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*Mar. 14.
*Mar. 31.

C. I. DREIFUS.....APPELLANT.

AND

HARVEY E. ROYDS, ASSISTANT COMMISSIONER FOR THE CITY OF PORT ARTHUR.....RESPONDENT.

ON APPEAL FROM THE ONTARIO RAILWAY AND MUNICIPAL BOARD

Appeal—Jurisdiction—Assessment—Amount in Controversy—Court of last resort—Supreme Court Act—R.S.C. [1906] c. 139, s. 41—8-9 Geo. V. c. 7 s. 2—R.S.O. [1914] c. 195, s. 80 [6], Assessment Act.

On appeal in a case of assessment on land for 1921, the District Court Judge reduced the valuation on the land to an amount which would make the tax to be levied $800. On further appeal the Ry. and Mun. Board restored the valuation of the Court of Revision, making the tax $2,050. The owner of the land appealed to the Supreme Court of Canada asking to have the judgment of the District Court Judge restored.

Held that the amount in controversy on the appeal to the Supreme Court of Canada is not $2,050, but the difference between that and $802 the tax as fixed by the decision of the District Judge. Therefore, as such amount does not exceed $2,000 and no leave to appeal has been obtained the court has no jurisdiction, under the Act of 1920, to entertain the appeal.

The Ontario Assessment Act provides that "an appeal shall lie from the decision of the (Ry. and Mun.) Board * * to a Divisional Court upon all questions of law". Prior to the Act of 1920 an appeal to the Supreme Court of Canada could only come from the Court of last resort in the Province and on a question of law. On appeal from the Ry. and Mun. Board as to the assessment for 1920.

Held, that the board was not the court of last resort in the Province and the Supreme Court had no jurisdiction.

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*PRESENT: Sir Louis Davies CJ. and Idington, Duff, Anglin, Brodeur and Mignault JJ.

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APPEAL from a decision of the Ontario Railway and Municipal Board reversing the judgment of the District Court Judge in a matter of assessment of land in Port Arthur.

Two appeals are brought and consolidated for hearing. One is an appeal from the decision of the board on the assessment of 1920. This was before the court in 1920 and was sent back to the board for re-consideration the court holding that the actual value of the land assessed had not been determined as required by the Assessment Act. (1) The board maintained its former valuation. The other appeal was from a decision on the assessment of 1921 which increased the tax to be levied under the judgment of the District Court Judge by over $1,200. In each case the appellant seeks the restoration of the Judgment by the District Judge.

Chrysler K.C. for the appellant.

Geo. F. Henderson K.C. for the respondent.

THE CHIEF JUSTICE.—This is a consolidated appeal from the judgments or orders of the Ontario Railway and Municipal Board upon appeals to that Board under the provisions of the Assessment Act. c. 195, R.S.O. 1914.

The first order was on a reference back by this court on the hearing of a formal appeal to it, the reasons for which reference back are reported at 61 Can. S.C.R. 326.

The matter in question was the amount of the assessment for the year 1920 upon certain lands in the City of Port Arthur belonging to the present appellant.

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The second appeal is from the judgment or order of the board upon the assessed value of the same lands for the year 1921. As to this second appeal we are unanimously of opinion that the appeal must fail for want of jurisdiction in this court to hear it, under the amended Supreme Court Act of 1920, no leave to appeal having been obtained, and the matter in controversy being only about $1,200.00.

The remaining question is as to the assessment for the year 1920 and the substantial contention at bar was that the board had disregarded the provision of the Assessment Act which enacts that land shall be assessed at its "actual value", and the directions of this court in that regard in remitting the case back to the board for further evidence and hearing. It was because this court was not satisfied on the first appeal that the board had fully complied with the direction of the statute as regards the finding of the actual value of the land, that we referred the case back to them for further evidence and consideration.

I have fully considered the evidence taken on the rehearing and reasons for the finding of the board given by the Chairman. I think the evidence taken before the board fully justifies the conclusion reached by it as to the actual value of the lands assessed.

I do not believe and cannot find any evidence whatever of any attempt by the board to evade the directions given by this court when on the previous appeal the case was remitted back to the board for further consideration and the taking of further evidence.

I am of the opinion that in a question of this kind as to the "actual value" of lands for purposes of assessment this court would not and should not interfere with the finding of fact as to such "actual value" if there was any evidence to sustain that finding.

The board is constituted of men of experience on questions of this character. They have the great advantage of visiting and viewing the lands in question, and of seeing and hearing the witnesses who may be called to speak to its value. Unless, therefore, the board misdirected themselves on the proper principles which should govern them in determining this "actual value", or obviously reached their conclusions as to such value by adopting and following some wrong or improper principle, this court would not and should not interfere with their findings.

In the case before us, I find nothing of the kind to justify us in interfering with the findings of "actual value" of the lands in question in this appeal.

So far as I am concerned I not only fail to find that the board erred in adopting a wrong or improper principle in reaching the conclusion they did, but I go further and say that the evidence given before them, in my judgment, amply justified their conclusion.

It is in many cases no easy matter to determine the "actual value" of lands in many unsettled parts of Canada. Lands which a few years ago were in great demand and could easily be sold are now a drug on the market. In many cases they cannot be sold at all, and in such cases where there is practically no market or other equivalent tests of the actual value, it is plain that it is no easy matter to determine what the "actual value" of the land is. It is plain, land cannot be treated as valueless because there are no purchasers to be found for it when assessed for taxes, and equally plain to my mind that in such cases the probabilities of a reasonably early return of a "market" must be considered and weighed. Expert evidence on this point may be given and must be fairly weighed. This was done in the case before us after we had remitted it back.

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Under all the circumstances of this case and holding that we have no jurisdiction to hear the appeal from the assessment of 1921 and finding that the board did not proceed upon any wrong or improper principle in reaching its finding on the 1920 assessment, I would dismiss both appeals with costs throughout.

IDINGTON J.—These are assessment appeals against the assessment of property in Port Arthur in Ontario. No objection was taken by counsel in either case to our jurisdiction.

In the first case I had, after considering the evidence, come to the conclusion that the appeal should be allowed, but the majority of the court came to the conclusion that the case should be referred back to the Ontario Railway and Municipal Board to be re-heard as appears from the report of the case in 61 Can. S.C.R. 326.

That board meantime had got seized of another appeal against the assessment for the year following that of the first of said assessments.

The parties concerned proceeded with the said rehearing of the first case upon the understanding that the evidence so taken and judgments of the learned District Judge should be considered in the second case as if given therein.

The said board having proceeded accordingly came to the conclusion to render judgment in each case restoring their original judgment in the first case and allowing the appeal from the learned District Judge in the second case and restoring the assessment.

The curious result was an assessment of the same property for the first year in question of $60,000, and for the next year of $49,750.00, the assessor, the respondent, having apparently become convinced that he had erred, but the board holding it had not.

Thereupon these two appeals from said judgment of the board came before us as a consolidated appeal and argument thereupon was heard.

The curious result above stated led me to consider (what I, by reason of the view I had taken, had not before occasion to do) the power of the court to refer back such an appeal to an intermediate appellate court.

Not being able to find any precedent as authority for such a reference induced me to go farther and consider the second assessment and the right in either case to come here instead of going to the court of appeal for Ontario.

Incidentally to that investigation I found a reference by the Chief Justice of the Common Pleas Division in the course of disposing of a stated case in an assessment appeal heard by the Appellate Division, to an amendment in 1916 to the Assessment Act as it appeared in R.S.O. 1914. On referring thereto and calling the attention of my colleagues thereto it was decided to ask counsel to explain, if possible, how we could have jurisdiction to hear an assessment appeal in regard to a mere question of law when the parties concerned could appeal by virtue of said amendment which makes section 80, sub-section (6) which read 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

by virtue of the amendment contained in the Assessment Act of 1916, section 6, sub-section (2), now read as follows:—

An appeal shall lie from the decision of the Board under this section to a Divisional Court upon all questions of law, or the construction of a statute, a municipal by-law, any agreement in writing to which the municipality concerned is a party, or any order of The Municipal Board.

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By 8-9 Geo. V., c. 7, s. 2, section 41 of the Supreme Court Act is amended by adding thereto the following:—

Provided that the valuation of the property assessed shall not be varied by the Court unless it is satisfied that in fixing or affirming it such Court of last resort in the province has proceeded upon an erroneous principle; and, instead of itself fixing the amount of an assessment which in its opinion should be varied, the Court may remit the case to such court of last resort in the province, to fix the same in accordance with the principle which the Court declares to be applicable.

I am unable to distinguish the jurisdiction given above to a Divisional Court for Ontario to hear any appeal on a question of law, from that to which our court is restricted by this amendment.

The principle referred to in this amendment to the Supreme Court Act must, I think, be taken to be a principle of law and thus substantially the same kind of jurisdiction as was given to the Divisional Court for Ontario as a court of last resort in the province. Therefore until that court has passed upon the principle of law involved herein it seems to me we have no jurisdiction.

It seems to be rather unfortunate that counsel concerned in the case before the board in appealing here had not observed this change in the law and, on the other hand, equally unfortunate that counsel when the case was before us in the first instance did not call our attention to the amendment. I see no way out of the difficulty except to declare that we never had jurisdiction in either of these cases. The appellant should have gone to the Divisional Court for Ontario, and then possibly either party might have found his way to coming here.

There should be no costs to either party in all the proceedings that have been taken, in the way of appealing here or proceeding on the reference back.

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DUFF J.—The appeals should be quashed.

ANGLIN J.—The owner appeals against the confirmation by the Ontario Railway & Municipal Board of assessment of lands in the City of Port Arthur for the years 1920 and 1921. The order of the board reversed the decision of the learned District Court Judge and restored the original assessments, which had been confirmed by the Court of Revision. Although consolidated by order of the registrar for convenience in the preparation of the case and for hearing, there are two distinct appeals, one for each year, which must be separately considered.

At the threshold of the 1921 appeal we encounter a question of jurisdiction. This appeal falls within the amendments to the Supreme Court Act made in 1920 and, special leave to appeal not having been obtained, our jurisdiction to hear it depends upon whether

> the amount or value of the matter in controversy in the appeal exceeds the sum of $2,000 (s. 39).

The total assessment of the appellant's property for the year 1921, as fixed by the Ontario Railway and Municipal Board, is $50,000; the rate of taxation for the year was 41 mills, as appears by the affidavit of Malcolm A. McKay, filed on the motion made to the registrar to affirm jurisdiction; the total taxes for the year 1921 were therefore $2,050. If the appellant sought to have his lands declared non-assessable or entirely valueless, $2,050 would be the amount in controversy in the appeal. But he does not ask this. On the contrary, he submits to the assessment as fixed by the learned District Court Judge, on appeal from the Court of Revision, at $100 per acre, making a total assessment of $20,000. The matter in controversy on the present appeal is

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therefore not the entire amount of the taxes for 1921, but the difference between $2,050 (taxes on an assessment of $50,000) and $802 (taxes on an assessment of $20,000) *i.e.*, $1,248. It follows that this appeal fails for want of jurisdiction.

The appeal against the assessment of 1920 falls under the former sec. 41 of the Supreme Court Act, R.S.C. 1906, c. 139. The assessment for that year being $60,000, no difficulty arises on the score of the amount involved. But the right of appeal conferred by former s. 41 is

> 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.

By s. s. 6 of s. 80 of the Ontario Assessment Act (R.S.O. 1914, c. 195) as amended by s.s. 2 of s. 6 of the Assessment Amendment Act, 1916, c. 41, it is provided that

> (6) An Appeal shall lie from the decision of the Board under this section to a Divisional Court upon all questions of law, or the construction of a statute, a municipal by-law, any agreement in writing to which the municipality concerned is a party, or any order of the Municipal Board.

The appellant comes directly to this court without having appealed to the Appellate Divisional Court and his appeal is in respect of two alleged errors of law on the part of the board, viz., (*a*) misconstruction of s. 40 (1) and s. 69 (16) of the Assessment Act and (*b*) the absence of any evidence that the actual value of the lands in question exceeds the $100 per acre fixed by the learned District Court Judge.

Under these circumstances it seems reasonably clear that the Ontario Railway and Municipal Board cannot be said to have been "the court of last resort created under provincial legislation", within the meaning of former s. 41 of the Supreme Court Act. The

question of jurisdiction was not raised or discussed at bar either on the original argument of the present, or on the hearing of the former, appeal in this case (1) and it then escaped the attention of the court.

When the amendment to the Assessment Act made in 1916 came to our notice during the consideration of the present appeal the court directed that counsel should be heard on the question of jurisdiction which it raises. This hearing took place on the first day of the present term. As already stated, I am satisfied that we are without jurisdiction in regard to the assessment for 1920 as well as to that of 1921. But as I had already considered the appeal on the assessment of 1920 on its merits, I shall shortly state the reasons why, in my opinion, it could not succeed.

On examining the judgment of the board I find that it professedly disposed of the appeal to it in accordance with the decision of this court on the former appeal. I am not convinced that the tenor of that decision was not correctly appreciated by the board. Observations of the Chairman made in the course of the hearing indicate that it was.

In the judgment itself the board bases its finding on the oral evidence and appeals to the assessed value of adjacent lands under s. 69 (16) merely for "confirmation of its conclusion". I find nothing to warrant an assumption that the avowed adherence of the board to the principle of assessment defined by this court was merely colourable. Such a view of the board's action would be justifiable only on a record admitting of no doubt. I am therefore unable to hold that there was on this occasion a repetition of the misconstruction or misapplication of s. 40 (1) and s. 69 (16) of the

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Assessment Act which we were of the opinion had influenced the board's former decision. I am not prepared to find that in reaching its conclusion upon the case now before us the board proceeded upon a mistaken view of the meaning and effect of the statutory provision that "land shall be assessed at its actual value" (s. 40 (1)). While, if weighing the evidence before the board, I should quite probably have reached the conclusion that it was insufficient to warrant disturbing the valuation made by the learned District Court Judge, it is not the function of this court to interfere in matters of assessment merely because in its opinion the valuation of the property has upon the weight of evidence been placed at too high a figure. We may vary the valuation made by the court of last resort in the province only if satisfied that in arriving at it that court "has proceeded upon an erroneous principle," (s. 41 Supreme Court Act, as amended by 8 & 9 Geo. V., c. 7).

An entire absence of evidence to sustain the valuation of the court *a quo* may warrant our intervention on the ground that in making it that court must have proceeded upon some erroneous principle. But in the case at bar I am not satisfied that there was not some evidence, given by Lionel C. S. Hallam, T. D. Roberts, J. A. Rapsey and W. F. Trenks, on which the board might base a valuation of $300 per acre. Personally I might not—probably would not—have accepted that evidence as sufficient to warrant setting aside the judgment of the learned District Court Judge. But without finding error in principle on the part of the board, which in my opinion has not been shewn, we are not entitled to review the valuation made by it.

The appeals fail and should be dismissed with costs as of a motion to quash.

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BRODEUR J.—I am of opinion that the appeal should fail for want of jurisdiction as to the assessment for 1921 for the reason stated by my brother Anglin. As far as the assessment for 1920 is concerned, I am of the view that the appeal should be dismissed on the ground that there was evidence to justify the Ontario Railway & Municipal Board in reaching the conclusion at which they have arrived, and that then we should not interfere with their decision because the members of the board were in a better position than we are to determine the actual values of the properties assessed.

A question has been raised as to whether we had jurisdiction as to this latter assessment,

This question of jurisdiction should be determined by the Supreme Court Act existing before the amendment of 1920. By the law then in force there is an appeal from the judgment of any court of last resort.

The provisions of the Ontario Assessment Act shew conclusively that the Ontario Railway & Municipal Board was not a court of final jurisdiction.

It is enacted in this Assessment Act that an appeal lies from the decision of the board to a divisional court upon all questions of law.

In view of these provisions, the decision of the Municipal Board is not a final judgment of the highest court of last resort (sec. 41 Supreme Court Act).

For these reasons the appellant fails and his appeal should be dismissed with costs.

MIGNAULT J.—There are two appeals here, the first from the order or judgment of the Ontario and Municipal Board fixing the assessment on the appellant's

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two properties in Port Arthur at $60,000.00 for the year 1920, and from the order of the board fixing the assessment for 1921 on the same properties at $49,750. Our jurisdiction over the 1920 appeal is governed by section 41 of the Supreme Court Act as in force before July 1st, 1920, and over the 1921 appeal by the new provisions enacted by chapter 32 of the statutes of 1920 (Can.).

At the hearing, doubts were expressed from the bench as to the right to appeal from the order respecting the 1921 assessment and further consideration has only confirmed these doubts. What is really in controversy in the appeal, is the difference between the amount of the taxes for 1921 at the valuation fixed by the Board and the amount of these taxes at the valuation contended for by the appellant, and this is less than $2,000.00.

There was no suggestion from counsel that there was any possible question as to the jurisdiction of this court to deal with the appeal from the order of the board concerning the 1920 assessment, which, as I have stated, is governed by section 41 of the Supreme Court Act before its amendment in 1920, for under that section the right of appeal exists when the judgment involves the assessment of property at a value of not less than $10,000.00. This court, without any doubt having been expressed as to its jurisdiction, dealt with the 1920 assessment in December of that year and referred back the matter to the Ontario Railway and Municipal Board for the reasons stated in its judgment. (1) And this appeal is from the order of the board on the reference back from this court.

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During the consideration of this case, however, a new difficulty was encountered as to our jurisdiction, a difficulty which none of the counsel had ever even hinted at. It is obvious that the court must look to counsel who come before it to draw its attention to any statutory provision bearing on a case which is being argued by them. Of course, there was no intention here to mislead the court—the professional standing of the learned counsel in the present case would render any such suggestion entirely out of the question—but all the same there is a material statutory provision in the Ontario Assessment Act which was never referred to, either now or during the hearing on the first appeal.

By section 41 of the Supreme Court Act, before the 1920 amendment, an appeal lay 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, but the valuation of the property assessed could not be varied by this court unless it was satisfied that such court of last resort in the province had proceeded upon an erroneous principle. The appellant here assumed, and the respondent did not dispute, that the Ontario Railway and Municipal Board was a court of last resort in municipal matters.

When, however, the Assessment Act and its amendments were examined, it appeared that under subsection 6 of section 80 of the Act an appeal from the board on any question of law was possible, by leave obtained, to a Divisional Court. There might have been a question whether the necessity of obtaining such leave prevented the board from being normally the court of last resort in the province on such matters.

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But by chapter 41 of the statutes of 1916, section 6, subsection 2, (Ont.), the provision in subsection 6 requiring leave was struck out, so that now, under subsection 6 as amended, there is an absolute right of appeal on a question of law (and our appeal under section 41 of the Supreme Court Act is only on a question of law) from the order of the Ontario Railway and Municipal Board to a divisional court. It follows that the Board can no longer be said to be the court of last resort in the province empowered to adjudicate concerning the assessment of property for municipal purposes.

It was decided to hear the parties on this question of jurisdiction, and this was done on the first day of the present term. Nothing said by the learned counsel for the appellant has convinced me that we have any jurisdiction to hear the 1920 appeal. I would therefore quash it for want of jurisdiction.

Appeal quashed with costs.

Solicitor for the appellant: *Malcolm A. McKay.*

Solicitor for the respondent: *D. J. Cowan.*