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*May 13.

*June 24.

THE CORPORATION OF THE CITY OF LONDON (DEFENDANTS) ..... } APPELLANTS;

AND

GEORGE WATT & SONS (PLAINTIFFS) RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Assessment and taxes—Ontario Assessment Act R. S. O. [1887] *c.* 19, *ss.* 15, 65—*Illegal assessment—Court of revision—Business carried on in two municipalities.*

Sec. 65 of the Ontario Assessment Act (R. S. O. [1887] c. 193) does not enable the Court of Revision to make valid an assessment which the statute does not authorize.

Sec. 15 of the act provides that "where any business is carried on by a person in a municipality in which he does not reside, or in two or more municipalities, the personal property belonging to such persons shall be assessed in the municipality in which such personal property is situated." W., residing and doing business in Brantford, had certain merchandise in London stored in a public warehouse used by other persons as well as W. He kept no clerk or agent in charge of such merchandise but when sales were made a delivery order was given upon which the warehouse keeper acted. Once a week a commercial traveller for W., residing in London, attended there to take orders for goods, including the kind so stored, but the sales of stock in the warehouse were not confined to transactions entered into at London.

Held, affirming the decision of the Court of Appeal, that W. did not carry on business in London within the meaning of the said section and his merchandise in the warehouse was not liable to be assessed at London.

APPEAL from a decision of the Court of Appeal for Ontario (1), reversing the judgment at the trial by which plaintiffs' action was dismissed.

The plaintiffs were wholesale grocers doing business at Brantford, and for convenience in supplying cus-

*PRESENT:—Sir Henry Strong C. J. and Fournier, Taschereau, Gwynne and Sedgewick JJ.

(1) 19 Ont. App. R. 675.

tomers at London and vicinity they kept a quantity of sugar at the latter city stored in a public warehouse kept by a man named Slater. The warehouse was used by other parties as well as the plaintiffs. When any of the sugar was sold a delivery order was given to the purchaser and the goods were delivered on such order by Slater. The plaintiffs were assessed for the years 1891 and 1892 on their sugar in the warehouse and paid the assessment under protest. In 1891 they appealed from the assessment to the Court of Revision by which it was affirmed and they eventually brought an action to recover back from the corporation of London the amounts so paid under protest for the two years. Two other firms, Lucas Park & Co, and Macpherson, Glassco & Co, respectively carrying on business at Hamilton, were assessed by the city of London in the same way and had also paid their assessments under protest. Both these firms assigned their claims to the plaintiffs for the purpose of bringing the action.

The case was tried before Chief Justice Armour who dismissed the action holding that it was a question solely for the Court of Revision. On appeal to the Court of Appeal this judgment was reversed and judgment given for the plaintiffs for the several amounts claimed.

Meredith Q.C. for the appellants. The policy of the assessment act is that every person carrying on business in a municipality shall, in respect to his personal property there, pay his share of the local rates. See *Toronto Street Railway Co.* v. *Fleming* (1).

The plaintiffs having property in London it was for the Court of Revision to decide as to whether or not they did business there and its decision, and that of the County Court Judge in appeal therefrom, are final.

(1) 37 U. C. Q. B. 116.

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By section 65 of the assessment act the assessment roll as finally revised is conclusive as to all matters it contains. The act was amended in consequence of the decision in *Nicholls* v. *Cumming* (1) in this court.

For purposes of assessment tangible personal property is in the same position as real estate. *McCarrall* v. *Watkins* (2); *City of Kingston* v. *Canada Life Assurance Co.* (3).

Gibbons Q.C. for the respondents. Plaintiffs had no place of business in London within the meaning of the act. *Kingston* v. *Canada Life Co.* (3); *Ex parte Charles* (4).

This case is not distinguishable in principle from *City of Brantford* v. *Ontario Investment Co.* (5), and *Nickle* v. *Douglas* (6).

The judgment of the court was delivered by

THE CHIEF JUSTICE.—I am of opinion that this appeal must be dismissed. First, I agree with the Court of Appeal in holding that the 65th section of the Ontario Assessment Act (R. S. O. ch. 193) does not make the roll, as finally passed by the Court of Revision, conclusive as regards question of jurisdiction. If there is no power conferred by the statute to make the assessment it must be wholly illegal and void *ab initio* and confirmation by the Court of Revision cannot validate it.

To this effect were the decisions in *Scragg* v. *City of London* (7); *Nickle* v. *Douglas* (6); *Nicholls* v. *Cumming* (1). Several other Ontario cases might be cited to the same effect. All these cases were founded on principles laid down in English decisions of the highest authority.

(1) 1 Can. S. C. R. 395.
(2) 19 U. C. Q. B. 248.
(3) 19 O. R. 453.
(4) L. R. 13 Eq. 638.
(5) 15 Ont. App. R. 605.
(6) 35 U. C. Q. B. 126; 37 U. C. Q. B. 51.
(7) 26 U. C. Q. B. 271.

I cannot assent to Mr. Meredith's argument that *McCarrall* v. *Watkins* (1), has any application to the present case. The distinction is that the property assessed in *McCarrall* v. *Watkins* (1), was real estate, in which case the property itself is the subject of assessment; here the property is personal in which case not the property but the owner is assessed. I adhere to what is said in *Nickle* v. *Douglas* (2), as to this distinction.

Then if the roll was not conclusive the only question remaining can be whether the case of the respondents comes within the 15th section of the Assessment Act which provides that—

> Where any business is carried on by a person in a municipality in which he does not reside, or in two or more municipalities, the personal property belonging to such person shall be assessed in the municipality in which such personal property is situated.

It is not disputed that the personal property—merchandise consisting of sugar—assessed in the present case was actually in a warehouse within the appellant municipality at the time it was assessed; nor can it be disputed that the respondents are residents of the city of Brantford and do not reside in the city of London. The sole question is, therefore, whether upon the evidence it can be said that they carried on business in London. The proof upon this head is that the sugar was stored in a public warehouse kept by a Mr. Slater in the city of London; that this warehouse was used for bonded as well as for unbonded goods, and by other persons as well as by the respondents; and that the respondents paid Slater the usual warehouse charges upon these goods. It further appears that they had no clerk or agent in charge of the goods, but that when they made sales of sugar they gave a delivery order which Slater acted upon; that once

(1) 19 U. C. Q. B. 248. (2) 37 U. C. Q. B. 51.

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a week or so their commercial traveller, who resided in London, attended there to take orders for goods, including sugar, but that the sales of sugar out of the stock in Mr. Slater's warehouse were not confined to transactions entered into at London.

I am of opinion that this does not show that the respondents carried on business at London. It only shows that some of their stock in trade incidental to the business they carried on at Brantford was stored in a warehouse in London. The proper presumption is, therefore, that they were assessed for this same sugar at Brantford where they exclusively carried on business. To maintain this assessment at London would therefore be to impose upon the respondents a double tax upon the same property which would be illegal and oppressive.

The case of *Kingston* v. *Canada Life Assurance Company* (1), which appears to me to have been properly decided, is an authority for the respondents as is also *Ex parte Charles* (2) referred to in the judgment of Mr. Justice Osler in the Court of Appeal.

The appeal must be dismissed with costs.

Appeal dismissed with costs.

Solicitor for appellants: *T. G. Meredith.*

Solicitors for respondents: *Gibbons, McNab & Mulkern.*

(1) 19 O. R. 453.

(2) L. R. 13 Eq. 638.