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*Oct. 19.
*Oct. 22.

THE CITY OF TORONTO .....APPELLANT;

AND

THE TORONTO RAILWAY CO ..... .RESPONDENT.

Appeal—Jurisdiction—52 V. c. 37 s. 2 (D.)—Appointment of presiding officers—County Court Judges—55 V. c. 48 (Ont.)—58 V. c. 47 (Ont.)—Statute, construction of—Appeal from assessment—Final judgment.

By 52 Vict. ch. 37, sec. 2, amending "The Supreme and Exchequer Courts Act," an appeal lies in certain cases to the Supreme Court of Canada from courts "of last resort created under provincial legislation to adjudicate concerning the assessment of property for provincial or municipal purposes, in cases where the person or persons presiding over such court is or are appointed by provincial or municipal authority." By the Ontario Act, 55 Vict. ch. 48 as amended by 58 Vict. ch. 47, an appeal lies from rulings of municipal courts of revision in matters of assessment to the county court judges of the county court district where the property has been assessed.

On an appeal from the decision of the county court judges under the Ontario statutes:

Held, King J. dissenting, that if the county court judges constituted a "court of last resort" within the meaning of 52 Vict. ch. 37, sec. 2, the persons presiding over such court were not appointed by provincial or municipal authority, and the appeal was not authorized by the said Act.

Held, per Gwynne J., that as no binding effect is given to the decision of the county court judges, under the Ontario Acts cited, the court appealed from was not a "court of last resort" within the meaning of 52 Vict. ch. 37, sec. 2.

Quære. Is the decision of the county court judges a "final judgment" within the meaning of 52 Vict. ch. 37, sec. 2?

MOTION to quash an appeal from the judgment or decision of a court of appeal from a municipal court of revision as to assessment of property, on the grounds

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PRESENT:—Taschereau, Gwynne, Sedgewick, King and Girouard JJ.

that the county court judges who presided over the court appealed from were not persons appointed by provincial or municipal authority, and that the court was not a "court of last resort," nor their decision a "final judgment" within the meaning of "The Supreme and Exchequer Courts Act," and its amendment by 52 Vict. ch. 37, sec. 2.

Laidlaw Q.C. for the motion. The court from which the appeal is taken is constituted under "The Consolidated Assessment Act, 1892," [Ont.] and the amending Acts, 55 Vict. ch 48, and 58 Vict. ch. 47. It is presided over by county court judges who are appointees of the Government of Canada under the provisions of "The British North America Act, 1867." They are not persons appointed by provincial or municipal authority within the meaning of "The Supreme and Exchequer Courts Act," as amended by 52 V. c. 37, s. 2. Neither is their court, as constituted by the Ontario statutes, a "court of last resort," nor their judgment a final judgment within the meaning of the Supreme Court Acts refered to. *Re Pacquette* (1); *Re Young* (2); *The Canadian Pacific Railway Co.* v. *The Little Seminary of Ste. Thérèse* (3); *Godson* v. *The City of Toronto* (4). The decision of the county court judges is not appealable as they are not a court of last resort and the judgment is not final nor effective under the Ontario statutes until certain formalities are complied with, when it becomes, by statute, conclusive for the assessment of the year. The statute also declares the decision to be non-appealable. *Danjou* v. *Marquis* (5). See judgment of Lord Cairns in *Théberge* v. *Laudry* (6). See also *Glengarry Election case*, *Kennedy* v. *Purcell* (7); *McDonald* v. *Abbott* (8).

(1) 11 Ont. P. R. 463.
(2) 14 Ont. P. R. 303.
(3) 16 Can. S. C. R. 606.
(4) 18 Can. S. C. R. 36.
(5) 3 Can. S. C. R. 260.
(6) 2 App. Cas. 102.
(7) 59 L. T. N. S. 279.
(8) 3 Can. S. C. R. 278.

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Robinson Q.C. contra. Our appeal is a matter of right given by Dominion legislation authorized by the B. N. A. Act, 1867, sec. 101, and cannot be taken away by provincial legislation, even when legislating as to municipal institutions. *Clarkson* v. *Ryan* (1); *Forristal* v. *McDonald* (2); per Richie C.J., in *The Queen* v. *Severn* (3); *Attorney General of Ontario* v. *Attorney General for the Dominion* (4).

There is no alteration possible in the judgment of the court on the reference to a judge of the Court of Appeal provided by the provincial Act; it is a conclusive decision binding on the parties, the result of full hearing and deliberation. The provincial legislature has created a new court vested with all the paraphernalia and attributes of a court of final resort upon the questions it is constituted to decide. Regular procedure is provided distinct from that of the county courts. The matters over which jurisdiction is given is not in any way ancillary to the county court jurisdiction, territorial or otherwise. The statute (5), provides also for the remuneration of the judges designated as the persons to preside over this court of appeal from municipal courts of revision. They are not appointed by name, but they are *personæ designatæ* appointed by the statute to an office separate and distinct from that to which the Dominion Government appointed them, but which is made their qualification as presiding officers of the municipal appeal court. As to what forms a court, see *Re Bell Telephone Co. and The Minister of Agriculture* (6). In *Godson* v. *City of Toronto* (7); the County Court Judge was not acting judicially, he was not required to decide a case but merely to report upon matters referred to him for inquiry.

(1) 17 Can. S. C. R. 251.
(2) 9 Can. S. C. R. 12.
(3) 2 Can. S. C. R. 70.
(4) [1896] A. C. 363
(5) 58 Vict. ch. 47 s. 6 (Ont.).
(6) 7 O. R. 609.
(7) 18 Can. S. C. R. 36; 16 Ont. App. R. 452.

The case *Re Pacquette* (1), is not in point as it refers merely to a case of exercise of summary jurisdiction. Neither does *Re Young* (2) which was a special matter in insolvency nor *Théberge* v. *Laudry* (3) where the order appealed from was in the exercise of discretion. As to the statute of 1894, ch. 51, sec. 5, the submission to the Lieutenant Governor in Council is a matter of prerogative.

TASCHEREAU J.—This appeal is taken under the provisions of the Supreme Court Amendment Act of 1889 (4) which gives an appeal to this court from the judgment of any court of last resort created under provincial legislation to adjudicate concerning the assessment of property for provincial or municipal purposes, *in cases where the person or persons presiding over such court is or are appointed by provincial or municipal authority*.

The judgment, or decision, appealed from was rendered by the court, composed of county court judges, constituted under 55 Vict. c. 48 (Ont.), as amended by 58 Vict. c. 47 (Ont.), for hearing appeals from the Court of Revision, as to assessments in Ontario, and the respondent moves to quash the appeal on the ground, *inter alia*, that the county court judges presiding over the said appeal court, are not appointed by *provincial or municipal authority*, and that consequently the case does not fall within the statute.

I am of opinion that we should allow the motion, and quash the appeal. The county court judges are not appointed by provincial or municipal authority, therefore the appeal does not lie. The Ontario statute authorizes them to preside, or constitutes them the presidents of

(1) 11 Ont. P. R. 463.
(2) 14 Ont. P. R. 303.
(3) 2 App. Cas. 102.
(4) 52 Vict. c. 37, sec. 2.

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such court, but they are appointed as county court judges by the federal authority. The word "appointed" cannot be extended so as to mean that the legislature has appointed them. *Appointed*, in that clause imports an act of the executive authority.

To entertain this appeal would be to strike out the words "in cases where the persons presiding over such court are *appointed by provincial or municipal authority*." The federal authority could never constitute such a court, or designate the persons who were to preside over it, and it cannot have been the intention of the legislature to provide for an impossible contingency.

To give effect to these words, as we must do if possible, we have to construe them as limiting the right of appealing to this court to cases where some other persons than judges appointed by the federal power are to be judges of that municipal court. Otherwise they would have no meaning.

If Parliament had intended to give an appeal in all cases, the words "in cases, &c., &c.," would have been absolutely unnecessary, for all such municipal courts must be presided over by persons, *quoad hoc*, appointed or designated by provincial power.

GWYNNE J.—This is a motion to quash an appeal to this court in the matter of an assessment made by the appellants upon the respondents in respect to certain property of theirs situate in the city of Toronto, which appeal the appellants claim to have a right to make under the provisions of an Act of the Dominion passed in the year 1889 (1), whereby it was enacted that an appeal should lie to this court

"(*j*) from the judgment of any court of last resort created under provincial legislation to adjudicate concerning the assessment of property

(1) 52 Vic. ch. 37, sec. 2.

for provincial or municipal purposes in cases where the person or persons presiding over such court is or are appointed by provincial or municipal authority, and the judgment appealed from involves the assessment of property at a value of not less than ten thousand dollars.

I am of opinion that the court contemplated by this statute as a court from whose judgment an appeal was given to this court, was a court which had yet to be created, and to which should be given, as a court of last resort, uniform appellate jurisdiction over all cases of appeal from the decision of the revision courts, and whose judgment should be conclusive, not merely as regards the particular assessment roll affected by it, but binding upon all revision courts and upon all other courts within the province in which the court should be created upon all questions of law adjudicated upon by such court, whatever might be the amount of the assessment complained of.

By chapter 193 of the Revised Statutes of Ontario, [1887], the Act then in force in relation to assessments, an appeal was given "to the county judge" from all decisions of courts of revision within the county of the county court of which he is the judge, and assuming these words "the county judge," by reason of the provisions of the subsections of sec. 68 and of sec. 69, to be sufficient to constitute the judge of the county court in such county a court of appeal in all assessment cases arising within the county of the county court of which he is the judge, his judgment was not made final otherwise than as regulating finally the assessment rolls of the year which must be completed within the year; nor even in that respect final in all cases, for by sec. 67 it is enacted that when the assessment complained of is of the value of $50,000 and over, although the appeal is in such case equally as in all others "to the county judge," still the appellant may request in writing the

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said county court judge to associate with himself on hearing of the said appeal, the judge of the county court of the county whose county town is nearest to the court house of the county to the judge of whose county court the appeal is given, and these two judges were directed then to hear the said appeal; and although by subsec. 3 of sec. 76 these two judges are declared to have the powers and duties which were by the Act assigned to "the county judge," acting alone, viz.: compelling attendance of witnesses, examination of all parties on oath, &c., &c., still in case they differ no judgment can be given, neither by the two conjointly by reason of their difference in opinion, nor yet by "the county judge" to whom the appeal is given. Special provision in such case is therefore made by subsection 4 of sec. 76, precisely similar in effect, it is true, to that which is the effect of the judgment of a court of appellate jurisdiction when its judges are divided in opinion; that subsection enacts that when two judges hear the appeal and differ in their opinion as to the allowance of the said appeal or otherwise, the assessment appealed from shall stand confirmed. In such a case, however, it must be observed that the confirmation of the judgment of the Court of Revision is effected by an express statutory provision and not by the judgment of any court, and moreover the confirmation of the judgment of the Court of Revision only affects the assessment roll of that year.

Such being the provisions in relation to appeal from the courts of revision when the above Dominion Act was passed, it does not appear to me that there was then any court in the province of Ontario which can be said to have been a court contemplated by the Dominion statute as being "a court of last resort created to adjudicate concerning the assessment of

property," from the judgment of which an appeal was given to this court.

Now all the above provisions of R. S. O. [1887] ch. 193, still remain in force precisely as therein enacted save as hereinafter mentioned. The appeal from the decision of the Court of Revision is still "to the county judge," nor has there been any alteration in the language used save as appears in 57 Vic. ch. 51, sec. 5 (1894), and in 58 Vic. ch. 47, sec. 5 (1895). By the former a new subsection was added to sec. 76, intituled 76*a*, whereby "in order to facilitate uniformity of decision without the delay or expense of appeals," it was enacted that a county judge may after his judgment in the case or matter, prepare a statement of the facts in the nature of a case on any question of general application which has arisen under the Act to be submitted in the manner provided in the Act to a judge of the Court of Appeal whose duty is declared to be to hear the case argued as also is provided in the Act, and to certify to the Lieutenant-Governor-in-Council his opinion thereon, and the Act proceeds to enact that such opinion shall forthwith be published in the Ontario Gazette, and a copy thereof sent to every judge of a county court, or the judge may, at any stage of the proceedings, refer the case to the full court for hearing and adjudication, and the said court shall have the authority and perform the duties assigned by the Act to, or conferred upon the judge (1).

Now, although it is provided by sec. 6 of this Act that the statement of any such case shall not delay the final revision of the assessment roll, the taxes imposed being necessary to be collected annually, yet the Act provides that the judge of the appeal court or the full court, should the matter be referred to them, shall

(1) 57 V. c. 51 s. 5, by ss. 7 of new sec. 76*a*.

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adjudicate upon the matter and make such order in the premises and as to costs and the payment thereof as will in the opinion of the judge or of the full court, as the case may be, do justice to all parties concerned, and any such order may be enforced as an order of a judge of the High Court under the Judicature Act or otherwise. Now, although the judgment of a judge or of the full court of appeal cannot alter the assessment roll of the year in which the case is prepared by "the judge," it is very obvious, I think, from the provisions enacted for the promulgation of the judgment of the judge of the Court of Appeal or of the full court, to whom the case should be referred, that their adjudication should in future be binding upon all county court judges upon all points of law by them decided, and such being the case, I am the more confirmed in my view that neither since nor before the passing of this Act was there a court in existence in Ontario which can be said to be a court of last resort created to adjudicate concerning the assessment of property.

Now, the only alteration made by 58 Vict. ch. 47, sec. 5, was to amend the section 76 by substituting two judges instead of one, thus providing that the appellant might request in writing "the county judge" to whom his appeal from the decision of the Court of Revision was made, to associate with himself two judges of county courts instead of one as previously provided by that section, and by enacting that when these three judges hear the appeal the decision of the majority shall prevail; that, in effect, is to say that in the one case the decision of the Court of Revision shall remain, and in the other that the clerk of the municipality shall alter the roll to conform to the decision of the majority. But, as already observed, this is a provision specially ordained by the statute and not the judgment of a court. "The county judge," if he

is a court, is the court which is in possession of the appeal.

In the present case, although the judges of county courts who have been associated with "the county judge" to whom the appeal was made, heard the appeal which involved a very grave question of law, and although their decision was at variance with the opinion of "the county judge" who, upon the assumption that he is a court, constitutes the court in possession of the appeal, but is made to prevail, still such their decision cannot, as it appears to me, be said to be the judgment of a court of last resort created to adjudicate concerning assessments within the meaning of the Dominion statute. That decision, although made to prevail over the opinion of "the county judge" as regards the particular assessment roll under consideration, is not given any binding effect whatever upon a revision court in any other county nor upon "the county judge" in any other county to whom an appeal should be made wherein the same point of law should arise, nor even upon "the county judge" having jurisdiction in appeals from the Revision Court in the city of Toronto, who, as it appears to me, if the same question should hereafter arise before him upon an assessment under $50,000 where his judgment is made final, would not be bound by the decisio the present case but might adjudicate in accordance with his own judgment unfettered ereby. An f he should entertain any doubt as the propriety of his doing so, he could prepare a case under the provisions of the statute and cause it to be submitted o a judge and eventually to the full Court of Appeal for Ontario, to adjudicate thereon, under the provisions of the statute in that behalf. The statute declaring the object of this provision being to facilitate uniformity of decision seems, I think, to show that the intent of

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the legislature in the directions for the publication and promulgation of such judgment was to compel conformity by all county court judges with such judgment, however imperfect the statute may be for securing such conformity. The provision shows, I think, that the legislature did not regard any tribunal in the province as a court of final resort for adjudicating concerning the assessment of property. The Court of Appeal was not, for it could only render a judgment on a case submitted at his pleasure by a county court judge, and for the reasons already given, the "county judge" assuming him to be a court, was not such a court.

I am of opinion, therefore, that the motion to quash the appeal must be granted.

SEDGEWICK J. was of opinion that the appeal should be quashed for the reasons stated by His Lordship Mr. Justice Taschereau.

KING J.—(Dissenting.) By 52 Vict. c. 37, sec. 2, an appeal is given to this court

(j) from the judgment of any court of last resort created under provincial legislation to adjudicate concerning the assessment of property for provincial or municipal purposes in cases where the person or persons presiding over such court is or are appointed by provincial or municipal authority, and the judgment appealed from involves the assessment of property at a value of not less than ten thousand dollars.

The Consolidated Assessment Act of Ontario (1) establishes a Court of Revision for the trial of all complaints in regard to persons wrongfully placed upon or omitted from the roll or assessed at too high or too low a sum.

By sec. 68 it is declared that an appeal to the county judge shall lie against the decisions of the Court of

(1) 55 Vict. c. 48 ss. 68 *et seq.*

Revision. Upon receiving notice of the intended appeals the county court judge appoints a time and place at which a court will be held to hear appeals, and notice is given to all parties to attend. The clerk of the municipality is appointed the clerk of the court, and in all proceedings before the county judge, under or for the purposes of the Act, it is enacted that he shall possess all such powers for compelling the attendance of, and for the examination on oath of all parties, &c., and for the enforcement of his orders, decisions and judgments, as belong to or might be exercised by him in the division court or in the county court. The decision of the judge is declared to be final and conclusive in every case adjudicated.

Where a person or corporation has been assessed to an amount aggregating $50,000, such person or corporation has the right to have the appeal from the Court of Revision heard by a board consisting of the judges of the counties which constitute the county court district, if the property assessed be in a county which forms part of a county court district, and if not, then by the county court judge and the judge of the county court of the county whose county town is nearest to the court house where the appeal is to be heard; and the said judges acting together have the powers and duties conferred upon and assigned to the county judge when acting alone under the Act (1).

The case before us is one where the proceedings were before a board of county court judges under the provisions last referred to. It seems manifest that what is sought to be appealed from to us is a judgment, and a judgment of a court of last resort created under provincial legislation to adjudicate concerning the assessment of property for provincial or municipal purposes, and the material question argued on the

(1) 55 V. c. 48 s. 76.

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motion to quash is whether the person or persons presiding over the court (in this case two county court judges), were appointed by provincial authority within the meaning of 52 Vict. c. 37, sec. 2 of the Acts of Canada.

The answer to be given to this question depends upon the meaning of the word "appointed," as used in the clause limiting the appeal to cases

where the person or persons presiding over such court is or are appointed by provincial or municipal authority.

The judges presiding in the court in question had been by the Dominion Government appointed to their respective offices as county court judges of certain counties or divisions; but the court over which they were presiding in the adjudication appealed from was not a county court, nor were the proceedings declared to be as in the county court. A distinct court was set up with independent officers, and certain of the powers and authorities of the county court, as for example, for compelling the attendance of witnesses and for examination on oath, and for enforcement of orders, &c., are conferred upon the county judges when acting as judges of the court so created. The effect of this is that the county court judges act, not *as such*, but as *personæ designatæ*. Their being county court judges is their qualification. It is by reason of their being such that they are appointed by the provincial legislature to preside in the court created to adjudicate concerning assessments.

Now it appears to me that the appointment that is referred to in the clause of 52 Vict. c. 37, sec. 2, already cited, means an appointment to preside over the court created to adjudicate concerning the assessment of property. The appointment of such persons to some other office, judicial or otherwise, by the Dominion Government is not a relevant fact at all, and indeed,

appointment by the Dominion Government of such persons to a non-judicial office, would be quite as relevant as their appointment to a judicial office other than that of a judge of the court created for the purpose mentioned in the Act.

In the present case, where the court consisted of two county court judges, it is clear that no authority other than provincial authority appointed such persons to preside over the court. It is not necessary to say what might be the proper conclusion if the jurisdiction were declared to be a part of the ordinary jurisdiction of the county court. Nor is it material that, upon the view here taken, perhaps no case might arise where persons appointed by other than provincial or municipal authority should preside in such a court as that referred to in the Act.

I think, therefore, that Mr. Robinson's contention is correct, and that the terms of the Act are fully met, and so the motion, in my opinion, ought to be disallowed.

GIROUARD J. was of opinion that the appeal should be quashed for the reasons stated by His Lordship Mr. Justice Taschereau.

Appeal quashed with costs.

Solicitors for the appellant: *Thomas Caswell.*

Solicitors for the respondent: *Laidlaw, Kappelle & Bicknell.*