

and an injunction to restrain the respondents from taking any proceedings for the collection of the said taxes. The respondents pleaded that in 1901 the street cars were legally assessable as real estate and also relied on a decision of the Court of Appeal dated the 28th of June, 1902, as res judicata between the parties.

The action was dismissed by Mr. Justice Ferguson, and an appeal from his judgment was also dismissed by the Court of Appeal on the 15th May, 1903. The present appeal is from the order then made.

No reasons were given either by Mr. Justice Ferguson or the Court of Appeal, as it was admitted that the point of law as to the assessability of the cars as real estate was indistinguishable from the point decided by the Court of Appeal in the previous year. That decision appears to have been given on the authority of a case of *The Bank of Montreal v. Kirkpatrick* decided by the same Court of Appeal in 1901, and reported 2 O.L.R. 113.

That was the trial of an interpleader issue between execution creditors of an electric street railway company and trustees for debenture holders of the same company. The property purporting to be charged by the debentures in question included the rolling stock of the company but the debenture deed was not duly registered as a chattel mortgage. The learned trial Judge held that the rolling stock was an essential part of the railway, the latter being useless for any purpose without it, and therefore that it was real property covered as such by the mortgage. The Court of Appeal affirmed this judgment. Osler, J., who delivered the judgment of the Court, held that the rolling stock of the electric railway really constituted part of one great machine confined to a particular locality for which it was specially constructed and fitted. Detached from the rails (he said) it was incapable of use, and upon the principles laid down in certain well known cases on the law of fixtures he was of opinion that, as regards its liability to be taken in execution, it may properly be regarded as part of the corpus of the entire machine, and therefore in the nature of a fixture and passing with the land over which it ran.

In their case on this appeal, the respondents submit that "the cars" are so actually or constructively affixed to land or buildings as to render "them real property and assessable as such," and this was the point argued before their Lordships. *Kirkpatrick's case* is not a direct authority in this case, which depends on the construction to be put on the Assessment Act, but the court below evidently considered that the reasons given for the judgment in *Kirkpatrick's case* were equally applicable to the present one.

Their Lordships are always disposed to treat with great respect an unanimous decision of the Court of Appeal in Ontario on the construction of one of their own statutes, but they cannot accede to the argument addressed to them, or adopt the reasoning of Mr. Justice Osler in *Kirkpatrick's case* without doing violence to the English language and to elementary principles of English law. It does not appear to them to advance