1915

*Dec. 6, 7.

1916

*Feb. 14.

THE TOWNSHIP OF CORNWALL.... APPELLANT;

AND

THE OTTAWA AND NEW YORK RAILWAY COMPANY AND OTHERS. } RESPONDENTS.

ON APPEAL FROM THE APPELLATE DIVISION OF THE SUPREME COURT OF ONTARIO.

Appeal — Jurisdiction of provincial tribunal — Consent of parties — Estoppel — Assessment — Railway bridge over navigable river— R.S.O. [1914] *c.* 195—*R.S.O.* [1914] *c.* 186.

By the Ontario Assessment Act an appeal is given from a decision of the Court of Revision to the county court judge with, in certain cases, a further appeal to the Railway and Municipal Board. A railway company took an appeal direct from the Court of Revision to the Board. When the appeal came up for hearing the chairman stated that the Board was without jurisdiction and the parties joined in a consent to its being heard as if on appeal from the county court judge. The Board then heard the appeal and gave judgment dismissing it. The companies applied for and obtained leave to appeal from said judgment, under section 80 of the "Assessment Act," which allows an appeal on a question of law only, to the Appellate Division which reversed it. On appeal from the last mentioned judgment to the Supreme Court of Canada,

Held, Fitzpatrick C.J. and Idington J. dissenting, that the case was not adjudicated upon by the Board *extra cursum curiæ;* that it came before the Appellate Division and was heard and decided in the ordinary way; an appeal would therefore lie to the Supreme Court under section 41 of the "Supreme Court Act."

Per Duff J.—The decision of the Board that the objection to its jurisdiction could be waived and that it could lawfully hear the appeal from the Court of Revision direct (and affirm or amend the assessment) given at the invitation of both parties pursuant to an agreement between them and acted upon by the Board in hearing the appeal on the merits, and acted on by the Appellate Division, is binding on the parties and not open to

*PRESENT:—Sir Charles Fitzpatrick C.J. and Davies, Idington, Duff and Anglin JJ.

question on this appeal: *Ex parte Pratt* (12 Q.B.D. 334); *Forrest* v. *Harvey* (4 Bell App. Cas. 197); *Gandy* v. *Gandy* (30 Ch. D. 57); *Roe* v. *Mutual Loan Fund Association* (19 Q.B.D. 347); and, consequently, the appellant municipality is precluded from contending on appeal to the Supreme Court of Canada that, in the circumstances, the Appellate Division had no authority under the "Assessment Act" to declare the assessment illegal.

A railway company, under authority of the Parliament of Canada, built an international bridge over the St. Lawrence River at Cornwall and have since run trains over it.

Held, that such superstructure supported by piers resting on Crown soil and licensed for railway purposes was not included in the railway property assessable under sec. 47 of the "Ontario Assessment Act" (R.S.O. [1914] ch. 195); if it is included it is exempt from taxation under sub-sec. 3 of sec. 47.

Judgment appealed against (34 Ont. L.R. 55) affirmed.

APPEAL from a decision of the Appellate Division of the Supreme Court of Ontario(1), reversing the ruling of the Ontario Railway and Municipal Board and quashing the assessment of the respondents' bridge over the St. Lawrence.

Two questions arose on the appeal. First, had the Railway and Municipal Board jurisdiction to deal with the matter except on appeal from a decision of the county court judge? Secondly, had the Township of Cornwall a right to assess the respondents for the Canadian portion of their bridge over the St. Lawrence? The Appellate Division decided against the right to assess.

Watson K.C. and *Gogo* for the appellant.

Ewart K.C. and *W. L. Scott* for the respondents.

THE CHIEF JUSTICE (dissenting).—I think this appeal must be allowed on the ground that the Ontario

(1) 34 Ont. L.R. 55.

1916

TOWNSHIP OF CORNWALL v. OTTAWA AND NEW YORK RWAY. CO.

The Chief Justice.

Railway and Municipal Board had no jurisdiction to hear the appeal from the Court of Revision of the Township of Cornwall. The judgment of the Board was a complete nullity and the Appellate Division could not vary it.

The "Assessment Act," R.S.O. 1914, ch. 195, contains the following sections:—

72. Sub-sec. 1.—An appeal to the county judge shall lie at the instance of the municipal corporation, or at the instance of the assessor, or assessment commissioner, or at the instance of any municipal elector of the municipality not only against a decision of the Court of Revision on an appeal to the said court, but also against any omission, neglect or refusal of the said court to hear or decide an appeal.

79. The decision or judgment of the judge or acting judge shall be final and conclusive in every case adjudicated upon.

80. (1) Where a person is assessed to an amount aggregating in a municipality in territory without county organization $10,000 or upwards, an appeal shall lie from the decision of the judge to the Ontario Railway and Municipal Board and any person who had appealed or was entitled to appeal from the Court of Revision to the judge shall be entitled to make the appeal to the Board.

(2) An appeal to the Board shall also lie where the amount, though originally less than the sum mentioned in the next preceding sub-section, has been increased by the Court of Revision or by the judge so that it equals or exceeds that sum.

(6) An appeal shall lie from the decision of the Board under this section to a Divisional Court upon all questions of law, but such appeal shall not lie unless leave to appeal is given by the said court upon application of any party and upon hearing the parties and the Board.

At the opening of the proceedings before the Ontario Railway and Municipal Board the Chairman said:—

The Board has already held that it has no jurisdiction to entertain an appeal from the Court of Revision; an appeal only lies to the Board from the county judge.

Nevertheless the Board by consent of the parties proceeded to hear and adjudicate upon the matter.

It is perfectly clear that no consent of the parties

can give to the court a jurisdiction which it does not possess. In the case of *In re Aylmer*(1), at p. 262, Lord Esher M.R. said:—

> If on the other hand it is an attempt to give to the court a similar power resting on the consent of the parties, the well known rule applies that the consent of parties cannot give the court a jurisdiction which it does not otherwise possess.

In the American and English Encyc. of Law and Practice, vol. 4, under the title "Appeal," it is said in a note on p. 44:—

> When an appeal should have been taken to an intermediate appellate court, consent cannot give the Supreme Court jurisdiction of it.

The statute having ordained the means by which an appeal may be brought against an assessment and prescribed the courts which shall have power to entertain such appeal, the parties cannot at their own pleasure agree on a different procedure. This is no mere question of formality or abbreviation of procedure. In every legal proceeding it would certainly be simpler to go *per saltum* direct to the final court of appeal. If this course had been permissible the parties need never have gone to the Railway and Municipal Board at all, but might have carried an appeal direct from the Court of Revision to the Appellate Division or even this court if we had been willing to entertain it.

If the court has no jurisdiction to hear a cause, its proceedings cannot, of course, be in any way validated by an appeal from the judgment, neither can the court to which the appeal is carried entertain the same. Encyc. of Law and Practice, vol. 4, p. 46:—

> Though an appeal will lie to the Supreme Court from a decision of an appellate court in a case in which the court has no juris-

(1) 20 Q.B.D. 258.

1916

TOWNSHIP OF CORNWALL v. OTTAWA AND NEW YORK RWAY. CO.

The Chief Justice.

diction by reason of any of the questions involved, the appeal cannot be entertained by the Supreme Court for the purpose of passing upon the merits of the case, but only for the purpose of reversing or vacating the judgment of the Appellate Court and remanding the cause to that court with direction to dismiss the appeal.

I think it is only necessary to point out in addition that the rules which would ordinarily govern in cases between private individuals do so with greater force in one in which the public has an interest. In the present case we have a court without jurisdiction undertaking to direct the alteration of a municipal assessment roll. This it certainly can obtain no authority to do from any consent of parties.

DAVIES J.—The competency of this court to entertain this appeal was first challenged on the ground that the parties had agreed during the course of the litigation to skip the statutory appeal to the county judge from the Court of Revision and appeal directly from the latter court to the Board of Railway Commissioners.

At the hearing, the Board called attention to this deviation from the course of the statutory proceedings, but as it would appear to have been then the desire of both parties, in order to abbreviate procedure and save expense, went on and heard and dismissed the appeal.

On that hearing after some discussion between counsel on the question of the necessity of an appeal to the county judge before coming to the Board of Railway Commissioners, Mr. Scott for the railway company said:—

Then this appeal will be taken as if it had gone before the county judge and we are appealing against an adverse decision of the county judge,

which apparently was accepted as the correct statement of the fact, whereupon the chairman said:—

> Your contention is that under the provisions of the "Assessment Act" the property is not assessable.

There is not anything, however, in the proceedings before the Railway Board indicating any intention upon the part of either party to treat the proceeding as one *extra cursum curiæ* and to ask the Board to act as arbitrators merely. On the contrary, it was to be treated

> as if there had been an appeal to the county judge and the railway company was appealing against an adverse decision of his.

The question both parties desired to have decided was that stated by the chairman: Was or was not the bridge over the St. Lawrence River assessable property?

It is only fair to say that counsel for the municipality followed the chairman's statement with a claim that counsel for the railway should admit that the bridge "was not on railway lands," apparently to exclude a claim that it was exempted under sub-section 3 of section 47 of the "Assessment Act," which admission counsel for the railway company, evidently acting upon an understanding which had been reached, immediately made qualifying the admission afterwards with the statement that

> some portions of the bridge might be on railway lands, but the whole bridge is over the St. Lawrence River.

As a fact, the bridge is one known as a cantilever bridge which crossed the St. Lawrence, an international public river. It was contended at bar that this admission, when read with the concurrent statements, was a concession as to the facts only, leaving the

1916

TOWNSHIP OF CORNWALL v. OTTAWA AND NEW YORK RWAY. CO.

Davies J.

broad question open as one of law whether such a bridge "not on the lands of the railway," but crossing the St. Lawrence River came within the provisions of the "Assessment Act."

It is well to note that while section 48 of the "Railway and Municipal Board Act," ch. 186, R.S.O., gives an appeal from the Board to a Divisional Court upon a question of jurisdiction or upon any question of law, sub-section 6 of section 80 of the "Assessment Act," ch. 195, R.S.O., enacts:—

> An appeal shall lie from the decision of the Board under this section to a Divisional Court upon the questions of law,

omitting any reference to questions of jurisdiction. Under both Acts, the appeals are dependent upon leave being obtained from the Divisional Court, but under the "Assessment Act" they are confined to appeals "upon questions of law," while under the "Board Act" they expressly embrace questions of jurisdiction as well as of law. I conceive the legislature intended that in all cases where the Board had original jurisdiction under the Act constituting it, leave to appeal might be granted either on questions of jurisdiction or of law while such leave could only be granted from the Board's decisions when acting under the "Assessment Act" as a court of appeal, on questions of law.

Leave on this appeal was only granted as it could only be granted under the provisions of the "Assessment Act" on a question of law, which in this particular case was whether the particular bridge was or was not within the "Assessment Act" and liable to be assessed.

On the question of jurisdiction I have reached the conclusion that the Divisional Court of Appeal had jurisdiction to grant leave to appeal from the judg-

ment of the Railway Board and to hear and determine the question of law raised, and that the appeal to this court from their judgment is competent.

I so hold upon the broad grounds that the parties to the appeal were within the jurisdiction of the Railway Board, that the subject matter of the appeal was one within the competence of that Board to decide upon and that while the agreed departure by the parties from the regular procedure to bring the matter before the Board was, it is true, a deviation from the *cursus curiæ*, it was not an attempt to give the Board a jurisdiction over the subject matter and the parties it did not possess, or such a departure from the ordinary practice by consent as would deprive either of the parties of the right of appeal from the Board's decision. No objection was taken to the jurisdiction of the Appellate Division to grant leave to appeal to that court. No objection to the Appellate Division's jurisdiction was raised before that court on the argument of the appeal. It is clear that all parties thought such an appeal would lie, and it hardly seems to me open to argument that the Court of Appeal acted as arbitrators only and not as a competent court believing it had full jurisdiction over the subject matter and the parties.

The judgments of their Lordships of the Judicial Committee in the appeal of *Pisani* v. *The Attorney-General for Gibraltar*(1), in which Sir Montague Smith reviews *Bickett* v. *Morris*(2), and other cases upon the question I am discussing seems to me to lay down at p. 522 the true principle upon which deviations from the *cursus curiæ* should be determined.

(1) L.R. 5 P.C. 516. (2) L.R. 1 H.L. Sc. 47.

1916

TOWNSHIP OF CORNWALL v. OTTAWA AND NEW YORK RWAY. CO.

Davies J.

It is true that there was a deviation from the *cursus curiæ*, but the court had jurisdiction over the subject, and the assumption of the duty of another tribunal is not involved in the question. Departures from ordinary practice by consent are of every day occurrence; but unless there is an attempt to give the court a jurisdiction which it does not possess, or something occurs which is such a violent strain upon its procedure that it puts it entirely out of its course, so that a Court of Appeal cannot properly review the decision, such departures have never been held to deprive either of the parties of the right of appeal.

As to the merits, I have had much difficulty in construing and reconciling the several provisions and sub-sections of section 47 of the "Assessment Act," but I agree that the language of sub-section 3, beginning with the words: "*Notwithstanding anything in this Act contained,*" makes it clear that the superstructures, etc., "on railway lands" (outside of the specified exceptions named in sub-section 2 within which this bridge does not admittedly come) "shall not be assessed."

This railway cantilever bridge spanning the St. Lawrence, it was claimed by respondent was admitted by Mr. Scott before the Board "not to be on railway lands" and so it was claimed not to be within the exemption of sub-section 3. Apart from such admission, I would feel strongly inclined to hold that as a matter of law this bridge was on railway lands and was exempt.

For me, however, a larger and broader question arises than the meaning of the exempting clause read in connection with the admission referred to or irrespective of that admission and that is whether such a bridge as this comes within section 47 at all.

It is not enough to satisfy the court that under the circumstances and in view of the admission of Mr. Scott the bridge does not come within the exempting

clause of the Act. The appellant must go further and shew that it comes with reasonable clearness within the provisions authorizing the assessment of railway property.

Where is the language to be found evidencing an intention on the part of the legislature to authorize the assessment of such a bridge or that part of it within Dominion territory ? The soil of the river to the international line is in the Crown, the abutments supporting the bridge are built in and upon the soil. The river is a public international river, and I agree with the Divisional Court that the bridge over that soil authorized to be so constructed by the Dominion Parliament should be held, as the Divisional Court held, to be in one sense a part of the soil itself. It is a unique structure not provided for by the clauses of the "Assessment Act" authorizing the assessment of property.

Built under the authority and with the licence of the Dominion Parliament over a public international river the soil of which to the boundary line is in the Crown, with supporting piers in this Crown soil, this "superstructure" is then licensed by legislative authority for railway purposes and, as I have said, is part of that soil. I am unable to conclude that the word "highway" used in connection with the words "street or road" in clause (*c*) of sub-section 2 of section 47 includes this public international river. I am not able to find any words in the clauses authorizing assessments of bridges or superstructures on railways which would include such a unique structure as this and being unable to find language authorizing with reasonable clearness such an inclusion I must, of course, hold the bridge not be assessable. As was

1916

TOWNSHIP OF CORNWALL v. OTTAWA AND NEW YORK RWAY. CO.

Davies J.

said by Lord Chancellor Loreburn in *Banknock Coal Co.* v. *Lawrie* (1), at pp. 110-11, quoted at p. 737 of Mr. Chartres's Book on the Judicial Interpretations of Workmen's Compensation Law:—

> We are not at liberty to amplify an enactment so as to include within its ambit matters which upon the plain meaning of the language are not included, even if convinced that the omission was inadvertent and undesigned.

I would, therefore, dismiss the appeal with costs.

IDINGTON J. (dissenting).—This appeal comes to us under somewhat peculiar circumstances, by virtue of section 41 of the "Supreme Court Act," which I shall presently refer to and examine. The respondents appealed against their assessment, for the year 1914, in respect of a bridge over part of the St. Lawrence River, by the township assessor, to the Court of Revision to which no evidence was presented and thereupon the appeal was dismissed.

Section 70 of the Assessment Act provides in such case that:—

> The roll as finally passed by the court, and certified by the clerk as passed, shall, except in so far as the same may be further amended on appeal to the judge of the county court be valid, and bind all parties concerned, notwithstanding any defect or error committed in or with regard to such roll, etc., etc.

There was no appeal taken to the county judge as provided by the Act against the judgment of dismissal by the Court of Revision.

The Act provides for such an appeal and what the judge in such case is to do and thereupon declares as follows:—

> The decision and judgment of the judge or acting judge shall be final and conclusive in every case adjudicated upon.

(1) [1912] A.C. 105.

No such appeal was taken.

Section 80 of said Act provides in cases of which this might have been one that

an appeal shall lie from the decision of the judge to the Ontario Railway and Municipal Board, and any person who had appealed or was entitled to appeal from the Court of Revision to the judge shall be entitled to make the appeal to the Board.

The respondents gave notice of an appeal to said Board in the following terms:—

Take notice that the Ottawa and New York Railway Company, the New York and Ottawa Railway Company and New York Central Lines intend to appeal and hereby appeal against the decision of the Court of Revision for the Township of Cornwall rendered on the 25th day of May, 1914, confirming the assessment of the International Bridge between Canada and the United States No. 1295 on the roll and amounting to $300,000 on the ground that the said bridge is not under the provisions of the "Assessment Act" properly assessable at all.

The Board met on 23rd September, 1914, when the chairman thereof pointed out, that it had held it had no jurisdiction to hear any such appeal, but only appeals from the county judge, and asked counsel for the present appellant if he intended to raise that objection. Counsel replied he would raise all the objections possible.

Then a discussion ensued between counsel and the chairman which shews that for some reason or other in the nature of a personal or professional reciprocity the counsel for appellant (then respondent) seemed to assent to trying the matter on its merits and then the following appears of record:—

Mr. Scott: I appreciate the position you take. Then this appeal will be taken as if it had gone before the county judge, and we are appealing against an adverse decision of the county judge.

The Chairman: Your contention is that under the provisions of the "Assessment Act," the property is not assessable?

1916

TOWNSHIP OF CORNWALL v. OTTAWA AND NEW YORK RWAY. CO.

Idington J.

Mr. Scott: Yes, we have no complaint as to the amount.

Mr. Gogo: Before the argument proceeds, I think my learned friend will concede that the railway bridge is not on railway lands.

Mr. Scott: Yes, there is no dispute as to the facts. It is purely a question of law. To begin with, I put in the assessment notice which is addressed to the Ottawa and New York Railway, the New York and Ottawa Railway and the New York Central Lines. There are a number of items on it, but the only one from which we appeal is the assessment of $300,000 on the International Bridge.

(Assessment notice marked Exhibit No. 1.)

The Chairman: This is a copy of the Assessment Roll?

Mr. Scott: Yes, nothing turns on the question of the parties; I represent them all.

Mr. Gogo: There is another question involved in this case, and that is that it is not a railway company who are operating the bridge. The railway company simply have running rights over the bridge.

Mr. Scott: The facts with regard to this bridge are as follows: The bridge was built and is owned by the Ottawa and New York Railway Company under the provisions of certain Acts of Parliament which I have set out in this memorandum that I propose to hand in.

The parties proceeded to argue the appeal, and in the course of that argument to state the supposed relevant facts.

The memorandum which appellant's counsel refers to therein I infer was supplied later. That memorandum appears in the case before us and a lease which also appears in the case is before us, but when the latter was introduced does not appear. Inasmuch as the two first exhibits in the record are apparently stamped by the clerk of the board, but the copy of lease in the record is not so marked, I infer it was not before the Board.

This argument before the Board appears in the case, apparently, as if taken down by the stenographer of the Board.

From that argument it seems quite clear that counsel for respondents (then appellants) never withdrew the concession he had made, or relied upon anything

in what either of law or fact it clearly covers. Apart from that, he took and seemed chiefly to rely upon, the distinct ground, that inasmuch as the bridge in question was over a navigable river it was, therefore, within the exemption in favour of the railway companies in respect of bridges over public highways. He failed in this contention before the Board, which held that such a public highway as a navigable river was not the kind of highway referred to in the Act, in providing for exemptions from taxation of bridges over highways.

The matter is thus stated by the Board:—

> The exceptions are (1) structures, etc., which are affixed to a highway, street or road merely crossed by a railway, and (2) bridges and tunnels in, out, under or forming part of any highway. Mr. Scott, for the appellants, contends that the River St. Lawrence is a "highway," that the bridge is over it, and, therefore, exempt under the last named exception; further, the river being such a highway, and being merely crossed by the railway, the bridge (a structure or superstructure) is exempt under the first named exception. To this contention the Board cannot accede.

The Board then proceeds to demonstrate why it cannot accede thereto and ends by stating:—

> It is admitted that sub-section (3) of section 47 has no application, the bridge in question not being on railway lands.

Hence, agreeing with Mr. Justice Britton's opinion in a previous case(1), between same parties the Board dismissed the appeal.

It is quite clear to me not only that the whole submission to the Board was irregular and a something never contemplated by the Act, unless and until the matter had been passed upon by the county judge, after a proper trial which should have elicited and

(1) *New York and Ottawa Railway Co.* v. *Township of Cornwall*, 29 Ont. L.R. 522.

1916

TOWNSHIP OF CORNWALL v. OTTAWA AND NEW YORK RWAY. CO.

Idington J.

made clear all the relevant facts, but was also a limited submission proceeding upon the elimination of any claim to exemption on the ground of the bridge being on or over railway lands as provided for in section 47, sub-section (3) of the Act.

It puzzles one to understand why such a course should have been pursued. Assuming the Board had decided the other way I am at a loss to understand how such a proceeding and possible judgment could have overridden the plain terms of section 70 of the Act as quoted above, making the roll as certified by the clerk, after the Court of Revision, final and binding upon all concerned.

The five gentlemen composing the Court of Revision are the same who presumably chose to make that submission. They had no power thus to interfere with the legal product of their own work thus validated by section 70.

A judgment of the Board under such circumstances was clearly not appealable to the Appellate Divisional Court.

It would be difficult to conceive of its being appealable, even if the language providing for an appeal from the Board to the Appellate Division had been much more comprehensive than it is; unless for the limited purpose of having it declared to have been made without jurisdiction.

Moreover, the appeal provided in assessment cases coming before the Board to the Appellate Division is of a very limited character. It is somewhat analogous to that provided in the way of appeals to this court from the Board of Railway Commissioners for Canada. It is limited to questions of jurisdiction and questions of law.

Sub-section 6 of section 80 (already referred to) of the "Assessment Act," provides as follows:—

(6) An appeal shall lie from the decision of the Board under this section to a Divisional Court upon all questions of law, but such appeal shall not lie unless leave to appeal is given by the said court upon application of any party and upon hearing the parties and the Board.

The next sub-section provides for the practice and procedure on such appeals following that prescribed in county court appeals.

The whole jurisdiction rests entirely upon section 80 restricted by sub-section 6 just quoted unless, as may be arguable, aided by section 48 of the "Ontario Railway and Municipal Board Act," ch. 186, R.S.O., 1914.

Sub-section 1 of that section seems to give the Divisional Court express power to hear appeals from the Board upon any question of its jurisdiction as well as upon any question of law.

As the appeal in any case is only upon leave being given one might have expected the order giving leave to define what is to be dealt with. We get no aid in that regard from the order made herein giving leave.

Sub-section 3 of section 48, aforesaid, provides as follows:—

(3) On the hearing of any appeal the court may draw all such inferences as are not inconsistent with the facts expressly found by the Board and are necessary for determining the question of jurisdiction or law, as the case may be, and shall certify its opinion to the Board and the Board shall make an order in accordance with such opinion.

I shall assume for our present purposes that these two sub-sections are applicable to such appeals as contemplated and provided for by sub-section 6 of section 80 of the "Assessment Act."

1916

TOWNSHIP OF CORNWALL v. OTTAWA AND NEW YORK RWAY. CO.

Idington J.

It is possible by doing so to give that some wider meaning than it might otherwise have in itself, and hence due to the Appellate Division, possibly taking that view to so consider it.

In view of the course of the argument herein before us I should not express any definite opinion as to their applicability. I only desire, for argument's sake, to assume that as far as jurisdiction of the Board came in question that may have been appealable and that inferences of fact, from facts found by the Board, might on such an appeal be drawn.

The Appellate Division seems not only to have set aside, or at all events overlooked, the terms of the submission, and proceeded as if the whole of the questions of both law and fact possible to have been originally raised were open for it to deal with, as might be done in an ordinary appeal and that notwithstanding the express concession of counsel as quoted above emphasized by the express statement of the Board also quoted above, and by the meaning evidently attached by him at the time, as the course of his argument before the Board indicates, to the concession he had made.

I am unable to understand why, under the circumstances, the matter should have been again agitated, or permitted to be so, before the Appellate Division.

Not only that but further evidence was introduced, a plan was filed, and correspondence between the Registrar of the Court and counsel had, explanatory thereof. As the result of doing so the Appellate Division has discarded the ground taken by respondents, when before the Board as appellants, and adopted the ground deliberately abandoned before the Board, as

the basis of an opinion which should, if competent, lead to the Board reversing its judgment.

We have not been helped much by anything appearing upon the record to understand such a result as springing from a mere submission by the parties concerned to a tribunal chosen by them, and acting entirely beyond the course defined by statute for such a tribunal to follow, when discharging its statutory duties.

I am driven to the conclusion that the Appellate Division must have inadvertently overlooked the fact that the Board was acting and could not properly act in any other way than as the result of such a submission, and in such a case its deliverance was not appealable.

In such explanation as Mr. Scott offered us he frankly stated that at some stage in the proceedings before the Appellate Division, Mr. Gogo, as counsel for respondent, called attention to the limiting effect of the concession which had been made, and something ensued as result which is not clear. The court has not dealt at all with that aspect of the case.

Mr. Ewart properly declined to enter upon any discussion of the disputed facts upon or in regard to which a misunderstanding (to which he was no party) had evidently arisen, but submitted to us in argument that the question was only one of law and involved no matter of fact.

For two reasons I cannot accede to that view. In the first place as already stated, both questions of law and fact were taken and treated by the Board as taken out of the case submitted to them. It is their understanding of what it was they complaisantly had undertaken to decide, which must govern, and I re-

1916

TOWNSHIP OF CORNWALL v. OTTAWA AND NEW YORK RWAY. CO.

Idington J.

spectfully submit ought to have governed all concerned.

In the next place it is impossible as the Appellate Division found, to treat the whole question involved as one of law. The course of calling for evidence of fact upon which to proceed puts aside Mr. Ewart's submission on that head. The basic facts upon which to found and frame any opinion of the law to govern are disputed unless confined to what the Board expressly states was admitted and acted upon by it. There is no room left therein to draw inferences of fact found in the lease and plan filed in the Appellate Division.

Indeed, the lease alone now appearing in the case, presents many arguable questions of law as to the legal result thereof before applying the provisions therein as fact to the determination of the rights of the parties hereto under the "Assessment Act."

The lease to the holding company is for ninety-nine years and it is by the terms thereof that company which must bear the burden of taxation. And the assessment roll, but for the curative clause already referred to is, I incline to think, defective in form in that connection.

Whether the contracting parties sought to avoid by the form of the provision in the lease relative to taxes, the claims of direct taxation of the holding company as being more favourable for all concerned than a taxation of the reversions, I know not.

Then, again, evidently there was in contemplation some improvements and additions to the structures to be made by the holding company and respectively become the respective properties of the leasing companies at the expiration of the term.

Are such improvements and additions taxable, and if so against whom ?

I am not concerned with all these things further than to point out the involved nature of the facts to be determined before the "Assessment Act" can be properly applied. And I express no opinion upon their effect in that regard.

I may be permitted, however, most respectfully to suggest, from what appears in the case, that if the Appellate Division had refused, as I submit it should have done, to entertain such an irregular appeal, the facts might have been better ascertained by the investigation in due course of law before the county judge and then and thereafter fully considered and given due effect to.

These considerations, moreover, suggest to me that the Appellate Division so far as it did go into an examination of the facts, went beyond its jurisdiction which was confined by the very terms of the Act enabling it to entertain any appeal to mere questions of law, even if the case could otherwise have been held appealable.

The case thus presented for our consideration in appeal is clearly one in which we cannot deal with the merits.

It falls in principle within what the House of Lords had to consider in the case of *Burgess* v. *Morton* (1). There the court had determined, at the request of the parties, upon a submission to the said court of an imperfectly stated case, and thereupon an appellate court had heard an appeal from such determination on the like material and the House of Lords

(1) [1896] A.C. 136.

1916

TOWNSHIP OF CORNWALL v. OTTAWA AND NEW YORK RWAY. CO.

Idington J.

declined to go into the merits and confined itself to declaring that the Appellate Court had no jurisdiction and to reverse it accordingly.

There are numerous cases upon the subject, but this one seems in principle, in its essential features, as nearly on all fours, as one might expect to find, with what happened and is involved herein.

But the question that has puzzled me most and in which we have not been able to elicit assistance from counsel is whether or not this court can be said to stand in relation to the courts below in the same position as the House of Lords stood in that case and numerous others to the courts appealed from.

We must never forget that we are not, as the Court of Queen's Bench formerly in England was, and its successors still are, possessed of an inherent jurisdiction in many ways to keep other courts within the limits of the jurisdiction assigned them.

Our duties in this case are confined within the terms of section 41 of the "Supreme Court Act," as follows:—

> An appeal shall lie to the Supreme 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 by provincial or municipal authority authoized to adjudicate, and the judgment appealed from involves the assessment of property at a value of not less than ten thousand dollars. 52 Vict., ch. 37, sec. 2.

It is quite clear that the Appellate Division is a court of last resort and answers all the requirements of the section in any ordinary case involving an assessment of not less than ten thousand dollars.

Do the words,

in cases where the person or persons presiding over such court is or are by provincial or municipal authority authorized to adjudicate, eliminate such a case as this ?

At first blush it seems incongruous for us to hold by virtue only of this section that the court appealed from had no jurisdiction and that we are entitled not only to so hold as a matter of opinion, but also to reverse on that ground.

Though counsel were invited to consider the section and aid us in regard to its construction no one has remarked upon this difficulty, and I, therefore, am content to assume the difficulty I suggest as possibly in our way does not exist. Inded, we have heard no argument on the section, though it was invited.

I have also observed since the argument the use in said section of the words "or municipal" therein which suggest the possibility of municipalities in some of the provinces being empowered by statute to submit to the court of last resort in the province a question needing determination. I know of none in Ontario and assume if any other power given than what I have referred to it would have been cited.

I may also add that I have considered whether the mere power to express an opinion can be held an authority "to adjudicate" within the meaning of the words of the section. I conceive so, if the opinion is intended to be imperative when confined as it ought to be to a question of law, and hence there may be herein an adjudication within the meaning of the section.

Moreover, on due reflection, the authorization dealt with in these words is that over the subject matter involved in the section as a whole, and not only over such merely incidental matter as arising in its application. Many variations of that which has occurred

1916

TOWNSHIP OF CORNWALL v. OTTAWA AND NEW YORK RWAY. CO.

Idington J.

herein or of an accidental excess of the jurisdiction of the court might in course of time arise. It would seem as if to give effect to any of the objections I suggest might be too much in line with the microscopical method of analyzing a statute and thereby laying a foundation for frittering it away instead of fitting the whole to what it was intended for. In this case the attempting to do so would disappoint what I think was the evident purpose of Parliament in assigning to us the jurisdiction it has by the enactment in section 41.

Assuredly neither the formal judgment nor the opinion judgment gives us any right to assume that the Appellate Division imagined it was acting upon or pursuant to a submission by consent to obtain its opinion, or doing anything but determining as the court of last resort in a province what it supposed it had power to determine.

I do not see how we can escape from declaring our opinion that it is because of the incompetency of the Appellate Division to review and in effect reverse the Board that we are debarred from examining the case on its merits and as a logical result must give as far as we can effect to such opinion.

Such a mode of dealing with appeals calling in question the jurisdiction of the court appealed from by merely expressing an opinion that the court below had no jurisdiction was in vogue in Ontario (then Upper Canada) at an early date. See the remarks of Chief Justice Hagarty speaking for the Queen's Bench in *Ferguson* v. *Township of Howick*(1), at page 553, in the year 1866.

(1) 25 U.C.Q.B. 547.

The later development of the law in Ontario appears in *Howard* v. *Herrington*(1), aided, I think, then by legislative enactment.

It seems to me that we should not only declare the Appellate Division incompetent to pass upon the judgment of the Board, but also give the judgment that court should have given. To do so is to reverse its judgment.

There is a question suggested by the case of *Bickett* v. *Morris*(2), and the course of appellant in the court below. In that case the judge ordinary deviated from the *cursus curiæ* and the party against whom he had decided appealed and succeeded, whereupon the unsuccessful party appealed to the House of Lords when the objection of assent was taken. The court held it was not disabled from pronouncing judgment. Though it was intimated that if the pursuer had been appealing his doing so might have been an answer to him, but not to one who had not acquiesced.

I cannot say that appellant acquiesced for its counsel raised the objection, though perhaps he did not take as determined a stand as some others might have done. Indeed, I doubt much if it ever was competent for the present appellants to acquiesce in anything depriving or tending to deprive the municipality of its taxes to which its legal right was established by the "Assessment Act" until the liability of appellant therefor had been got rid of by due course of law.

In view of both parties having pursued the course taken in this case, I do not think costs should be allowed.

(1) 20 Ont. App. R. 175. (2) L.R. 1 H.L. Sc. 47.

1916

TOWNSHIP OF CORNWALL v. OTTAWA AND NEW YORK RWAY. CO.

Idington J.

The only justification for such litigation as has been followed herein might be the hope of a final and binding decision upon the questions raised and that was hopeless from the start if due regard had been had to the recognized state of the law.

In any result got or likely to be got it would not bind either party in future years. Indeed, even as to the year involved herein such a decision as either the Board or Appellate Division or this court might render as against the appellant might be tested by litigation rested upon the prior validation of the roll by the "Assessment Act" and the result in the Court of Revision.

I, therefore, think the appeal should be allowed on the ground that the court appealed from had no jurisdiction to pronounce the judgment it did or award the costs awarded.

DUFF J.—This appeal concerns the assessability under the provisions of the "Ontario Assessment Act" (R.S.O., ch. 195, secs. 47 and 48) of part of a railway bridge owned and occupied by the respondents, the Ottawa and New York Railway Co., crossing the St. Lawrence River near Cornwall. Part of this bridge is within the territorial limits of the Township of Cornwall and was entered in the assessment roll for the year 1914 of the appellant township and assessed at the sum of $300,000.

Before coming to the merits of the question of the legality of the assessment there are two technical points which it will be convenient to consider together. The first concerns the competence of the present appeal, or, as I prefer to put it, the appealability of the

judgment of the Court of Appeal; and the second is the question whether assuming that judgment to be appealable to this court, it ought to be reversed on the ground that in the particular circumstances in which it was pronounced, the Court of Appeal had no authority to give judgment on the validity of an assessment under the statutory enactment or enactments, sec. 80, "Assessment Act," ch. 95, R.S.O., 1914; sec. 48, "Railway and Municipal Board Act," ch. 186, R.S.O., 1914, under which it professed to act because the essential statutory prerequisites of that authority were wanting.

The proceedings must be briefly noticed. The respondent gave notice of appeal from the assessment to the Court of Revision, and on that appeal the assessment was confirmed. No notice of appeal to the county court judge was given under section 72 of the "Assessment Act," but on the 25th of May, 1914, the respondent gave notice of appeal direct from the Court of Revision to the Ontario Railway and Municipal Board, and on the 7th October of the same year judgment was pronounced dismissing the appeal. On the 4th of December, 1914, leave was obtained by the respondent to appeal to the Appellate Division under section 80 of the "Assessment Act," and on this appeal judgment was pronounced on the 26th of April, 1915, declaring the assessment to be invalid. Both parties appear to have concurred in the view that as the right of appeal expressly given by the "Assessment Act" to the Railway and Municipal Board was a right of appeal from a decision of a county court judge pronounced under the authority of section 72, and that the respondents could not without the consent of the appellant municipality bring the question

1916

TOWNSHIP OF CORNWALL v. OTTAWA AND NEW YORK RWAY. CO.

Duff J.

disputed between them before the Board by way of direct appeal from the Court of Revision; at the same time they appear also to have concurred in the view that the objection to the competence of such an appeal direct could be effectively waived by the appellant municipality.

The objection was waived and the Board acting obviously on the view of the parties that the effect of the waiver was to bring the provisions of section 80 of the "Assessment Act" into play just as if there had been a judgment by the county court judge and they were hearing an appeal from that judgment, heard the appeal and pronounced judgment in favour of the municipality dismissing the appeal on the merits.

It is now said against the appellant municipality that this order was not an order of the Board pronounced in exercise of its statutory jurisdiction and consequently that it was not appealable to the Court of Appeal under section 80 of the "Assessment Act," or section 48 of the "Ontario Municipal and Railway Board Act"; and that in consequence the judgment of the Court of Appeal must be deemed to have been a judgment pronounced in an appeal heard pursuant to a *directio personarum* and not in exercise of any authority given by law with the result, of course, that it is not appealable to this court on the authority of *Burgess* v. *Morton* (1), and the decisions referred to in the judgments of the Law Lords in that case. While on behalf of the appellant municipality it is said that the judgment of the Court of Appeal declaring the assessment in question invalid was a judgment which

(1) [1896] A.C. 136.

the Court of Appeal had no legal authority to pronounce; because the authority of the Court of Appeal in respect of such matters arises only when there is an appeal before that court from an order made by the Board in a proceeding in which the Board itself would have had authority to deal with an assessment by pronouncing it valid or invalid, and that the Board in this instance had no such authority because the objection referred to above going to the statutory conditions of the Board's authority was an objection of the kind that cannot be waived. The judgment of the Court of Appeal nevertheless, it was argued on behalf of the appellant municipality, is a judgment of a court of general jurisdiction having *inter alia* authority—certain conditions being satisfied — to pronounce a judgment of the character of that now appealed from; that the judgment necessarily involves a decision that the conditions of jurisdiction existed, a decision appealable to this court as being a judgment of a court of last resort in an assessment matter within the meaning of section 41 of the "Supreme Court Act."

I have no difficulty in holding that the appeal lies. The judgment of the Court of Appeal is *ex facie* a judgment pronounced in an appeal regularly before the court after leave given under section 80 of the "Assessment Act." There is not a suggestion in the formal judgment, in the reasons for judgment, in the order giving leave to appeal that the court was acting otherwise than in the normal course. It must, therefore, be taken in the absence of evidence to the contrary, and there is none, that the appeal was heard and judgment was pronounced in the ordinary course of jurisdiction.

That being so the point as to the appealability of

1916

TOWNSHIP OF CORNWALL v. OTTAWA AND NEW YORK RWAY. CO.

Duff J.

this judgment is, I think, disposed of by the judgment of the Court of Appeal in an appeal from a winding-up order made in exercise of the jurisdiction given by the "Companies Act, 1862." *In re Padstow Total Loss and Collision Assurance Association* (1). At page 142, Sir Geo. Jessel M.R. puts the matter in a sentence:—

> The first point to be considered is whether, assuming that the association was an unlawful one, and that the court had no jurisdiction to make the order, an appeal is the proper mode of getting rid of that order. I think that it is. I think that an order made by a court of competent jurisdiction which has authority to decide as to its own competency must be taken to be a decision by the court that it has jurisdiction to make the order, and consequently you may appeal from it on the ground that such decision is erroneous.

In this conection three other decisions may usefully be referred to. In *Pisani* v. *Attorney-General for Gibraltar* (2) it was in substance held that even where there was a deviation from the *cursus curiæ* unless there was an attempt to give the court a jurisdiction which it did not possess or a strain upon its procedure putting it so entirely out of its course that the decision could not properly be reviewed, such a departure does not deprive either party of the right of appeal. I refer particularly to the judgment of Sir Montague Smith at page 522.

Then there is *Morris* v. *Davies* (3), the effect of which is summarized in Sir Montague Smith's judgment at page 524. A new trial having been ordered, Lord Lyndhurst instead of sending the case back to a jury by consent of the parties heard and disposed of it himself. In the House of Lords the objection taken to the competence of an appeal from Lord

(1) 20 Ch. D. 137. (2) L.R. 5 P.C. 516.
(3) 5 Cl. & F. 163.

Lyndhurst's decision was rejected by their Lordships on the ground that it was never intended that Lord Lyndhurst should try the case otherwise than as a judge or that it was not to go on subject to all the incidents of a cause regularly heard in court, including an appeal, if the parties so desired.

In *Low* v. *General Steam Fishing Co.* (1) the House of Lords had to consider the appealability of a judgment by the Second Division of the Court of Session, in these circumstances. On the hearing of a claim under the "Workmen's Compensation Act" by a sheriff substitute, the sheriff substitute refused to state a case upon a question which was afterwards held to be a question of law. On appeal, the Second Division after intimating their view that the arbitrator was bound to state a case suggested that counsel should concur in a minute, the effect of which was that the case should be disposed of by the Second Division as if upon a case stated by sheriff substitute in terms of the statute, which was accordingly done. On appeal it was held by their Lordships that what was done merely amounted to an abbreviation of procedure and was not such a departure from the *cursus curiæ* as to deprive the parties of their appeal. In the first and fourth of these cases it may be noted that the jurisdiction in dispute was a special statutory jurisdiction.

The contention of the appellant municipality presents a more difficult question. The first step is to consider the character of the order of the Board. There is sufficient evidence in the form of the order itself and in the reasons for judgment that the order

(1) [1909] A.C. 523, at p. 528.

1916

TOWNSHIP OF CORNWALL v. OTTAWA AND NEW YORK RWAY. CO.

Duff J.

was intended to be and was pronounced in exercise of the corporate authority of the Board. The members of the Board were not as individuals arbitrating in a matter before them by consent; the order was pronounced upon a matter in respect of which it must be assumed they held themselves to have jurisdiction by reason of the fact that the objection above referred to had been waived.

The view of the Board and of the parties was that waiver by the appellant municipality of the objection that no appeal lies to the Board from the Court of Revision *per saltum* and consent that the appeal should be treated as an appeal from the county judge was sufficient to give the Board power to grant the relief asked in exercise of its statutory authority; and it is manifest that the court of appeal treated the appeal before them as an appeal in the ordinary course, and that they had no thought of exercising a jurisdiction resting upon consent alone.

In the view I take it is unnecessary to say whether or not the Board rightly decided that the objection to the appeal could be overcome by waiver. I have no difficulty in holding that by its conduct in concurring with the respondent company's invitation to the Board to hold that the objection could be waived and in taking part in the appeal to the court of appeal which followed without objection the appellant municipality has precluded itself from contending on this appeal that the decision of the Board upon the point of competence was erroneous.

Two considerations weighing against this view have to be examined. First, it is said to be a case for the application of the maxim consent cannot give juris-

diction. This, of course, simply begs the question. Consent can give jurisdiction when it consists only in waiver of a condition which the law permits to be waived, otherwise it cannot. Where want of jurisdiction touches the subject matter of the controversy or where the proceeding is of a kind which by law or custom has been appropriated to another tribunal then mere consent of the parties is inoperative. No consent, for example, could give the Supreme Court of Ontario jurisdiction to hear a petition for determining the right to a seat in Parliament. But the question before us is not whether the consent of the municipality did in point of law give the Board jurisdiction, but whether the municipality having concurred with the respondents in asking the Board to hold that such was the effect of consent, and the Board having so held and acted upon its holding, and the municipality having taken chances of a favourable decision by the Board, and by the court of appeal on that footing, can now, on appeal, dispute the Board's decision on the point of jurisdiction. Generally speaking, where the proceeding is of a character appropriate to a tribunal which has, in given conditions, jurisdiction over the subject-matter and is competent to decide the question whether such conditions can be waived, it is competent to the parties to agree to recognize the validity of the tribunal's judgment and thereby (if the tribunal decide that it may act upon such an agreement and do so) to preclude themselves from raising afterwards the objection that, in the particular case, some condition of jurisdiction was wanting in fact.

Reverting to the case before us, the question brought before the Board was in itself precisely the

1916

TOWNSHIP OF CORNWALL v. OTTAWA AND NEW YORK RWAY. CO.

Duff J.

kind of question which it would be the Board's duty to determine under section 80 of the "Assessment Act," and the object of the parties in omitting what in the circumstances they no doubt, without any disrespect regarded as the formality of an appeal to the county court judge was, to use an expression taken from a reported case to which I have referred, merely the abbreviating procedure and saving expense. The effect of such an agreement has been considered in a number of cases, to some of which it will be useful to refer. In *Forrest* v. *Harvey*(1), the House of Lords had to consider the effect of a defendant appearing before the Magistrates of Leith in answer to an application under a statute conferring jurisdiction with respect to small debts. It was admitted that the jurisdiction of the magistrate might have been successfully objected to on the ground of non-observance of certain essential formalities, and the principal question their Lordships had to consider was whether this defect had been cured by waiver. Lord Brougham appears to have taken the view, although it was not strictly necessary to the decision that the defect could not have been cured by any agreement to waive the objection, and Lord Cottenham agreed that the mere failure to take the objection at the earliest moment was not an answer to it. Lord Cottenham and Lord Campbell, however, concurred in holding that the parties might contract together in such a way as to prevent them disputing the competence of a tribunal which had assumed jurisdiction, although some otherwise essential statutory condition of jurisdiction were wanting.

(1) 4 Bell App. Cas. 197.

In *Ex parte Pratt*(1), at p. 341, the same principle, the primary court being a superior court, is expressed by Lord Justice Bowen in these words:—

> There is a good old-fashioned rule that no one has a right so to conduct himself before a tribunal as if he accepted its jurisdiction, and then afterwards, when he finds that it has decided against him, to turn round and say, "You have no jurisdiction." You ought not to lead a tribunal to exercise jurisdiction wrongfully.

It is not disputed that there was an express agreement between the municipality and the respondents to submit the point of competence to the judgment of the Board; to invite the Board to hold that it had jurisdiction; and I think the proper conclusion is that it is not open to the appellant municipality to raise by way of appeal this objection which I am now considering.

The second point touches the effect of the "Ontario Assessment Act" and the "Railway and Municipal Board Act." It is said that the effect of section 70 of the "Assessment Act" is that the assessment roll is binding as finally passed by the Court of Revision except as altered on appeal to the judge of the county court and that this provision in fact forbids any exercise of jurisdiction by the Board or the court of appeal in the absence of an appeal to the county court.

I agree that if on the true construction of those statutes an agreement not to dispute the jurisdiction of the Board in the circumstances in question here is in conflict with the policy of the law, effect cannot be given to such an agreement. I do not think such is the effect of the statutes.

The provisions of the "Railway and Municipal Board Act" and the "Assessment Act" relating to the

(1) 12 Q.B.D. 334.

1916

TOWNSHIP OF CORNWALL v. OTTAWA AND NEW YORK RWAY. CO.

Duff J.

powers and character of the Board as a tribunal evidence an intention on the part of the legislature that the Board should have jurisdiction, subject to review, to pass upon any question whether as regards any appeal touching a subject-matter within its competence the conditions precedent of its authority had been fulfilled.

The following provisions are relevant:—

R.S.O., ch. 186, 1914.

Sec. 5, sub-sec. 4.—The Board shall have all the powers of a Court of Record and shall have an official seal which shall be judicially noticed.

Sec. 5, sub-sec. 5(*b*).—The Chairman of the Board, if at the time of his appointment a barrister of at least ten years' standing at the bar, shall not be removed at any time by the Lieutenant-Governor in Council, except upon an address of the Assembly.

Sec. 7.—Whenever in any Act it is provided that any railway company shall, during construction of any line of railway, furnish such information as to the location and plans of passenger or freight stations as may from time to time be required by the Lieutenant-Governor or any of his Ministers, or that such company shall comply with any directions that may be given for the erection of stations or the number of them, such information shall be furnished to the Board and its directions shall be complied with by the company. 3-4 Geo. V., ch. 37, sec. 5.

Sec. 21, sub-sec. 3.—The Board shall, as to all matters within its jurisdiction, have authority to hear and determine all questions of law or of fact.

Sec. 21, sub-sec. 4.—The Board shall, as respects the amendment of proceedings, the attendance and examination of witnesses, the production and inspection of documents, the enforcement of its orders, the entry on and inspection of property, and other matters necessary or proper for the due exercise of its jurisdiction, or otherwise for carrying this Act or any other general or special Act into effect, have all such powers, rights and privileges as are vested in the Supreme Court.

Sec. 22.—The Board shall have exclusive jurisdiction in all cases and in respect of all matters in which jurisdiction is conferred on it by this Act or by any other general or special Act. 3-4 Geo. V., ch. 37, sec. 22.

Sec. 38.—(1) A certified copy of any order or decision made by the Board under this Act or any general or special Act may be filed in the office of the Clerk of Records and writs, and shall thereupon

become and be enforceable as a judgment or order of the Supreme Court to the same effect, but the order or decision may be nevertheless rescinded or varied by the Board.

(2) It shall be optional with the Board to adopt the method provided by this section for enforcing its orders or decisions or to enforce them by its own action. 3-4 Geo. V., ch. 37, sec. 38.

Sec. 43.—The Board may make general rules regulating its practice and procedure. 3-4 Geo. V., ch. 37, sec. 43.

Sec. 48(1).—An appeal shall lie from the Board to a Divisional Court upon a question of jurisdiction or upon any question of law, but such appeal shall not lie unless leave to appeal is obtained from the court within one month after the making of the order or decision sought to be appealed from or within such further time as the court, under the special circumstances of the case, shall allow after notice to the opposite party stating the grounds of appeal.

Sec. 48, sub-sec. (8).—Save as provided in section 47,

(*a*) Every decision or order of the Board shall be final; and

(*b*) No order, decision or proceeding of the Board shall be questioned or reviewed, restrained or removed by prohibition, injunction, certiorari or any other process or proceeding in any court. 3-4 Geo. V., ch. 37, sec. 48.

"Assessment Act," ch. 195, R.S.O. 1914.

Sec. 80(5).—The Board shall have power upon such appeal to decide not only as to the amount at which the property in question shall be assessed, but also all questions as to whether any persons or things are liable to assessment or exempt from assessment under the provisions of this Act.

(6) An appeal shall lie from the decision of the Board under this section to a Divisional Court upon all questions of law, but such appeal shall not lie unless leave to appeal is given by the said court upon application of any party and upon hearing the parties and the Board.

Section 21, sub-section 4, indicates an intention on the part of the legislature that it should be the duty of the Board to decide whether or not the conditions essential to its jurisdiction as regards any subject-matter within its competence have or have not been fulfilled, and I think the proper conclusion having regard to the quoted provisions as a whole, is, for all relevant purposes, independently of section 48, sub-section 8(*b*), that a decision of the Board upon such a question is equivalent to a decision of

1916

TOWNSHIP OF CORNWALL v. OTTAWA AND NEW YORK RWAY. CO.

Duff J.

a superior court. In so far as the decision relates to a question of fact it is final, in so far as it depends upon questions of law, then an appeal lies under section 48. It is not necessary to decide whether section 48, sub-section 8(*b*), applies to orders made by the Board in professed exercise of the jurisdiction given by some statute other than the "Railway and Municipal Board Act." It is clear to my mind that a decision of the Board that the conditions of jurisdiction under section 80 of the "Assessment Act" have been observed, in so far as it is not a decision upon a mere question of fact, is a decision upon a question of law within that section and appealable as such. In these circumstances I see no reason why the parties to an appeal may not competently contract to accept the judgment of the Board on any such question as final; and, if so, it would follow that a party inviting the Board to find on a certain state of facts that it had jurisdiction to deal with a subject-matter which is in given conditions within the cognizance of the Board and having had the advantage of the Board's decision that it had jurisdiction by getting a hearing on the merits of a question which it desired to have disposed of, could not afterwards be heard to say by way of appeal that the facts did not exist which were necessary in point of law to give the Board jurisdiction.

Gandy v. *Gandy*(1), at page 82; *Roe* v. *The Mutual Loan Fund*(2). See Everest & Strode, "Estoppel."

Is the bridge assessable under sections 47 and 48 of the "Ontario Assessment Act?" It is convenient

(1) 30 Ch. D. 57.

(2) 19 Q.B.D. 347.

to set out the first of these enactments in full. Section 47 as follows:—

47. (1).—Every steam railway company shall annually transmit on or before the first day of February to the clerk of every municipality in which any part of the roadway or other real property of the company is situate, a statement shewing:—

(*a*) The quantity of land occupied by the roadway, and the actual value thereof (according to the average value of land in the locality) as rated on the assessment roll of the previous year;

(*b*) The vacant land not in actual use by the company and the value thereof;

(*c*) The quantity of land occupied by the railway and being part of the highway, street, road or other public land (but not being a highway, street or road which is merely crossed by the line of railway) and the assessable value as hereinafter mentioned of all the property belonging to or used by the company upon, in, over, under, or affixed to the same;

(*d*) The real property, other than aforesaid, in actual use and occupation by the company, and its assessable value as hereinafter mentioned; and the clerk of the municipality shall communicate such statement to the assessor. 4 Edw. VII., ch. 23, sec. 44(1).

(2) The assessor shall assess the land and property aforesaid as follows:—

(*a*) The roadway or right of way at the actual value thereof according to the average value of land in the locality; but not including the structures, sub-structures and superstructures, rails, ties, poles and other property thereon;

(*b*) The said vacant land, and its value as other vacant lands are assessed under this Act;

(*c*) The structures, sub-structures, superstructures, rails, ties, poles, and other property belonging to or used by the company (not including rolling stock and not including tunnels or bridges in, over, under, or forming part of any highway), upon, in, over, under or affixed to any highway, street or road (not being a highway, street or road merely crossed by the line of railway) at their actual cash value as the same would be appraised upon a sale to another company possessing similar powers, rights and franchises, regard being had to all circumstances adversely affecting the value, including the non-user of such property; and

(*d*) The real property not designated in clauses (*a*), (*b*) and (*c*) of this sub-section in actual use and occupation by the company, at its actual cash value as the same would be appraised upon a sale to another company possessing similar powers, rights and franchises. 4 Edw. VII., ch. 23, sec. 44(2).

(3) Notwithstanding anything in this Act contained, the structures, sub-structures, superstructures, rails, ties, poles, wires and

1916

TOWNSHIP OF CORNWALL v. OTTAWA AND NEW YORK RWAY. CO.

Duff J.

other property on railway lands and used exclusively for railway purposes or incidental thereto (except stations, freight sheds, offices, warehouses, elevators, hotels, roundhouses and machine repair and other shops) shall not be assessed. 6 Edw. VII., ch. 36, sec. 13.

(4) The assessor shall deliver at, or transmit by post to, any station or office of the company a notice, addressed to the company, of the total amount at which he has assessed the said land and property of the company in his municipality or ward shewing the amount for each description of property mentioned in the above statement of the company; and such statement and notice respectively shall be held to be the assessment return and notice of assessment required by sections 18 and 49.

(5) A railway company assessed under this section shall be exempt from assessment in any other manner for municipal purposes except for local improvements. 4 Edw. VII., ch. 23, sec. 44(3-4).

These provisions are perhaps a little wanting in precision, but one thing is not doubtful, and that is that "structures, substructures and superstructures" on "the roadway or right-of-way" are not assessable; it being understood that this does not apply to "structures, substructures and superstructures * * * upon, in, over, under or affixed to any highway, street or road" except in the case of a mere crossing. It is also clear that all such "structures, sub-structures and superstructures" which are on "railway lands" and are used exclusively for railway purposes or incidental thereto are (with certain exceptions not material at present) not assessable. By sub-section 5(*h*) of the interpretation section (section 2), all structures and fixtures

erected or placed upon, in, over, under or affixed to any highway, lane or other public communication or water,

are comprehended under the word "land." It was admitted on the hearing before the Board by the respondents that the part of the bridge, the assessment of which is now in question, is supported by piers resting on the bed of the St. Lawrence River, which is the

property of the Crown; and I propose to consider the construction and application of the Act in view of this admission of fact and afterwards to discuss the point made on behalf of the appellant municipality that the admission was of such a character as to preclude the respondent from invoking sub-section 3 of section 47 for any purpose whatever. I should add, however, that it seems to me to be perfectly clear that both parties intended that the hearing before the Board should proceed and that the hearing did proceed upon the assumption that the bridge is lawfully where it is.

In these circumstances, I have reached the conclusion that on this question of the assessability of the bridge the appellant municipality must fail. It is a long settled rule that a given subject is not to be held to be a subject of taxation unless the intention to include it among the subjects of taxation is expressed in "clear and unambiguous language."

Oriental Bank Corporation v. *Wright* (1), at p. 856; *Simms* v. *Registrar of Probates* (2), at p. 337.

The rule is so well settled and so well known that it is right to read every taxing Act on the assumption that it has been framed in view of the rule. I am not disposed to go so far as to say that the intention to exclude such property as that in question is clearly expressed in section 47. But on the other hand "railway" in my judgment in sub-section 2(*a*) is capable of being read as including a viaduct resting by piers upon land occupied solely under authority of a licence to occupy, and if it be right to read it in that broad sense there can be no question that this bridge is excluded by the last sentence of that clause.

(1) 5 App. Cas. 842. (2) [1900] A.C. 323.

1916

TOWNSHIP OF CORNWALL v. OTTAWA AND NEW YORK RWAY. CO.

Duff J.

Nor have I any doubt (having regard to the part of the interpretation section quoted above) that sub-section 3 of section 47 can reasonably be read as extending to structures such as this bridge.

These views of these provisions are not free from objection; but it is sufficient to find that, on a reasonable construction of the enactment upon which the appellant municipality relies, the bridge is excluded. That is sufficient on the principle above indicated for holding it to be non-assessable. And that is the conclusion to which, I think, effect should be given.

I must add a word upon the effect of the admission made before the Board. Counsel who appeared for the respondent company assumed that sub-section 3 had no application to the question before the Board and said so. In this he was a little precipitate. But reading the proceedings as a whole I am quite convinced that it would be doing him an injustice to construe what was said during the course of the argument by him as amounting to an agreement (as one of the terms of the consent for the hearing of the appeal) that consideration of sub-section 3 should be entirely eliminated.

It is quite plain, I think, that the admission went to the point of fact and to that only, that the piers supporting the bridge rested on the bed of the river which was public property. I do not think that anybody was misled by that admission into thinking that counsel was conceding that the bridge was wrongfully there or that he was consenting to a hearing of the appeal upon that footing; and I see no reason to suppose, and I cannot suppose, that counsel for the appellant municipality assumed that any such consent was being given.

I entirely agree with Mr. Watson that the court ought not to tolerate any attempt, if such an attempt were made, to recede from the admission of fact which undoubtedly was given whatever the consequences might be; but giving full effect to that admission fairly construed from the point of view of both parties, I can see nothing which precludes us from considering and giving effect to sub-section 3 upon the basis of fact above indicated.

In the result I think the appeal fails and should be dismissed with costs.

ANGLIN J.—At the threshold of this appeal we are confronted by two questions of jurisdiction—one a question of the jurisdiction of the Appellate Division raised by the appellants; the other a question of the jurisdiction of this court, raised not by the respondents but by the court itself.

In *Re Ontario and Minnesota Power Company and The Town of Fort Frances*(1), the Appellate Division, on the 27th November, 1914, held that the Ontario Railway and Municipal Board had no jurisdiction to entertain an appeal brought to it directly from a court of revision. In that case the question of jurisdiction arose on an application for leave to appeal, made under R.S.O., 1914, ch. 195, sec. 80, sub-sec. 6 (then 3 & 4 Geo. V., ch. 46, sec 13), from the decision of the Board that an appeal did not lie to it directly from the Court of Revision.

In the present case, decided in the Appellate Division on the 26th April, 1915, leave had been sought and obtained for an appeal, and, although the fact

(1) 32 Ont. L.R. 235.

1916

TOWNSHIP OF CORNWALL v. OTTAWA AND NEW YORK RWAY. CO.

Anglin J.

that the appeal to the Railway Board had been taken directly from the Court of Revision appeared on the face of the order of the Board and cannot conceivably have escaped the attention of the Appellate Court, it proceeded to hear the appeal and to deal with it, so far as the certificate of its judgment shews, in the ordinary course, as from a decision of the Board made in the exercise of its jurisdiction under section 80 of the "Assessment Act" Why ? Certainly neither because the court had forgotten that within six months it had affirmed the decision of the Railway Board that no appeal lay to it directly from the Court of Revision, nor because it meant to reverse that recent judgment without alluding to it. That is to me inconceivable. Then why? Either because the court regarded the consent or waiver upon which the Board had proceeded as involving an agreement that its decision should be subject to an appeal to the Appellate Division—that court thus itself proceeding by consent; or because, applying the ratio of the decision in *Morris* v. *Davies*(1), and giving effect to the consent or waiver according to the intention of the parties, it allowed it to operate so as to make the decision of the Board regular and subject to the right of appeal conferred by the statute. That such a consent may be given that effect was the basis of the decision of the Judicial Committee in *Pisani* v. *Attorney-General for Gibraltar*(2), at pages 521 *et seq.*

If the Appellate Division proceeded upon the former assumption its opinion as certified would not be a

judgment of the court of last resort

(1) 5 Cl. & F. 163. (2) L.R. 5 P.C. 516.

within section 41 of the "Supreme Court Act." Its validity and binding effect would depend wholly upon the consent on which it was based; it would not be for any purpose appealable to this court; and this appeal should be quashed.

But if the Appellate Division had proceeded by consent that fact would almost certainly have appeared on the face of the certificate of its judgment. The certificate is silent as to consent and is in the form usual upon appeals from the Railway Board. It would, therefore, seem to me more probable that the court dealt with the order of the Board as appealable to it under section 80 of the "Assessment Act." As already pointed out it cannot have made the mistake of considering that the Board had jurisdiction apart from consent or waiver to entertain an appeal directly from the Court of Revision. It follows that, if the Appellate Division did not itself proceed by consent, it must have deemed the question of jurisdiction concluded.

But, it may be said, the jurisdiction of the Appellate Division was purely statutory and the principle of the judgments in *Morris* v. *Davies*(1), and *Pisani* v. *Attorney-General for Gibraltar*(2), is inapplicable. Without at all acceding to that contention, if it be sound, the parties having both acquiesced in that court hearing and disposing of the appeal to it in the exercise of its curial function, and not as a body proceeding by consent only and discharging the function of quasi-arbitrators, upon the principle of the decision in *Bickett* v. *Morris*(3), there is a personal bar against

(1) 5 Cl. & F. 163. (2) L.R. 5 P.C. 516.
(3) L.R. 1 H.L. Sc. 47.

1916

TOWNSHIP OF CORNWALL v. OTTAWA AND NEW YORK RWAY. CO.

Anglin J.

either of them taking the ground, whether for the purpose of entirely precluding an appeal to this court, or of preventing an appeal upon the merits, that the decision of the Appellate Division is not a final judgment of the court of last resort in the province, made in the exercise of its jurisdiction under section 80 of the "Assessment Act," and, therefore, appealable to this court under section 41 of the "Supreme Court Act." That this court has jurisdiction to entertain this appeal, if only for the purpose of determining that the judgment of the Appellate Division was pronounced without jurisdiction, is the appellants' contention. But upon the authority of *Bickett* v. *Morris* (1) they cannot be heard to urge that ground of appeal. If the Appellate Division proceeded by consent, there would be no appeal whatever from its order; if it did not proceed by consent, its judgment is subject to appeal and, its jurisdiction not being open to question, the appeal must be disposed of on the merits.

Section 48 of the "Ontario Railway and Municipal Board Act" in my opinion has no application to appeals under section 80 of the "Assessment Act." If it had, its 8th sub-section would have concluded against the appellants the question of jurisdiction raised by them.

On the merits I agree that the authorization by Parliament, in the exercise of the paramount jurisdiction conferred upon it in regard to railways extending beyond the limits of a province, of the construction of the bridge in question not only renders the occupation by it of the land upon and over which it is erected

(1) L.R. 1 H.L. Sc. 47.

lawful, but vests in the railway company owning the bridge such an interest in that land that it may be deemed for the purpose of sub-section 3 of section 47 of the "Assessment Act" (R.S.O., 1914, ch. 195), railway land upon which a superstructure is erected, and that such superstructure is, therefore, exempt from assessment.

It was very strongly argued either that it was made a condition of the consent of counsel for the municipality to the Railway Board hearing the appeal to it from the Court of Revision, that the appeal should be dealt with on the footing, or that there was an admission of counsel for the railway company binding upon his clients, that the bridge in question does not stand on railway lands. So far as such a condition can be established, it must be strictly observed; so far as any such admission is an admission of fact it is undoubtedly conclusive. But a mere admission upon a matter of law is equally clearly not binding, and, if erroneous, may, and should, be ignored by the court.

An examination of the record makes it clear that counsel for the municipality did not ask for, and counsel for the company did not assent to, any such admission being made as a condition of the Board proceeding to hear the appeal as if it had been brought from a decision of the county judge. The question of jurisdiction owing to the appeal having been brought directly from the Court of Revision having been raised, the following discussion ensued:—

The Chairman: This point has been up in two or three cases and I do not see any other interpretation that can be given to the statute. The procedure is apparently clear; there must be an appeal from the Court of Revision to the county judge or district judge, and then from the judge to this Board. The notice of appeal to this Board is dated 24th of May, 1914.

1916

TOWNSHIP OF CORNWALL v. OTTAWA AND NEW YORK RWAY. CO.

Anglin J.

Mr. Scott: I was ready to come here and have this tried on the 3rd June, and it was adjourned to accommodate my learned friend.

Mr. Gogo: I do not want to take any advantage.

Mr. Scott: When I did that to accommodate you, you should not take advantage of the position now.

Mr. Gogo: I would rather fight the matter out on its merits.

Mr. Scott: You were served with a written notice of our intention to appeal, and surely that can be amended and made as an appeal to the county judge.

Mr. Gogo: If you think you are in any way prejudiced, I will concede your right, and we can go on now.

Mr. Scott: I think that would be a fair thing to do. It is a solicitor's slip and the matter will have to be tried out sooner or later.

Mr. Gogo: I am willing to have it tried out now.

Mr. Scott: I appreciate the position you take. Then this appeal will be taken as if it had gone before the county judge, and we are appealing against an adverse decision of the county judge.

The Chairman: Your contention is that under the provisions of the "Assessment Act," the property is not assessable?

No doubt counsel for the company almost immediately afterwards stated that he

conceded that the railway bridge is not on railway lands;

adding, however,

there is no dispute as to the facts; it is purely a question of law.

Later on he said:—

There may be some portions of the bridge on our lands, but the whole bridge is over the St. Lawrence River * * * a public river;

and again:—

The test is not whether it is on railway lands. We are there with the permission of the Crown, and to that extent I suppose we are rightfully there. Undoubtedly the title is in the Crown; it is a public river that we are crossing, but it may be said to be public railway land.

Finally he said.

sub-section 3 (of section 47) does not apply.

The only admission in all this that is binding is that the bridge is over the St. Lawrence River and is there with the permission of the Crown. The state-

ments that it is not on railway lands and that sub-section 3 of section 47 does not apply are merely mistaken admissions of legal consequences which were not asked for as conditions of the Board being allowed to assume jurisdiction and are, therefore, not binding upon the company.

If I had not reached the conclusion that the respondents' bridge is exempt under sub-section 3 of section 47, and that there is nothing to preclude their invoking that sub-section, I should be prepared to sustain the judgment of the Appellate Division on the ground that a bridge situated as is that in question, is not declared by the statute to be a subject of taxation with sufficient clearness and certainty to justify its being assessed.

I would, for these reasons, dismiss this appeal.

Appeal dimissed with costs.

Solicitors for the appellant: *Gogo & Harkness.*

Solicitors for the respondents: *Ewart, Scott, Maclaren & Kelly.*