1949
*Oct. 25, 26, 27.
1950
*Mar. 30

MUNICIPAL DISTRICT OF SUGAR CITY No. 5 (DEFENDANT) ..... APPELLANT,

AND

BENNETT & WHITE (CALGARY) LIMITED (PLAINTIFF) ..... RESPONDENT,

AND

ATTORNEY GENERAL OF CANADA...INTERVENANT.

ON APPEAL FROM THE SUPREME COURT OF ALBERTA, APPELLATE DIVISION

*Taxation—Municipal—Personal property—Construction contract providing that plant and equipment used will be "property" of Crown—Whether title of ownership in Crown or in contractor—Whether taxable—Recovery—Distress—Whether decision of Alberta Assessment Commission res judicata—Assessment Act, R.S.A. 1942, c. 157, ss. 5, 35, 45, 53—Municipal District Act, R.S.A. 1942, c. 151, s. 370—Vehicles and Highway Traffic Act, R.S.A. 1942, c. 275, s. 119.*

Respondent contracted to do certain works at an irrigation project for the Crown. It was provided that respondent would furnish all machinery, plant, equipment and materials but that, until completion of the works, they would "be the property of His Majesty for the purposes of the said works" without His Majesty being answerable for loss or damage to such property; that they could not be removed without the consent of His Majesty; and that upon completion of the works they would be delivered to respondent. Should respondent be in default, His Majesty could use this property for the completion of the works and could sell or otherwise dispose of it.

Appellant assessed and taxed the said plant and materials. On appeal, where it was argued that the property belonged to the Crown, the assessment was confirmed by the Court of Revision and later by the Alberta Assessment Commission. Being threatened with seizure of the plant and equipment under powers of distress given by the *Municipal District Act,* respondent asked by the present action that the assessment be declared invalid. The trial judge maintained the action and the Appellate Division affirmed.

*Held:* The contract did not transfer the absolute title of ownership which remained in respondent, subject to the clauses binding the use of the plant and equipment to the works and tying them to the area within which they were brought for that purpose. All that was vested in the Crown was a group of rights and powers which, being security for the performance of the contract, would be specifically enforceable and would constitute an interest *ad rem.* Therefore respondent was taxable but, as there is no statutory provision for the recovery of tax on personal property by action, no such right can be implied nor can the appellant distrain upon the property taxed while it is under the obligations of the contract.

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

*Held further:* The decision of the Alberta Assessment Commission is not *res judicata* as regards liability to taxation, because section 53 confers jurisdiction on the Commission only to correct or confirm the actions of the assessors and of the Court of Revision within their administrative jurisdiction of taxation and cannot be construed as vesting in the Commission judicial authority to determine questions of exemptions which involve the civil rights of property owners.

*Per* Kerwin J.: The decision of the Alberta Assessment Commission as regards liability to taxation is *res judicata,* as section 53 clearly confers upon the Commission jurisdiction to determine whether any person was legally assessed. But appellant is not entitled to judgment for the amount of the taxes involved as there is no provision in the *Act* to recover taxes in respect of personal property as a debt; he can recover by distress but not on the property which is subject to the terms of the contract.

APPEAL from the judgment of the Supreme Court of Alberta, Appellate Division (1), affirming the decision of the trial judge, Shepherd J., maintaining an action for a declaration that a municipal assessment on personal property was invalid.

*A. C. Virtue, K.C.* for the appellant.

*S. J. Helman, K.C.* and *R. H. Barron* for the respondent.

*D. W. Mundell, K.C.* for the Attorney General of Canada.

KERWIN J.: The respondent, Bennett & White (Calgary) Limited, brought an action in the Supreme Court of Alberta against the appellant, Municipal District of Sugar City No. 5, for a declaration that the assessment of the respondent for personal property, made by the appellant for the year 1947, is invalid; for an order that the respondent's name be stricken from the appellant's tax roll in respect of personal property for 1947; and for an injunction restraining the appellant from attempting to enforce its alleged claim for taxes and taking any steps to seize any of certain chattels, equipment and tools, hereafter referred to. The appellant counter-claimed for a declaration and decree that the assessment and taxation referred to were properly made and imposed; terminating the interim injunction already granted; in the alternative and in any event, that certain proceedings before the Court of Revision and the Alberta Assessment Commission preclude the

(1) [1949] 2 W.W.R. 129.

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respondent from maintaining the action; and, in the further alternative, for judgment against the respondent for the amount of the taxes involved and penalties. The trial judge granted the declaration and order firstly and secondly asked by the respondent, dismissed the counterclaim and, no doubt considering it unnecessary, made no order continuing the interim injunction. His judgment was affirmed by the Appellate Division (1).

The respondent is a company incorporated under the *Companies Act* of the Province of Alberta, having its head-office in Calgary, and the appellant is a municipal district constituted pursuant to the provisions of the *Municipal District Act,* R.S.A. 1942, c. 151. On July 22, 1946, the respondent, therein called the contractor, entered into an agreement with His Majesty, represented therein by the Minister of Agriculture of the Dominion of Canada, to construct certain diversion and irrigation tunnels at the St. Mary's Dam Project which lies within the boundaries of the appellant. By clause 3 of this agreement, it was provided that the respondent should at its own expense provide all and every kind of labour, superintendence, services, tolls, implements, machinery, plant, materials, articles and things necessary for the due execution and completion of the works, and should deliver the works complete in every particular to His Majesty on or before certain fixed dates. By clause 12, all plant, materials, etc., were included in the price payable by His Majesty under the agreement. By clause 15 (speaking generally) all plant, etc., became the property of His Majesty subject to a term whereby upon the completion of the works such of the plant, etc., as should not have been used and converted in the works, or disposed of by His Majesty under powers conferred by the contract, should upon demand be delivered up to the respondent. This clause reads as follows:—

> 15. All machinery, tools, plant, materials, equipment, articles and things whatsoever, provided by the Contractor or by the Engineer under the provisions of sections 14 and 16, for the works, and not rejected under the provisions of section 14, shall from the time of their being so provided become, and, until the final completion of the said work, shall be the property of His Majesty for the 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

(1) [1929] 2 W.W.R. 129.

loss, or damage, whatsoever, which may at any time happen to such machinery, tools, plant, materials, equipment, articles or things. Upon the completion of the works and upon payment by the Contractor of all such moneys, loss, costs and damages, if any, as shall be due from the Contractor to His Majesty, or chargeable against the Contractor, under this contract, such of the said machinery, tools, plant, materials, equipment, articles and things as shall not have been used and converted in the works or disposed of by His Majesty under powers conferred in this contract, shall, upon demand, be delivered up to the Contractor in such condition as they may then be in.

In pursuance of this agreement, the respondent moved considerable plant and materials to the site of the works to be performed, the site being owned by His Majesty and being within the limits of the appellant. In 1947, the appellant assessed and taxed the said plant and materials under the provisions of the *Assessment Act,* R.S.A. 1942, chapter 157, and the *Municipal District Act.* Upon receipt of notice of the assessment, the respondent, in pursuance of section 35 of the *Assessment Act,* appealed to the Court of Revision which, by section 37, is composed of members of the council of the municipal district. By a letter supplementary to its notice of appeal to the Court of Revision, the respondent had taken the ground that the plant, etc., which was the subject of the assessment, did not belong to it but to His Majesty in the right of the Dominion of Canada. The Court of Revision confirmed the assessment and, pursuant to section 47, the respondent appealed against that decision to the Alberta Assessment Commission, constituted as provided by the *Alberta Municipal Assessment Commssion Act,* R.S.A. 1942, chapter 156. Section 53 of *The Assessment Act* reads as follows:—

53. 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 Commission dismissed the appeal except for a reduction in the amount of the assessment.

The appellant thereupon threatened to seize the plant and equipment under the powers of distress given it by subsection 4 of section 310 of the *Municipal District Act* in relation to taxes which are not a lien upon land. The present action followed and the interim injunction referred to above was secured.

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A number of interesting and difficult questions were argued at bar and some of them are referred to in the reasons for judgment in the Courts below. The first to be determined is whether the decision of the Assessment Commission is *res judicata*. The trial judge considered that a previous decision of the Appellate Division in *In Re Companies Act, In Re Northern Transport Co. Limited and Village of McMurray* (1), effectively disposed of the contention, and his reasons were adopted by the Appellate Division in the appeal (2) in the present case. In the *McMurray* case, the Appellate Division, holding that the principle to be applied was to be found in *Toronto Railway Company* v. *Toronto* (3), *Victoria* v. *Bishop of Vancouver Island* (4), and *Donohue Bros.* v. *St. Etienne* (5), decided that the Alberta Assessment Commission had no power to determine that non-taxable property was taxable.

The *Toronto Railway* case was decided upon the provisions of the *Ontario Assessment Act,* R.S.O. 1897, chapter 224. Section 68 of that *Act* enacted with reference to the Court of Revision:—

> At the time or times appointed, the Court shall meet and try all complaints in regard to persons wrongfully placed upon or omitted from the roll, or assessed at too high or too low a sum.

Provision was made for an appeal to a Court of Revision, a County Judge, a Board of County Judges where the assessment exceeded a certain amount, and to the Court of Appeal. Proceedings were taken thereunder wherein the Court of Appeal determined that the Railway Company's electric cars were real estate and assessable. The Company brought an action for a declaration that its cars were personal property and not subject to assessment or taxation. The Judicial Committee held, reversing the Court of Appeal and the trial judge, that the previous decision of the Court of Appeal in the assessment proceedings was not *res judicata* because by section 68 the jurisdiction of the assessment courts was confined to the amount of assessment and did not extend to validate an assessment unauthorized by the statute.

In the *Victoria* case, no appeal from the assessment had been taken by the Bishop, and the Judicial Committee held

(1) [1949] 1 W.W.R. 338.
(2) [1949] 2 W.W.R. 129.
(3) [1904] A.C. 809.
(4) [1921] 2 A.C. 384.
(5) [1924] S.C.R. 511.

that provisions whereby any one complaining of an "error or omission in regard to himself" as having been wrongfully placed on the assessment roll should have a right of appeal to a Court of Revision and that the assessment roll, as revised, confirmed and finally passed, should be deemed valid and binding notwithstanding any defect or error, etc., were merely machinery sections and did not empower the corporation or its officers to assess and tax any property expressly or impliedly exempt from taxation.

In the *Donohue* case, which arose in the Province of Quebec, this Court held that the appellant was not restricted to an appeal under the assessment provisions but was entitled to bring an action in the Superior Court for a declaration that the assessment of its machinery was null and void.

After the decision in the *Toronto Railway* case, the *Ontario Assessment Act* was amended in 1910 by 10 Edward VII, chapter 88, when section 19 was enacted, which subsequently became section 83 of R.S.O. 1914, chapter 195, whereby power and jurisdiction were given the Court of Revision to determine not only the amount of any assessment but also all questions as to whether any person or things are, or were, assessable. In *Village of Hagersville* v. *Hambleton* (1), Hambleton had been assessed by the Village in respect of income and the assessment was confirmed by the Court of Revision and no further appeal taken. The defendant's plea in an action subsequently brought by the Village for taxes, based upon that assessment, that he did not reside in the Village and was not assessable was rejected by the Court of Appeal who held that it was *res judicata* because of the provisions of section 83. Middleton, J.A., pointed out that in two intervening cases, *City of Ottawa* v. *Nantel* (2), and *City of Ottawa* v. *Keefer* (3), the attention of the Court had not been drawn to the amendment to the *Assessment Act.*

The *Hagersville* case was referred to by Smith J., in delivering the judgment of this Court in *Sifton* v. *Toronto* (4). There, Sifton removed from Toronto to the Township of York on December 14, 1923. An assessment roll for Toronto had been prepared in 1923, while Sifton still

(1) (1927) 61 O.L.R. 327.
(2) (1921) 51 O.L.R. 269.
(3) (1924) 54 O.L.R. 86.
(4) [1929] S.C.R. 484.

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resided there and he was entered on the roll for income. It was pointed out that he could not have successfully appealed against this assessment. In 1924, Toronto adopted, pursuant to a by-law passed in accordance with the *Assessment Act*, the 1923 assessment as the one for 1924. It was held that the assessment in question was on Sifton's income for 1924 and that by various enactments referred to, the municipality was prohibited from attempting to exercise jurisdiction outside the municipality and was exceeding its powers to "levy on the whole rateable property within the municipality." The *Hagersville* case was clearly distinguishable and it was held that it had no application.

In the subsequent case of *City of Ottawa* v. *Wilson* (1), the Court of Appeal held that where a person in an action for income taxes was found to have been not resident in the municipality at the time of assessment, the provisions of the *Ontario Assessment Act* did not empower the assessor to place her upon the assessment roll. The *Hagersville* and *Sifton* cases were referred to by Grant, J.A., and it was found that as the facts underlying the *ratio decidendi* in the former were not present, the decision did not affect the matter under consideration. Middleton, J.A., and Masten, J.A., who had taken part in the *Hagersville* decision, agreed. In *Becker* v. *Toronto* (2), the Court of Appeal, without giving reasons, held that a man whose property was exempt from taxation could recover taxes paid under protest. In each of these cases the party assessed had not appealed from the assessment.

In the present case, section 53 of the *Alberta Assessment Act* is very clear in conferring jurisdiction upon the Commission to determine whether any things are, or were, assessable, or persons were properly entered upon the assessment roll, or are, or were, legally assessed. That jurisdiction was appealed to by the present respondent and it cannot now be heard to raise the same point again. It is not to the purpose to argue that the members of the Court of Revision were not lawyers and, therefore, presumably incompetent to pass upon legal questions, and that the Commission might not be composed of persons of legal training. The legislature has seen fit to set forth in unmis-

(1) [1933] O.R. 21. (2) [1933] O.R. 843.

takable language the power and jurisdiction of the Commission and the meaning of section 53 should not be abridged even if it were thought that such a power should not have been conferred upon such a body. This is the only point decided and, in the absence of the Attorney General of Alberta, nothing is said as to the power of the legislature to confer such a jurisdiction upon the Commission.

The respondent is therefore not entitled to a declaration that the assessment in question was invalid or to an order that its name be stricken from the appellant's tax roll in respect of personal property for 1947 and, on the other hand, the appellant is entitled to a declaration and decree that the assessment and taxation were properly made and imposed. However, the appellant is not entitled to judgment for the amount of the taxes involved. Section 305 of the *Municipal District Act* provides that the taxes due in respect of any land, mineral, or timber, or business, may be recovered with interest as a debt. There is no reference to taxes due in respect of personal property and the rule is well-settled at common law that there is no such right. Section 370 of the *Municipal District Act* does not confer it. The appellant is entitled to exercise whatever powers of distress are conferred by subsection 4 of section 310 of the *Municipal District Act* but, in view of the agreement between His Majesty and the respondent, the appellant is not entitled to seize any of the machinery, tools, plant, materials, equipment, articles and things of the respondent, referred to in the agreement, while they are subject to the terms thereof.

The appeal should be allowed and judgment entered for the appellant in accordance with the foregoing. The appellant is entitled to its costs of the claim and counter-claim throughout. There should be no costs to or against the Attorney General of Canada.

The judgment of Taschereau, Rand, Estey and Locke JJ. was delivered by

RAND, J.: This appeal raises questions going to the taxability of certain plant and equipment used by the respondent as contractor for works undertaken with the Dominion Government. The works were on a large scale

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and embraced diversion and irrigation tunnels on what is known as the St. Mary Dam Project. The plant and equipment belonged to the respondent and was within the municipality in such circumstances that if they had not been affected by the terms of the contract there would have been no question of their liability to taxation.

The main point of controversy arises from the provisions of paragraph 15 which reads thus:—

> All machinery, tools, plant, materials, equipment, articles and things whatsoever, provided by the Contractor or by the Engineer under the provisions of sections 14 and 16, for the works, and not rejected under the provisions of section 14, shall from the time of their being so provided become, and, until the final completion of the said work, shall be the property of His Majesty for the 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 moneys, loss, costs and damages, if any, as shall be due from the Contractor to His Majesty, or chargeable against the Contractor, under this contract, such of the said machinery, tools, plant, materials, equipment, articles and things as shall not have been used and converted in the works or disposed of by His Majesty under powers conferred in this contract, shall, upon demand, be delivered up to the Contractor in such condition as they may then be in.

The effect of that paragraph is said to be to vest such a title or interest to the plant and equipment in the Crown or to affect the title of the respondent in such manner as renders the assessment invalid, and the first question is whether that conclusion is sound.

It will be seen that both plant, equipment and materials are included, and that they are declared to be the property of His Majesty "for the purposes of the said works". The purpose of the materials is obviously quite different from that of the plant and equipment, and the qualifying clause must appropriately respond to that difference. It was argued that the phrase defines the time or period of a transferred ownership; but at law there are no estates or remainders in personal property: the only title is the absolute title. The true conception where successive ownerships in A and B are in mind seems to be that the property in B is made subject to a right or power of use in A for a

specified period: but no doubt contractual stipulations may affect transfers of title on the happening of events or conditions.

The effect of the clause is both to bind the use of the plant and equipment to the works, and to tie them to the area within which they are brought for that purpose. It is seen that the Minister may permit units to be removed from the works which the contractor would be at liberty to return, and it would be treating title rather freely to conceive it as shuttling back and forth as the units might move on or off the working grounds.

The contractor is undoubtedly to remain in actual and legal possession of the plant and equipment while he is not in default; likewise his beneficial interest in them is not affected and with it the risk of loss or damage. Power is given to the Minister, in certain contingencies, to take the works, as it is said, "out of the hands" of the contractor and use the plant and equipment to complete them. Upon completion, the plant and equipment are to be, not "reconveyed" or "re-transferred" to the contractor, but "delivered up" to him as they may then be, which I take to signify no more than that the powers binding them come to an end.

Then it is contemplated that the plant or equipment or parts of either may not be owned by the contractor at all, but hired or rented by him, as in paragraph 29 which speaks of sums due for "hire of horses, teams or carts" "or any claims against the contractor, or any subcontractor for . . . plant, equipment . . . hired or supplied upon or for the works". In case of default, also, paragraph 18 provides that, "all plant, including horses and all rights, licences, powers and privileges affecting the personal property acquired or possessed by the contractor for the purposes of the work shall remain and be the property of His Majesty for all purposes incidental to the completion of the works, and may be used, exercised and enjoyed by His Majesty as fully, to all intents and purposes, connected with the works as they might theretofore have been used, exercised and enjoyed by the contractor, and the Minister may also, at his option, on behalf of His Majesty, sell or otherwise dispose of" them.

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Shepherd, J. at the trial who found against the assessment seemed to extract some support for his view from the language of paragraph 12 providing, as he stated it, "that all plant and materials furnished by the plaintiff were included in the prices payable by the Government under the agreement"; but that, with great respect, does not seem to be the true meaning of the language paraphrased. What is there being declared is that the price or prices shown in paragraph 34, which deals with unit prices, include everything done and furnished by the contractor and the reference to the plant excludes by way of precaution any question of adding to those prices rental or other compensation for the use of the equipment. Such allowances are, in special circumstances, contemplated by the paragraph which, for new work, provides that in addition to the actual and reasonable cost, "10 per cent thereon for the use of tools, contractor's plant, superintendence and profits" is to be allowed. It is, I think, incontrovertible that neither plant nor equipment is, in such sense, "paid for" by the Crown.

These stipulations make it clear to me that what has been vested in the Crown, in relation to the plant and equipment, is a group of rights and powers to the extent of the contractor's title or interest in them; and that the contractor employs his own property as he would ordinarily do but within those restrictions both as to its use and its residence. The effect of the language is not, "I give you the property but subject to my use of it for the purposes of the contract"; it is rather, "I give you the right to have the property kept on your land and its use applied to those purposes whether I fulfill them or some one else does". That arrangement is virtually identical with that in *Keen* v. *Keen, Ex p. Collins* (1). Such was the situation at the time of the assessment.

On appeal (2), Ford J.A. seems to lay it down that taxability of personal property depends upon the competency of the taxing authority at the moment of assessment to exercise against the property the powers of distress given by the statute, which, in some manner, follows from the fact that the power given is "to tax property

(1) [1902] 1 K.B. 555. (2) [1949] 2 W.W.R. 129.

and not persons in respect of an interest therein". What, then, is meant by taxing property as distinguished from persons in respect of property?

The notion that to "tax property" is to subject it, as a legal object, to some sort of inhering obligation vaguely to be regarded as the equivalent of a lien, is, I think, a misconception. Although the *Assessment Act* speaks of the taxation of property or business, it does not always do so: section 26(3), "every person who is assessed in respect of such property"; section 32, "where any person was at the time of the assessment taxable in respect of any property, business, trade or profession"; section 33, similar language but also "the assessment of the property"; section 291 of the *Municipal Districts Act* refers to business taxes "payable by each person assessed . . . in respect of a taxable business"; section 295, to the taxes due by a person whose name appears on the roll "in respect of the property or business for which he is assessed"; section 310(4), dealing with distress for taxes which are not a lien on land, in paragraph (*a*) provides for distress "upon the goods or chattels of the person taxed wherever found within the province"; and paragraph (*c*), "upon the goods and chattels in the possession of the person taxed, etc."

On the other hand, section 305, dealing with taxes "due in respect of any land, etc.", declares that they may be recovered as a debt and "shall be a special lien on the land". But no lien is created on personal property. Although the personal property existing at the time is the basis of the assessment, the collection of the tax is not in any manner bound up with it. The tax based on today's personal property may be collected on tomorrow's property, whether within or without the municipality. These provisions distinguish between the assessment and imposition of a tax and the modes of collection, but all three of them must be found either expressly or impliedly in the taxing statute; together they constitute the legislative authority and power for the exaction. Except as it may be evidential of an implied means of collection, the conception of the assessment, *per se*, as of property or of a person in relation to property, carries no practical significance of difference.

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The Minister's rights and powers, being security for the performance of the contract, would be specifically enforceable and constitute an interest *ad rem*. It may be, on the principle of *In re Marriage, Neave & Co.* (1), that such an interest cannot be asserted by a subject against a distress of this nature: but, as enjoyed by the Crown, it could not so be defeated.

But these rights and powers are no essential part of the title; they are exercisable in relation to the use of the property and so far they derogate from one of the incidents of ownership; but they assume title in the contractor. Being of such a nature, the interest as at the time of assessment, if held by a subject, would not be a taxable interest under the *Assessment Act*.

The statute contains nothing that even purports to make assessability conditional upon contemporaneous exigibility by distress. The basic fact for assessment is the ownership or legal possession of personal property, and here, at the critical time, both were in the respondent. Goods subject to a chattel mortgage and in the possession of the mortgagor are clearly liable to assessment and to distress, and, seemingly, I should say, distrainable whether or not in his possession, where not in the possession of the mortgagee. Before that step, the mortgagor is the owner within the meaning of the statute. A *fortiori* a mere interest *ad rem* does not affect that title or prevent a distress.

Taking the personal property, then, as being taxable, can the taxes be recovered by suit against the owner as for a debt? Since the remedy must appear from the statute and as the statute here, while specifically providing for the recovery by suit of taxes imposed in respect of land, has not done so for taxes on personal property and has instead provided the means of distress, no such right can be implied.

It is objected that the interest of the Crown, exempt from taxation, has nevertheless been included in the property taxed; but as that interest was not at the time of assessment a taxable interest, and the value of the user has never in fact been out of the contractor, the point falls. Moreover, this contention ignores the distinction between

(1) [1896] 2 Ch. 663.

taxing an interest of the Crown and taxing an interest of the subject as if, for purposes of amount, he were the owner of the Crown's interest: *Fairbanks* v. *Halifax* (1).

The remaining question is whether any of the plant and equipment is exempt under paragraph (*z*) of section 5(1) as being within the expression "motor vehicles". The word "vehicle" in its original sense conveys the meaning of a structure on wheels for carrying persons or goods. We have generally distinguished carriage from haulage, and mechanical units whose chief function is to haul other units, to do other kinds of work than carrying, are not usually looked upon as vehicles. But that meaning has, no doubt, been weakened by the multiplied forms in which wheeled bodies have appeared with the common feature of self-propulsion by motor.

The object, then, of the exemption becomes important; and, quite apart from the canon that an exemption from taxation should be in precise language, it seems to me that in this case, in relevant statutory expressions that object does appear. By section 119 of *The Vehicles and Highway Traffic Act,* chap. 275, R.S.A. 1942, it is declared that except where an Act specifically provides to the contrary, "no municipality shall have the power to pass, enforce or maintain any by-law requiring from any owner of a motor vehicle or chauffeur, any tax, fee, licence or permit for the use of the public highways . . .". Although the tax is associated with the use of the highways, I take it to evidence the intention that the exaction of fees or taxation for motor vehicles—which, to some extent at least, use highways as part of their normal operation—is to be provincial and not municipal. But "motor vehicle" in that Act does not include traction engines or vehicles running on rails. What was intended by the exemption in the *Assessment Act* was to make clear the uniformity between the two statutes. The exemption then does not include units of self-propelled equipment whose main purpose is either that of haulage or work other than conveying or vehicles running on rails as distinguished from general locomotion.

The objects fall within four categories. There are, first, what are described as dumptors assessed at $18,000:—these are ordinary four-wheeled vehicles with gasoline engine,

(1) [1928] A.C. 117.

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the body of which is a box and the purpose of which is to carry material from place to place. I am unable to distinguish them from the ordinary truck, and they would seem clearly to be exempt. The second class consist of caterpillar tractors used, with concave blades attached to the front as bulldozers, or with other devices attached behind to gather up material of excavation. These, as clearly, are not exempt. The third are known as draglines; these are large units, in operation like mechanical shovels, which excavate earth and other materials by means of a scoop bucket dragged along the ground by heavy cables. The entire body moves on caterpillar treads by its own power, but as can be seen, its whole function is that of doing work as against carrying, which excludes it from the exemption. The fourth are locomotives and cars which run on rails to carry away the excavated material: they remain taxable. Other items of equipment such as dozer blades, caterpillar power units, dragline buckets, and Letourneau Carryalls, are all accessories to or integral parts of the units in the four classes, which they must follow.

In the result, then, the assessment should be reduced by the amount representing the dumptors and their accessories; subject to that, it remains.

Mr. Virtue contends that as the respondent appealed both to the Court of Revision and the Alberta Assessment Commission, the taxability of the respondent is by the effect of section 53 of the *Assessment Act res judicata.* The section provides:—

> 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.

This language, it will be noticed, does not purport to conclude issues on the questions mentioned. If the Commission were an ordinary court, dealing in a judicial sense with matters of civil rights, the import of jurisdiction would be unquestioned. But taxation is essentially an administrative function; the assessor is directed by the statute to ascertain the value of certain property as the basis on which the province will exact a contribution from persons interested in it to enable government to be carried on. That ascertainment is an act *in rem* and its execution, given the

jurisdiction to tax, lies in such mode and such means as the legislature may prescribe.

But the statute, in defining the subject matter of taxation, necessarily limits the scope of legal action, and if, as we say, a subject is excluded from taxation, then as to it, a purported administrative act would have no legal effect.

Whether an act is or is not within a jurisdiction depends, if challenged, upon a determination by a tribunal. Ordinarily, jurisdictional facts, arising under a statute, are found by the civil courts; and when we speak of a finding of non-assessability of property, we mean as that conclusion has been or is declared by those tribunals. But the initial question is not what the fact is in actuality, which must be as it appears to some mind; it is rather, what is the tribunal to which we must look for that jurisdictional determination?

In dealing with taxation, from assessors to taxation commissions, the provisions of the statute regarding liability and exemption are necessarily taken into account by lay persons and bodies. The determination of an exemption involves an interpretation of the statute, and it thus affects a civil right. But the assessor must have regard to exemptions for the purpose of the administrative integrity of the roll; and although it is his duty to follow the provisions of the statute to the extent his judgment permits him to do so, it is undoubted that that preliminary judgment is essentially different from a judicial determination of the legal question.

The assessor, as part of his administrative duty, and as distinguished from purely administrative acts, exercises a lay judgment in the interpretation of the statute. From the whole of his exercise of authority, the statute ordinarily gives a right of appeal. By the nature of appeal, in the absence of special and original powers given to the revising body, it is to be taken as limited to examination of the matter that was before the assessor and to the giving, in the same sense, of the decision which he should have given.

In this case, section 35 of the *Assessment Act* provides for a complaint to the Court of Revision which is to be in respect of:—

(*a*) any error or omission alleged in respect of the assessment of any property or persons;

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

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(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.

Section 45 provides:—

Upon the termination of the sittings of the Court of Revision . . . the Secretary-Treasurer shall . . . enter . . . the following certificate . . .; and the roll as thus finally completed and certified shall be the assessment roll for that year, subject to amendment on appeal to the Alberta Assessment Commission . . . 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.

Authority must obviously be vested in that court to amend in any respect the roll as completed by the assessor, and the provisions of the *Act* do that. As in the case of the assessor, finality is given or confirmed to the purely administrative acts, but in the quasi-judicial determinations, the decision is of the same character as that of the assessor.

It is seen, next, that further amendment by the Assessment Commission shall be "on appeal", and it is on that footing that section 53 confers jurisdiction on the Commission as preceding sections had vested jurisdiction in the Court of Revision. But following the same rule, what the Commission does is to correct or confirm the actions of the assessor and the Court of Revision within their jurisdictions. It is for determining "all matters brought before the Commission" that the jurisdiction is declared, but those matters are such as come by way of appeal, and I see nothing in the section which introduces a new and original authority to deal with those matters in other than the administrative manner in which they have already been dealt with: I see nothing intended to confer a purely judicial function dealing with civil rights.

The material sections in the Alberta Act have their prototypes in provisions of the *Ontario Assessment Act*, and it is argued that the case of *Village of Hagersville* v. *Hambleton* (1) has given an authoritative interpretation of section 83, which corresponds to section 53, to the effect that a confirmation by the Court of Revision of an assessment for income tax was conclusive as to the residence

(1) (1927) 61 O.L.R. 327.

of the person assessed. The Judicial Committee in *Toronto Railway Company* v. *Toronto* (1), had found the jurisdiction of the Court of Revision limited to the question of more or less in value, from which it followed that whether a person was or was not a resident of a municipal area within the meaning of the statute was a question to be determined by the civil courts. But section 83 had been amended and the application of that authority was rejected. Riddell, J.A., at the opening of his judgment, says:—

> I may say at once that if the liability of the defendant to be assessed depended on the evidence of residence given at the trial, the judgment appealed from could not stand.

He held the amendment to have established exclusive tribunals of appeal to which only the assessed person could resort, and that the fact of residence as found by the Court of Revision was conclusive. In this view, the other members of the Court concurred.

In the next year, *Sifton* v. *City of Toronto* (2) came before the same court. There, the plaintiff had resided in Toronto from the beginning of the year until the 14th of December of 1923 when he moved to and became a resident of another municipality where he continued to reside during the whole of 1924. He had been assessed in 1923 for income and had paid the tax to Toronto. Under section 56 of the *Assessment Act,* on the 28th of February, 1924, Toronto passed a by-law adopting the assessment made for 1923 as that for the current year 1924, and later in 1924 demanded taxes accordingly from the former taxpayer. They were paid, and proceedings brought to recover them. On appeal from the judgment of the County Court dismissing the action, the court was equally divided: Mulock, C.J., and Grant, J.A. were to dismiss and Magee, J.A. and Hodgins, J.A. were for allowance. In this Court (3), the judgment below was reversed. Smith, J., who gave the judgment, distinguished the case of *Hagersville* v. *Hambleton* (4) on the ground that upon the adoption of the roll by the by-law of February 28th there was no tribunal to which the taxpayer could appeal against an improper assessment. But what lay at the bottom of the decision was the fact that in February, 1924, when the resolution

(1) [1904] A.C. 809.
(2) (1929) 63 O.L.R. 397.
(3) [1929] S.C.R. 484.
(4) (1927) 61 O.L.R. 327.

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of adoption of the roll was passed, the person assessed was not resident in Toronto. There was an apparent conflict between the statutory provision that Toronto could tax only those who were resident within its boundaries, and the declaration that the roll as certified was to be the roll for the year in question. But the fact giving rise to that conflict was held to be determinable by the civil court, and the former provision to be controlling.

That case was followed by *Ottawa* v. *Wilson* (1). The situation was somewhat similar. Before the assessment against the defendant was made, she had moved from Ottawa to Rockcliffe, but after that removal, and in the same year, her name had been entered upon the roll for Ottawa. No appeal was taken to the assessment tribunals. In an action to recover the taxes, it was held that it was *ultra vires* of Ottawa to assess a person who, as determined by the civil courts, was not a resident. Although the *Hagersville* case is mentioned, it is declared by Grant, J.A. that, as interpreted by the *Sifton* judgment, it did not affect the case at bar. With Grant, J.A. agreed Mulock, C.J.O. and Masten, J.A. Middleton, J.A. concurred in those views: he treated the *Sifton* decision as carrying to its logical conclusion the principle that a person can only be assessed for income "in the municipality in which he resides". But again arises the question, as found by what tribunal?

So far as the *Hagersville* case declares an exclusive jurisdiction in the assessment tribunals for determining the fact of residence, it must be taken to be inconsistent with these subsequent decisions; and I attribute to those tribunals only a jurisdiction of an administrative body as I have defined it. What questions of law involved in the assessment can be dealt with on appeal from those tribunals to a superior court, a step which in Alberta does not lie, depends on the language of the statute giving the right of appeal. What appears then is this, that if as found by the civil courts, jurisdiction for the act of assessment is absent, neither the decision of the assessment courts nor any statutory provision dealing with the conclusiveness of the roll is effective.

(1) [1933] O.R. 21.

That was the view taken of somewhat similar language in *R. M. Buckland* v. *Donaldson* (1), and in *Victoria* v. *Bishop of Vancouver* (2).

The same principle applies *a fortiori* to the question of exempted property. Whatever may be determined to be in that class is beyond the jurisdiction of assessment; and the judicial interpretation and application of the language of exemption is for the civil courts.

It may be, given property within the province, that the legislature might declare the scope of the exemption should be as interpreted by the assessment tribunal: that would be to vest a sub-legislative taxing authority in the Commission. But in this case the legislature has not done so. Or the legislature might purport to set up special provincial courts to interpret judicially legislative provisions affecting civil rights. If it were clear that that was the effect of the statute in this case, then the serious question of *ultra vires* would be presented. But where the legislative language is capable, as here, of being given rational meaning within undoubted provincial authority, and any other view would raise doubts and anomalies within the statute, the legislature's intention to go beyond that authority and within a questionable field should not be inferred.

For these reasons, section 53 is not to be construed as purporting to vest in the Assessment Commission judicial authority to determine questions of jurisdiction arising out of the provisions declaring exemptions; as the civil rights of owners of property are involved, the section is to be taken, in that respect, to contemplate only such dealing with the roll by the Commission in the exercise of its practical judgment on such matters as will render it as free as possible from errors of law.

I would, therefore, allow the appeal and, subject to the modification in the assessment roll mentioned, dissolve the injunction and dismiss the action. On the counterclaim, the appellant is entitled to a declaration that the taxes as modified were properly imposed: but the appellant cannot distrain upon the property taxed while it is under the obligations of the contract. The appellant should have its

(1) [1928] 1 W.W.R. 40. (2) [1921] 2 A.C. 384 at 396.

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costs of the action including the counterclaim throughout. The intervention of the Attorney General will be without costs.

*Appeal allowed with costs.*

Solicitors for the appellant: *Virtue, Russell and Morgan.*

Solicitors for the respondent: *Helman, Mahaffy and Barron.*

Solicitor for the intervenant: *D. W. Mundell.*