THE CORPORATION OF THE CITY OF WINDSOR..... APPELLANT;

AND

HIRAM WALKER-GOODERHAM & WORTS LIMITED and SUBSIDIARIES HOLDING COMPANY LIMITED ..... RESPONDENTS.

1948
*May 17, 18, 19, 20, 21, 25, 26, 27.

1949
*Jan. 7

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Assessment and Taxation—Income Assessment—Whether decision of County Court Judge under s. 57(3) final—The Assessment Act, R.S.O. 1937, c. 272, ss. 57, 59, 60, 73, 76, 84, 123, (as amended by 1939, c. 3 s. 8), and s. 125.

The appellant municipal corporation under the *Assessment Act*, R.S.O. 1937, c. 272, s. 57(2), assessed the appellant in 1943 in respect of income received in 1940, 1941 and 1942. The respondent, as provided

*PRESENT: Kerwin, Taschereau, Kellock, Estey and Locke JJ.

1949

CITY OF WINDSOR v. HIRAM WALKER-GOODERHAM & WORTS LTD. ET AL

by s. 57(3), appealed to the court of revision and from that court to the county court judge, who upheld the appeal. The municipality then appealed under s. 84 and the Ontario Municipal Board allowed its appeal. The respondent appealed to the Court of Appeal for Ontario and that court held the decision of the county court judge was final.

Held: That the appeal should be dismissed.

Held: Also that as to the by-law passed in 1943 under s. 123, the appellant was not, in view of subsection 12, entitled to assess and tax the 1942 income.

Per: Taschereau, Kellock and Locke JJ., as to the income for the years 1940 and 1941, which the appellant purported to tax under s. 57:

(1) The right of appeal given by s. 57(3) is a special and limited right of appeal from taxation exhausted when the county court judge is reached. *Scottish Widows' Fund Life Assurance Society* v. *Blennerhassett,* [1912] A.C. 281 at 286; *Furtado* v. *London Brewery Co.,* [1914] 1 K.B. 709 at 712.

(2) The right of appeal given by s. 84 is with respect only to entries in the current assessment roll which have been made the subject of formal complaint to the court of revision and not with respect to taxes already imposed. *Re Blackburn* v. *City of Ottawa,* (1924) 55 O.L.R. 494 at 501.

Per: Kerwin and Estey JJ., that as to the 1940 and 1941 income, the income assessments and tax rolls prepared by the appellant in 1941 and 1942 do not fall within the meaning of "the assessment roll from which such assessment has been omitted" as prescribed by s. 57(2), and the actions of the appellant's officers failed to bring the respondents within the terms of s. 57.

Per Kerwin and Estey JJ., (dissenting in part):

(1) The effect of deleting the words "and no appeal shall lie from the decision of the county court judge on any such appeal" from s. 123(8) by 1939, c. 3, s. 8, must have the effect of permitting further appeals, if the necessary conditions are met, to the Ontario Municipal Board and the Court of Appeal under s. 84. When the person assessed exercises the right of appeal to the court of revision under s. 57(3), the matter is brought into the general stream so as to permit either the party or the municipality to pursue the matter to the end.

(2) In view of subsequent changes in legislation, the decision in the *Blackburn* case is no longer applicable.

APPEAL from the judgment of the Court of Appeal for Ontario, (1) setting aside a decision of the Ontario Municipal Board allowing an appeal from a decision of the county court judge.

S. Springsteen K.C. and *L. R. Cumming* for the appellant.

C. F. H. Carson K.C. and *P. Kidd* for the respondent.

(1) 1947 O.R. 488.

The judgment of Kerwin and Estey, JJ., dissenting in part, was delivered by

KERWIN J.:—The Court of Appeal for Ontario allowed the appeal of the respondent companies from a decision of the Ontario Municipal Board, which had allowed the appeals of the present appellant, the Corporation of the City of Windsor, from a judgment of the senior County Judge of the County of Essex. All these appeals were assessment appeals under the Ontario *Assessment Act*, R.S.O. 1937, chapter 272, as amended, as they arose from assessments made against the respondents in 1943 in respect of the income received by them in the years 1940, 1941 and 1942. The Court of Appeal decided that the decision of the county judge was final with respect to the income for any of these years and as agreement with that conclusion would be sufficient to dispose of the matter, that point should first be considered.

The assessments for 1942 income were made in pursuance of By-law 425 of the City of Windsor, passed July 20, 1943, under the authority of section 123 of the Act. The names of the respondents were entered in a special roll of taxable income and payment of the taxes due was demanded by the tax collector. Thereupon, in the words of subsection 8 of section 123, the respondents had "in respect thereto the right of appeal provided in this Act in the case of assessments." If, in reading subsection 8, one omits for the moment the following words that appear between commas, "upon receipt from the collector of demand for payment of the said rate upon the amount for which he is taxable according to said roll", the first part of the subsection would then provide:—"A person whose name is entered in the special roll of taxable income shall not be entitled to notice of such entry but shall have in respect thereto the right of appeal provided in this Act in the case of assessments." That, I think, is the correct way of reading the subsection, and the words between commas merely indicate the time when the right of appeal arises. Upon that construction the word "thereto" would refer to the entry in the special roll and the appeal would be an assessment appeal. However, even if "thereto" be taken

1949

CITY OF WINDSOR v. HIRAM WALKER-GOODERHAM & WORTS LTD. ET AL

Kerwin J.

to refer to the demand for payment, that demand is based upon a prior assessment, and upon the respondents' appeals the amounts of the assessments were put in issue.

The respondent failed before the Court of Revision and unless there is something else in the Act, conferring a further right to appeal to the county judge, the Court of Revision's decision would be final. Subsection 10 envisages an appeal to the county judge so that it is permissible to call in aid the previous sections of the Act dealing with what might be termed the general scheme of assessment appeals. That view is confirmed when one considers the history of subsection 8. It was first enacted by section 8 of chapter 1 of the 1934 statutes as part of what was then section 120A when the following words appeared at the end "and no appeal shall lie from the decision of the county court judge on any such appeal." These words presuppose an appeal from the Court of Revision to the county judge. They were continued in subsection 8 of section 123 of the Revised Statutes of 1937 but in 1939, by chapter 3, section 8, they were deleted. This deletion must have the effect of permitting further appeals, if the necessary conditions are met, to the Ontario Municipal Board and the Court of Appeal under section 84. I am unable to agree with the contention that only the person assessed has all or any of these rights of appeal and that the municipality has none. While no right of appeal to the Court of Revision is given the municipality under subsection 8 of section 123, neither is such right given under the earlier sections dealing with the general scheme of assessment appeals. When the person assessed exercises the right of appeal to the Court of Revision the matter is brought into the general stream so as to permit either the party or the municipality to pursue the matter to the end.

The question of the right of appeal from the county judge in connection with the income received in 1940 and 1941 sends us to subsections 2 and 3 of section 57. Acting under subsection 2, the Assessment Commissioner in 1943 reported to the city clerk that income assessments against the respondents for 1940 and 1941 had been omitted. The assessments were accordingly added to assessment rolls, to be described hereafter, and to the collector's roll for 1943, prepared under By-law 425 and section 123 of the Act.

In accordance with subsection 3 of section 57, notices of the amounts of the assessments and of the taxes were sent to the respondents. The words "so taxed" in this subsection are merely descriptive of the person to whom notice is to be sent as he is notified as well of the assessments as of the taxes. The subsection provides not only that such person may appeal to the Court of Revision but also that "an appeal may also be had to the county judge by such person or by the municipality from any decision of the Court of Revision." This makes the matter quite clear up to and including appeals to the county judge and, once an appeal under the subsection is brought, the matter falls into the general scheme of assessment appeals so as to make applicable section 84, conferring a right of appeal from the county judge, not only upon the person assessed and taxed, but also upon the municipal corporation. If this be the correct conclusion upon the language of the subsection itself, it is no argument to the contrary that as a result of a municipality's appeal the person assessed and taxed may incur penalties for non-payment at the time demanded since the same result would follow in the ordinary course.

Reliance is placed upon the decision of the Court of Appeal for Ontario in *Re Blackburn and City of Ottawa* (1). At that time the section under which the Assessment Commissioner for Ottawa purported to report to the city clerk that income assessment had been omitted, contained the words "and the parties so assessed and taxed shall have the right of appeal as provided in section 118." Section 118 was the one conferring upon the Court of Revision power to order a remission of taxes, and the Court of Appeal considered that the right to petition for the exercise of such power and the right of appeal from an assessment had always been entirely separate and distinct things so that the decision of the county judge was final after an alleged omission had been entered on the rolls. In 1929, however, what is now subsection 3 of section 57 was first enacted, at which time subsection 2 was amended by striking out the following words at the end thereof:—"and the parties so assessed and taxed shall have the right of appeal as provided in section 121." Section 121 there

(1) (1924) 55 O.L.R. 494.

1949

CITY OF WINDSOR v. HIRAM WALKER-GOODERHAM & WORTS LTD. ET AL

Kerwin J.

mentioned is for all relevant purposes the same as section 118 referred to in the *Blackburn* Case. In view of the changes in the legislation, that decision is no longer applicable.

The appeal as to the assessability of 1942 income may be quickly disposed of. Although it was argued that subsection 12 of section 123 was superfluous, some meaning must be ascribed to it, and reading it in conjunction with all the other subsections, I agree that the earliest the provisions of section 123 could take effect under By-law 425 was the year 1944 with respect to income for 1943. The income for the year 1942, therefore, is not caught.

In order to decide as to the 1940 and 1941 income, it is necessary to describe the assessment rolls to which were added the assessments of income for those years. It has already been pointed out that By-law 425, by virtue of which section 123 of the *Assessment Act* took effect, was passed July 20, 1943. Up to that time, By-law 22, passed October 30, 1935, was in force. This latter by-law was passed in pursuance of what is now section 60 by which a city, instead of proceeding as set forth in section 59, may by by-law provide for making the assessment at any time prior to September 30th and for fixing prior and separate dates for the return of the roll of each ward. By subsection 2 of section 9, the income to be assessed shall be the income received during the year ending December 31st then last past. Without detailing the other provisions of the *Assessment Act* and the relevant sections of the *Municipal Act*, the result should have been that the income for 1940, for instance, would be entered on the assessment roll prepared in 1941 and that the taxes in respect thereof would be payable in 1942 and not before. Instead of following this normal procedure, the City officials, commencing in 1936, proceeded as if By-law 425 had been enacted and section 123 brought into effect. In 1941, they prepared a "Corporation Income Tax Roll, 1941, from returns for the year 1940 Assessment and Tax Roll 1941", the title of which is self-explanatory and in 1942 they prepared a similar roll, which, however, is headed "Income Assessment and Tax Roll 1942." On each of these appeared the names of certain corporations, the amounts of income for which

they were assessed, and the taxes figured at the proper rate, which it might be noted was the same in each of the years 1940, 1941 and 1942. So far as the respondents are concerned, neither of these rolls falls within the meaning of "the assessment roll from which such assessment has been omitted" as prescribed by subsection 2 of section 57. None of the cases cited assists the appellant to overcome the fact that the actions of its officers have failed to bring the respondents within the terms of section 57.

The appeal should be dismissed with costs.

The judgment of Taschereau, Kellock and Locke JJ. was delivered by:—.

KELLOCK J.:—Dealing first with the income of the respondent companies for the years 1940 and 1941, which the appellant purported to tax under the provisions of section 57 of the *Assessment Act,* the first question which arises is as to whether or not section 84 applies so that the appellant was entitled to appeal from the county judge to the Ontario Municipal Board.

By subsection 1 of section 84 an appeal lies "where a person is assessed" in excess of amounts mentioned in the subsection. The respondents' contention is that the appeal provided for by this section does not apply to cases coming within either section 57 or, with reference to the income of 1942, with which I shall deal later, section 123, i.e., that section 84 applies where assessment only is involved and not to cases where the matter has gone beyond that stage and taxation has been imposed.

Turning to the statute, section 23 provides that every assessor in preparing the assessment roll, which takes place annually, shall set down therein certain particulars, including the names of all persons who are liable to assessment in the municipality, with the amounts assessable against each in respect of land, buildings, business and income, as well as the total assessment. Before completing his roll section 52 requires the assessor to send to every person named in the roll a notice of the assessment. While under section 54 he may correct any error in his assessment and alter the roll accordingly, he may do so only within the time fixed for the return of the roll and he must give an

1949

CITY OF WINDSOR v. HIRAM WALKER-GOODERHAM & WORTS LTD. ET AL

Kellock J.

amended notice of assessment to the person affected. Form 4 of the statute speaks of the assessment as made when the notice has been sent out, but however that may be, the taxation stage is not reached until appeals against assessments have been disposed of and the roll has been revised by the court of revision and county judge and a levying by-law has been passed by the council under section 315 of the *Municipal Act*, the levy being arrived at under section 316 upon the basis of the estimated expenditure in relation to the total assessment as disclosed by the assessment roll. After these steps have been taken the collector's roll is then made up pursuant to section 104 of the *Assessment Act* and this roll is then delivered to the collector who is required by section 108 to proceed to collect.

Subject to sections 59 to 63 of the Act, the assessor is required by section 53 to begin to make his roll in each year not later than the 15th of February and to complete the same by the 30th of April, by which last mentioned date he must deliver the roll, completed and added up, with the requisite affidavits, to the clerk of the municipality. Where this section applies the time for appealing against an assessment to the court of revision is, as provided by section 73, subsection 2, within fourteen days after the day upon which the roll is required to be returned or within fourteen days after its return, if it has not been returned within the time fixed by law. It is provided by subsection 21 that all the duties of the court of revision shall be completed and the roll finally revised before the 1st of July. Section 76 authorizes an appeal from the court of revision to the county judge, notice of appeal being required to be given by subsection 2 within five days after the date limited for the closing of the court of revision, or in case the court sits to hear appeals after that date, then within five days after its actual closing. By subsection 7 it is required that all appeals shall be determined before the 1st of August.

In certain municipalities where it is not desired to follow the procedure provided for by section 53 it is provided by section 59 that by-laws may be passed for taking the assessment between the 1st of April and the 30th of September, the rolls being returnable on the 1st of October. In such case the time for closing the court of

revision is the 15th of November and the final return by the county judge is to be on the 15th of December, although subsection 2 recognizes that there may be delay in the final return beyond the last mentioned date.

By section 60 cities, instead of proceeding under section 59, may by by-law provide for making the assessment at any time prior to the 30th of September and for fixing prior and separate dates for the return of the assessment roll of each ward or subdivision of a ward. The by-law must provide for the holding of a court of revision for the hearing of appeals from the assessment in each ward or subdivision upon the return of the assessment roll of such ward or subdivision and the time for appeal to the court of revision is to be within ten days after the last day fixed for the return of the roll and for appeal to the county judge within ten days after the decision of the court of revision or after receipt of written notice of such decision. By subsection 4 the county judge is required to complete his revision of the last of the assessment rolls for the city by the 20th of October in each year, although again subsection 5 recognizes that there may be delay.

Under the combined provisions of section 1(*j*) and section 74, the roll as revised by the county judge is deemed to be finally revised and binds all parties concerned, notwithstanding any error mentioned in section 74.

In cases falling within section 53 therefore, the time for appealing an assessment would, in the normal course, expire on the 15th of May in each year as provided by section 73, subsection 2. In cases within section 59 the time for such appeals would normally expire on the 15th of October and in cases within section 60 on the 10th of October. Section 76 provides for appeals to the county judge and in cases where the assessment is sufficient in amount there may be a further appeal to the Municipal Board under section 84. On questions of law there is an appeal also from the Board to the Court of Appeal under section 85, but as already mentioned, the assessment roll is considered as finally revised once the county judge has finished his revision and notwithstanding that there may be appeals outstanding to the Municipal Board or the Court of Appeal,

1949

CITY OF WINDSOR v. HIRAM WALKER-GOODERHAM & WORTS LTD. ET AL

Kellock J.

the clerk of the municipality is required by section 104 to make up the collector's roll and insert therein the several amounts of taxes.

The above outline of these statutory provisions is sufficient, in my opinion, to indicate the subject matter dealt with by section 84. The right of appeal thereby given is with respect only to entries in the current assessment roll which have been made the subject of formal complaint to the court of revision within the time prescribed as above mentioned. Entries in the assessment and collector's rolls under section 57 may be made "at any time" and hence long after, and as much as two years after the time prescribed for appeals in the ordinary assessment procedure.

Subsection 6 of section 73 prohibits any exercise of jurisdiction with respect to making any change in an assessment except in cases which have originated by a formal complaint to the court of revision as provided by that section. The appeal with which section 84 is concerned is therefore an appeal with respect to assessments and not an appeal with respect to taxes already imposed.

It is convenient at this point to refer to section 123. By subsection 1 the council, instead of making "an assessment of income as hereinbefore in this Act provided", may pass by-laws requiring every person liable to assessment in respect of income to furnish, within the time fixed by the by-law, a return of income received during the year ending on the 31st of December then last past and providing for the entry of the names of all such persons, whether or not they have complied with the demand, with the amount of the taxable income of each in a "special roll of taxable income" and also for levying upon the taxable income according to such roll at the appropriate rate. Subsection 2 provides for the rate and for recovery thereof in the same way as other rates. By subsection 8 a person entered on this roll is not entitled to notice of the entry but upon receipt of the tax demand from the collector he is given "in respect thereto", that is the demand for payment of taxes, "the right of appeal provided in this Act in the case of assessments".

In my view the language last quoted recognizes that the "case of assessments" is not the same thing as that with which section 123 is concerned, namely, the immediate imposition of taxation. The person upon whom the tax is imposed is, however, given the right of appeal applicable in the case of assessment.

In *Teck* v. *Hayward* (1), Henderson J.A., in speaking of the predecessor of section 73, subsection 1, and the other sections dealing with assessment appeals to the county judge, said at p. 133:

> It is clear, in my opinion, that the appeal provided for by these sections is an appeal only from an assessment, and does not confer any right of appeal from the rate of taxation imposed by the municipality.

On the following page with respect to subsection 8 of the then section 120a, now section 123, he said:

> My construction of this subsection is that the appeal is in respect of the demand for payment of the rate and that the words "the right of appeal provided in this Act in the case of assessments" describes the tribunals to which the appeal lies.

With respect to section 84, then section 80, Middleton J.A., in *Re Blackburn* v. *City of Ottawa* (2) said at page 501:

> But, reading the section in its context, it appears to me clearly to indicate that it was intended to apply only to appeals from actual assessments made in the ordinary way, and not to the attempt on the part of the municipality to collect taxes upon land or income which had inadvertently escaped assessment.

In his consideration of section 80 as it stood at that time, Middleton J.A., had in his mind, it is true, the ancestor of the present section 57, which was then in different form. I shall deal with that aspect of the matter in connection with consideration of the provisions of section 57. In my view, however, any change in the form of section 57 since the above judgment does not affect the appropriateness of the excerpt from the judgment just quoted to the present section 84.

When one comes to section 57 the situation is, in my opinion, analogous to that arising under section 123 in that section 57 does not deal merely with matters of assessment but with the imposition of taxation. While under subsection 2, in the case of income which has been omitted from the assessment roll, the assessor is directed

(1) [1936] 3 D.L.R. 125.
(2) (1924) 55 O.L.R. 494.

1949

CITY OF WINDSOR v. HIRAM WALKER-GOODERHAM & WORTS LTD. ET AL

Kellock J.

to enter the same on the appropriate assessment roll or rolls, he is also directed to enter the rates on the collector's roll for the current year. On so doing the clerk is then required by subsection 3 to deliver or send by registered letter post to the person "so taxed" a notice which contains not only the amount of the assessment but also the taxes, and such person is given the right of appeal provided for by the subsection.

As already stated, in my opinion, the language of section 123, subsection 8, namely, "the right of appeal provided in this Act in the case of assessments" indicates that an assessment appeal and the appeal from the imposition of taxation provided for in section 123, subsection 8, are separate and distinct. The appeal provided for in section 57, subsection 3, is of the latter class. In the last mentioned subsection this differentiation is emphasized. The subsection makes no reference to the appeal given in the case of assessments but sets out specifically the persons entitled to appeal and the tribunals to which resort may be had. It provides, in my opinion, a special and limited right of appeal and is its own code. There is no room under section 57(3), for instance, for any reference to section 73 so as to permit the persons mentioned in subsection 3 of that section to appeal. With respect to the appeal to the court of revision it is the "person so taxed" only who may appeal. Again, section 57(3) permits only that person and the municipal corporation to appeal to the county judge. There is no room therefore for the application of section 76(1), which permits other persons to make the appeal thereby provided for. Section 73(22) emphasizes that that section is dealing only with "an appeal * * * against an assessment" which is the subject of "a complaint formally made according to the above provisions", (subsection 6) notice having been given within fourteen days after the return of the assessment roll (subsection 2). The appeal to the county judge provided for by section 76 is an appeal from a decision of the court of revision made pursuant to section 73. The same is, in my opinion, true of section 84, which operates by way of exception to the prohibition contained in section 83, both sections, however, dealing only with appeals with respect to assessments made

in pursuance of sections 53, 59 or 60, and made the subject of formal complaint to the court of revision within the prescribed time after the assessment.

When one looks at the way in which section 57 has evolved to its present form the conclusion set out above is very much strengthened. It is not necessary to go back beyond the Revised Statutes of 1927, cap. 238. At that time the right of appeal in the case of income omitted from assessment at the proper time being subsequently inserted in the assessment and collector's rolls is to be found in section 57, subsection 2, which gave to "the party so assessed and taxed * * * the right of appeal as provided in section 121", (formerly 118). Subsection 1 of the last mentioned section, as it then stood, provided that the court of revision should receive and decide upon an application from any person assessed for a tenement which had remained vacant during more than three months in the year or from any person who declared himself from sickness or extreme poverty unable to pay taxes or who by reason of any gross or manifest error in the roll had been overcharged or who had been assessed in respect of land, income or business assessment under section 57, or who had been assessed for business but had not carried on business for the whole year and the court was authorized to remit or reduce the taxes or reject the application. By subsection 3 of section 121 an appeal was authorized to the county judge by either the applicant or the municipality from any decision of the court of revision.

In 1924, by 14 Geo. V, *cap.* 59, section 7, "application" was substituted for "petition" in the section. In 1929 by 19 Geo. V, *cap.* 63 sec. 7(3), section 121 was recast so as to permit of an appeal from the court of revision in the case only of an application for the cancellation or reduction of taxes by a person assessed for business who had not carried on such business for the whole year. At the same time by section 4 of the same statute, section 57 was amended, eliminating the provision as to appeal by reference to section 121 and providing expressly for an appeal to the court of revision and to the county judge, the same tribunals mentioned in the last mentioned section.

While the legislation was in the form in which it appeared in 1927, apart from the amendment of 1924, to which I

1949

CITY OF WINDSOR v. HIRAM WALKER-GOODERHAM & WORTS LTD. ET AL

Kellock J.

have referred, it was decided by the Appellate Division in *Re Blackburn and City of Ottawa supra* that section 84, in the language of Middleton J.A., cited above, applied "only to appeals from actual assessments made in the ordinary way and not to the attempt on the part of the municipality to collect taxes upon land or income omitted from assessment". The whole argument of the appellant on the present appeal is that the effect of the amendments of 1929 was to make applicable the provisions of section 84 to the cases covered by section 57. If that be the result it has been brought about in my opinion by accident rather than by any design on the part of the legislature. The subject matter of section 57 is not "assessments made in the ordinary way" but the imposition of taxation. In my opinion the change in 1929, from the right of appeal defined by reference to section 121 in the 1927 legislation, to a right of appeal to the same tribunals named in section 57 itself, did not constitute the appeal an "assessment" appeal. In my view the right of appeal given by section 57(3) remained a special and limited right of appeal exhausted when the county judge is reached just as it was when the right of appeal was defined by reference to section 121. The fact that both tribunals are expressly mentioned in sections 57 and 125 (formerly 121) as well as the persons entitled to appeal, emphasizes to my mind that that procedure exhausts the right of appeal in the case of each section.

It is useful at this point to contrast the language of subsection 4 of section 57a where the legislature enacts that "the same rights in respect of appeal shall apply as if such building or land had been assessed in the usual way". The appellant's contention really is that the effect of the language used in section 57(3) is the same as that used in section 57a, but I am unable to take that view.

In the *Blackburn* case there was of course involved in the decision of the court that there was no room for the application of section 84 to the subject matter of section 118, now section 125, a section dealing not with assessment but with remission of taxes. The amendments which that section has undergone since that decision, to some of which I have already referred, did not change the applicability

of that decision to cases within that section. It remains a section giving a special and limited right of appeal, exhausted when the county court judge is reached and I do not think there is any more reason for thinking that the legislature, by reason of any amendments to section 57 since the *Blackburn* decision, have made applicable to the subject matter of that section the provisions of section 84 than in the case of section 125. Neither did the 1935 amendment to section 84, 25 Geo. V, *cap.* 3, section 3, in my opinion, do more than give the municipal corporation a right of appeal in assessment cases, properly speaking, as to which doubt had been raised by the view expressed by Ferguson J.A., in the *Blackburn* case as to the distinction made throughout the statute between "person" and "municipal corporation" rendering inapplicable, in his view, the provisions of the *Interpretation Act*. The appeal with which that section concerns itself is still, in my opinion, an appeal with respect to an assessment duly made pursuant to sections 53, 59 or 60, which has been passed upon by the court of revision and county judge pursuant to sections 73 and 76.

In the case of section 142 also, as with sections 57, 123 and 125, the subject matter is taxes, in this case taxes already imposed. An appeal from the decision of the assessment commissioner to the court of revision and to the county judge is provided and not only are the tribunals to which appeal may be had, but the persons entitled to appeal, are prescribed in the section itself. In my opinion all these sections stand outside the sections dealing with appeals from assessments and the provisions of section 84 do not apply to them. There being no other provision for an appeal subsequent to the appeal to the county judge provided for by subsection 3 of section 57 applicable to the cases within that section, there was, in my opinion, no right of appeal by the appellants in the present case to the Municipal Board.

In *Scottish Widows' Fund Life Assurance Society* v. *Blennerhassett* (1) the Earl of Halsbury said at page 286:

> I content myself with saying that if there is an appeal it must be shewn. It is a principle of law that you cannot have an appeal unless there is either a pre-existing right of appeal at law or a right of appeal conferred by statute.

(1) [1912] A.C. 281.

1949

CITY OF WINDSOR v. HIRAM WALKER-GOODERHAM & WORTS LTD. ET AL

Kellock J.

In *Furtado* v. *London Brewery Company* (1), Swinfen Eady L.J., put the matter thus at page 712:

> The rule of law is that although a certiorari lies unless expressly taken away, yet an appeal does not lie unless expressly given by statute.

Coming to the income of 1942, which the appellant purported to tax by entry in the special roll of taxable income in 1943, the first question to be considered is the right, if any, on the part of the appellant municipality to appeal from the county judge to the Municipal Board. The question is governed by section 123, subsection 8, already mentioned. It is the contention on behalf of the appellant that the effect of the subsection is to make applicable to the subject matter of section 123 the provisions of sections 73 and 76 and hence also the provisions of section 84, although counsel appeared to be pressed with some difficulty as to the applicability of subsection 3 of section 73, which entitles any person whose name appears on the ordinary assessment roll in respect of some assessment for real property, business or income, to appeal to the court of revision if he thinks that any other person has been assessed too high or too low or who has been wrongly inserted in or omitted from the assessment roll.

In my opinion it is impossible to say that subsection 3 of section 73 is applicable to a case arising under section 123. I think any such construction is excluded by the express mention in section 123, subsection 8, of the person whose name has been entered on the special roll as entitled to appeal and if that be so I think there is no room for the application of section 76, subsection 1 either, which permits an appeal to the county judge at the instance of other persons and particularly at the instance of "any person assessed". If that person is precluded from an appeal to the court of revision, as I think he is, it would be strange if the legislature had provided for an appeal by that person from the court of revision to the county judge and subsequently to the Ontario Municipal Board. In my opinion no one is given any right of appeal under section 123, subsection 8, except the person therein described and I think there is no question but that the right of appeal given by the section is not limited to an appeal to the court of revision but includes an appeal therefrom to the

(1) [1914] 1 K.B.

higher tribunals mentioned in the statute. If there were any doubt as to the proper construction of subsection 8 on this point I think it would be removed by a reference to the form of the subsection in which it was originally enacted in 1934 by 24 Geo. V, *cap.* 1, section 8. At that time the subsection had a provision that no appeal should lie from the decision of the county court judge. This provision has since been eliminated by 3 Geo. VI, *cap.* 3, section 8, but this amendment does not affect the construction of the subsection on this point. The truth is that the subject matter of section 123 as in the case of sections 57, 125 and 142, is outside the appeal procedure laid down by the statute in the case of assessments. There is no general language such as that employed in section 57a (4) and I am unable to apply to the *Assessment Act* any different canon of construction than that which applies in the case of other statutes; *Cartwright* v. *City of Toronto,* (1). Further, in every case outside of the ordinary appeal procedure provided for the case of assessments (and there are no others that I know of except the sections just mentioned, namely, 57, 123, 125 and 142) not only are the tribunals to which an appeal lies either specifically mentioned or as in the case of section 123, subsection 8, defined by reference, but the persons intended to have the right of appeal are also expressly mentioned.

I agree also with Robertson C.J.O., in the view that the mere striking out of the words in subsection 8 limiting the right of appeal given to the county judge did not have the effect of conferring any right of appeal on the municipality. In my opinion, therefore, there was no right on the part of the appellant municipality to appeal to the Municipal Board. The argument for the appellant as to the applicability of section 76, subsection 1, is that, read literally, it provides for an appeal to the county judge against "a decision" of the court of revision and similarly, that section 84, subsection 1, provides for an appeal from "the decision" of the judge and it is said that once a person affected by an entry under section 123 appeals to the court of revision and that court deals with the appeal, there is then "a decision" of that court from which an appeal lies under the sections just mentioned. That argument would

(1) (1914) 50 S.C.R. 215 at 219.

1949

CITY OF WINDSOR v. HIRAM WALKER-GOODERHAM & WORTS LTD. ET AL

Kellock J.

be equally applicable in the case of a decision of the county judge under either section 125 or section 142, but in my opinion "the decision" referred to in sections 76 and 84 is a decision on appeals with respect to assessments and not with respect to matters dealt with by sections 57, 123, 125 or 142.

With respect to the 1942 income I should in any event be of opinion that the appellant was not entitled to assess and tax that income in 1943. On the 16th of March, 1943, the council passed by-law 403, levying upon the whole assessment according to the last revised assessment roll. On the 20th of July, 1943, by-law 425 was passed under section 123, providing for a special roll of taxable income and for collecting the taxes not later than the first day of October of the same year.

On the same day, July 20th, by-law 426 was passed, referring to by-law 403 and stating that the last mentioned by-law had, through an error, described the revised assessment roll as including income assessments, whereas it did not in fact include such assessments and it amended by-law 403 by striking out all reference to income and providing for a levy upon the special roll of taxable income at the same rates as were set forth in by-law 403. It also by paragraph 5 repealed all by-laws or parts of by-laws inconsistent or repugnant to it.

Prior to by-laws 425 and 426, the city had been proceeding under the provisions of by-law 22 passed in conformity with section 60 and by-law 403 in purporting to levy on the last revised assessment roll was levying upon the assessment, so far as income was concerned, made in 1942 of 1941 income.

So far as subsection 1 of section 123, had it stood alone, is concerned, this procedure would appear to have been regular but it is provided by subsection 12 that "income received in the year in which a by-law is passed under subsection 1 *for the purpose of bringing the provisions of this section into effect* shall be subject to the provisions of this section and of such by-law, notwithstanding that such income or any part thereof may have been received before the provisions of this section take effect".

Mr. Cumming argues that this subsection, to use his language, is to be given "no legal effect" and that therefore

the procedure adopted by the appellant was authorized. Mr. Springsteen submitted that the effect of the subsection was to remove any doubt there might be as to the liability to taxation of that portion of income received in the year the by-law was passed between the first of January and the date of the passing of the by-law. In my opinion the purpose of the subsection was to make it clear that while, in the contemplation of the legislature, a by-law passed under the provisions of the section would, apart from subsection 2, have no operation on income received in fact before the date of its passing, such by-law, by reason of the subsection would operate with respect to income received during the whole of that year but should have no further retroactive effect. It would be difficult to attribute to the legislature the view that while apart from subsection 12 the section applied to income received during the whole of the year preceding the year in which the by-law was passed, it would not but for the subsection apply to income received in the latter year between the first of January and the date of the passing. Accordingly, in my opinion, the view of the Court of Appeal on this point was right and, with respect, I agree with it.

A number of other points were discussed on which, in view of the conclusions to which I have come, it is not necessary to express any opinion, including the question as to whether the income for any of the years here in question was received from the business in respect of which the respondents were liable to business assessment.

I would dismiss the appeal with costs.

Appeal dismissed with costs.

Solicitor for the appellant: *Lorne R. Cumming.*

Solicitor for the respondent: *Paul J. G. Kidd.*