the subject and was let to the Crown. The same consideration applies to the *City of Vancouver* v. *Attorney-General of Canada* 1944 S.C.R. 23 where again the subject (the C & P. Railway) leased land to the Crown and was assessed under the terms of the Provincial Statute which charged the lessor in respect of the whole value of such land. Rather they have in mind cases such as *Smith* v. *Vermillion Hills Rural Council* 1916 2 A.C. 569 ; *Rural Municipality of Spy Hill* v. *Bradshaw* 1912 2 W.W.R. 399 ; and *City of Montreal* v. *A.G. for Canada* 1923 A.C. 136.

In *Smith* v. *Vermillion Hills* the appellant was assessed, under Saskatchewan Statutes 6 E 7 c 36 & 7 E 7 c 3, in respect of Dominion land of which he held grazing leases from the Crown. "Land" was defined in such statutes as including any estate or interest therein. It was held that the statutes should be read as imposing the tax on the appellant's interest in the land. This case is clearly distinguishable from the present appeal on the ground that the relevant Provincial Statute dealing with "land" (in which successive interests and estates can subsist) provided that that term should include "any estate or interest therein" and that every "owner or occupant" should be liable to be taxed for "land owned or occupied by him".

It was held, affirming the Supreme Court of Saskatchewan and the Supreme Court of Canada, that the tax was not imposed on the land itself, so as to conflict with section 125 of the British North America Act, but was imposed only on the "interest" of the appellant as a tenant thereof. The Supreme Court of Canada had reached a similar conclusion in *Calgary & Edmonton Land Coy* v. *A.G. of Alberta* 45 S.C.R. 170.

In *City of Montreal* v. *A.G. for Canada* 1923 A.C. 136 the material Provincial taxing provision (Art. 362A, added to the City of Montreal Charter by 7 Edw. 7 c 63 Art. 19) provided that persons occupying for certain purposes Crown buildings or lands should be taxed as if they were actual owners. The tenant of such buildings and lands did not pay. The Judicial Committee held, following the *Vermillion Hills* case, that the tax was only on the tenant's interest during his occupation, and was not a tax "on" Crown lands and as such *ultra vires* section 125 of the British North America Act.

In the present case:—

(1) "lands" are not involved, but personal property, in which estates do not exist;

(2) there is no express provision that the subject is to be liable to any extent in respect of Crown property, or that the exemption accorded to such property shall not extend to the subject who may have some interest therein (contrast cf. *City of Montreal* v. *A.G. for Canada, supra*);

(3) all that is said is that (without specific reference to Crown property) the subject shall be liable where in legal possession;

(4) This leaves it open to doubt whether "person in possession" covers a person in possession of Crown property. Where the terms and scope of incidence of such a provision are in any doubt they should if possible be construed so as not to conflict with section 125 of the British North America Act—and that accord can in the present case best be secured by reading persons "in legal possession" as limited to persons who would be taxable if owners in possession; and the Crown, who are the owners, would not have been taxable if in possession;

(5) Lastly, according to the terms of section 26 (1) (L) itself the person to be entered on the assessment roll is not the person in legal possession of any personal property, but the person "in legal possession of assessable personal property"; and Crown property not being taxable is *a fortiori* non assessable.

For these reasons it appears to their Lordships that even if motor vehicles had not been included in the assessment, it would still, for the reasons indicated above, have been invalid.

Their Lordships will accordingly humbly advise His Majesty that this appeal ought to be allowed, the judgment of the Supreme Court of Canada set aside and the judgment of the Appellate Division of the Supreme Court of Alberta restored, and that the respondents ought to pay the appellants' costs of the appeal to the Supreme Court of Canada. The respondents must pay the appellants' costs of this appeal.

(12639) Wt. 8137—69 100 8/51 D.L.

In the Privy Council

BENNETT & WHITE (CALGARY) LTD.

v.

MUNICIPAL DISTRICT OF SUGAR CITY No. 5

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