1954
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THE CORPORATION OF THE CITY OF TORONTO (*Appellant*) ..... APPELLANT;

AND

OLYMPIA EDWARD RECREATION CLUB LTD. (*Respondent*) ..... RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Assessment—Taxation—Powers and jurisdiction of Court of Revision, County Court Judge, Municipal Board, Court of Appeal—The Assessment Act, R.S.O. 1950, c. 24, ss. 80, 82 and 83—The British North America Act, ss.

The issue raised by this appeal was whether the respondent's bowling alleys formed part of the real estate as defined by the *Assessment Act*, R.S.O. 1950, c. 24, s. 1 (i) (iv) and were therefore assessable.

Held (Affirming the decision of the Court of Appeal for Ontario, Rand, Kellock, Locke and Cartwright JJ. dissenting): that the question was a question of law and that the Court of Appeal was right in determining that the Ontario Municipal Board had no power to decide it. *Toronto Ry. Co.* v. *Toronto Corp.* [1904] A.C. 809. *Bennett & White (Calgary) Ld.* v. *Municipal District of Sugar City No. 5* [1951] A.C. 786 distinguished.

Per Estey, Fauteux and Abbott JJ.: The question could only be determined by a court presided over by a judge appointed under s. 96 of the *British North America Act*. *Quance* v. *Ivey* [1950] O.R. 397 approved. *Phillips & Taylor* v. *City of Sault Ste. Marie* [1954] S.C.R. 404 distinguished.

Per Rand and Cartwright JJ. (dissenting): The series of special appeals from an original assessment is, on the present statutory language limited to the task of completing the assessment roll and does not

*PRESENT: Kerwin C.J. and Taschereau, Rand, Kellock, Estey, Locke, Cartwright, Fauteux and Abbott JJ.

extend to the judicial determination of liability to taxation, a function of the civil courts alone. Under s. 83 an appeal to the Court of Appeal does not embrace the determination of taxability either appellate or original, the section gives an appeal only on a question of law properly arising before the lower tribunals.

On an appeal to the Municipal Board that body would be concerned with administrative jurisdiction only in the sense of being the final tribunal in review of the original assessment, its decision having no greater effect judicially than the act of the assessor. On appeal it may (as here) revise the acts of the assessor, amend the assessment roll and give it administrative finality. The court in *Quance* v. *Ivey, supra,* did not consider the administrative function of the Board. On this view of the statute it was within the jurisdiction of this Court to review the appeal to the Court of Appeal on the question of the jurisdiction of the Board.

Per Kellock J. (dissenting): The *Assessment Act* lays a statutory duty upon the assessor to determine whether a given piece of property is or is not "land" or is assessable or exempt. He is to form his own judgment and act upon it. The same is true of the several assessment tribunals charged with the statutory duty of preparing and settling the assessment roll. The function of the courts is to determine in any given case to what extent, if any, liability to taxation follows. The decision of the Privy Council in the *Sugar City* case, *supra,* was not, as wrongly decided in *Quance* v. *Ivey, supra,* that the legislation was to be construed as conferring upon the assessment tribunals a jurisdiction formerly exercised by the courts and therefore ultra vires, but upon the view that it did not confer any such jurisdiction at all. The same is true of the judgment of this Court in *Phillips and Taylor* v. *Sault Ste. Marie, supra.*

Per Locke J. (dissenting): The powers given to the Court of Revision, the County Court Judge and the Municipal Board by s. 83 of the *Assessment Act* to decide whether property is or is not assessable, may properly be exercised by them respectively, in discharge of their statutory duties as administrative acts to enable the completion of assessment rolls with reasonable promptness. *Bennett & White* v. *Municipal District of Sugar City, supra,* at 811 and 812; *Ladore* v. *Bennett,* [1939] A.C. 468 at 480. *Quance* v. *Ivey, supra,* distinguished.

APPEAL by special leave from the judgment of the Court of Appeal for Ontario (1) dismissing the appellant's appeal from the decision of the Ontario Municipal Board (2) in assessment appeal proceedings under the *Assessment Act* (Ont.)

J. P. Kent, Q.C. and *A. P. G. Joy* for the appellant.

C. R. Magone, Q.C. for the Attorney General for Ontario.

H. E. Manning, Q.C. and *D. W. Mundell, Q.C.* for the respondent.

(1) [1954] O.R. 14.

(2) [1953] O.W.N. 149.

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D. W. H. Henry, Q.C. for the Attorney General of Canada.

The judgment of Kerwin C.J. and Taschereau J. was delivered by:

THE CHIEF JUSTICE:—In this appeal from the decision of the Court of Appeal for Ontario (1) the Corporation of the City of Toronto is the appellant and Olympia Edward Recreation Club, Ltd., is the respondent. It is an assessment appeal and leave was given by this Court to bring it here. The Attorney General of Canada and the Attorney General of Ontario were notified and were represented.

The proceedings commenced in 1950 when the *Asssessment Act* in force in Ontario was R.S.O. 1937, c. 272, as amended, since the Revised Statutes of Ontario, 1950, did not come into force until December 31st of that year. Earlier in the year the respondent had been assessed $31,250 in respect of a parcel of land in the City of Toronto and $31,000 in respect of an unfinished building being erected on the land. In the later part of 1950, under the provisions of the old *Assessment Act,* a notice was given that the building was assessed for $305,000 and that taxes would be levied on that assessment for a period of two months from November 1, 1950 to December 31, 1950. Another notice was given that the buildings were assessed at $274,000 and that taxes would be levied on such assessment for a period of twelve months from January 1, 1951 to December 31, 1951. In each case the respondent appealed to the Court of Revision giving as its reason "building assessment too high". When the respondent's appeals came before the Court of Revision and the appellant's appeals before the County Court Judge and the Ontario Municipal Board the Revised Statutes of 1950 were in force so that these proceedings are governed by the provisions of the *Assessment Act* in that revision, c. 24.

The Court of Revision deducted in each case $96,000 from the value of the building. While the notices of appeal to it might indicate on their face that the matter to be determined by the Court of Revision was merely one of quantum, it has been made clear throughout that the

(1) [1954] O.R. 54.

$96,000 represented the value of the bowling alleys in the building in question and that the real problem was whether the alleys were personal property and, therefore, not subject to assessment. Undoubtedly the assessor's duty was to perform the functions allotted to him by the *Assessment Act*, but if a party assessed takes no steps upon receiving notice of an assessment, there is nothing to prevent it raising in the ordinary Courts the question that it was not legally assessable; and if it appeals, even as far as the Court of Appeal, and fails, it is not bound by that action and may raise that question in a similar manner.

It was so held in *Toronto Ry.* v. *Toronto Corporation* (1), although no constitutional point was there raised. The matter had been determined in the same sense in *Great Western Ry. Co.* v. *Rouse* (2) and *Nickle* v. *Douglas* (3), so that the jurisdiction conferred by the *Assessment Act* on the various appellate tribunals broadly conforms to the type of jurisdiction exercised by the Superior, District or County Courts, which is the test adopted in *Labour Relations Board of Saskatchewan* v. *John East Iron Work Ld.* (4).

It is now settled that the assessor, the Court of Revision, the County Court Judge and the Ontario Municipal Board have no jurisdiction to determine conclusively whether a company is taxable in respect of any particular property. (*Phillips and Taylor* v. *City of Sault Ste. Marie* (5)). When such a question is raised what purpose can there be to permit appeal after appeal at great expense to those concerned when the same matter may be litigated again? The question of ultra vires was not raised in *Bennett & White (Calgary) Ld.* v. *Municipal District of Sugar City No. 5* (6), but, in my opinion, the Judicial Committee did not there decide, as contended by the appellant, that, when such a matter as the one in issue here arises, any of the appellate tribunals provided for by the Assessment Act has jurisdiction to decide the point as an administrative matter. Their Lordships found that s. 53 of the Alberta Act there in question was not unambiguous and suggested that it might bear several constructions. Nowhere, as I read the judg-

(1) [1904] A.C. 809.
(2) (1857) 15 U.C.Q.B. 168.
(3) (1875) 37 U.C.Q.B. 51.
(4) [1949] A.C. 134.
(5) [1954] S.C.R. 404.
(6) [1951] A.C. 786.

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ment, is it suggested that when the only matter is, for instance, the one before the appellate tribunals in this case, any one of them has any authority of any kind to pronounce upon that subject.

Here the question before the Court of Appeal was whether the Ontario Municipal Board has power to decide that question. Being of opinion that the Court of Appeal was right in determining that the Board had no such power, the appeal should be dismissed with costs, but there should be no costs to or against either Attorney General.

RAND J. (*dissenting*):—A few observations may be useful in clarifying what has for some time been and seems still to be somewhat confused. The assessment of property for taxation purposes is primarily an administrative function, directed by statute, in two aspects of which legal questions may arise. They may go to the jurisdiction to tax, or they may arise in the course of exercising the function. An example of the latter would be whether the basis on which a valuation is made is within the intendment of the statute. That would be a question which the administrative tribunals would pass upon judicially and the decision of which, if not appealed from, would stand.

The question of jurisdiction, however, is of another nature. Whether person or property is within the scope of the assessing and taxing provisions, with which alone the assessing bodies are authorized to deal, depends, in its legal aspect, upon the decision of a court within s. 96 of the Confederation Act. But obviously when the assessor is preparing the roll he must consult those provisions in deciding upon doubtful property or exemption, or doubtful residence, and what he does is to exercise a lay judgment in discharging his duty to prepare the roll.

All features of the assessment may, in turn, be made subject to appeal to other subordinate tribunals. There may be administrative questions of law, as in the illustration used, or of fact, the findings on which will be conclusive unless reversed through the means of appeal given. In matters of jurisdiction, these tribunals can be invested with power to revise the lay judgment on assessability exercised

in the first instance by the assessor and to modify the assessment roll accordingly. The policy of vesting such authority in a body with provincial wide scope is quite apparent, contributing as it would to greater uniformity and probability of soundness, and the only question would be whether the legislation has conferred that authority on the appeal body.

Then there may be appeals to superior courts. Questions of law within the judicial scope of the assessment tribunals could be carried to them. If appeal is not expressly provided the decisions would be open to *certiorari*. In the revising authority of an administrative nature, the question arises whether a Court of Appeal as such could be charged with such a duty. And finally it might have to be considered whether a superior court has been given a special original jurisdiction, in the course of such appeals, to deal with the liability to assessment.

With these considerations in mind, the issues in this appeal can now be approached. The decision in *Bennett & White Ld.* v. *District of Sugar City* (1) in the Judicial Committee, and in this Court (2), that of this Court in *Sifton* v. *Toronto,* (3) and that of the Court of Appeal for Ontario in *Ottawa* v. *Wilson,* (4) have clarified the interpretation of the assessment statute of Ontario from which that of Alberta is largely taken. It is now settled that the series of special appeals from the original assessment is, on the present statutory language, limited to the task of completing the assessment roll and does not extend to the judicial determination of liability to taxation.

It is also settled that in providing these assessment tribunals the statute does not set them up as alternative to the civil courts, carrying the right of election. So far as the former are validly invested with jurisdiction to deal with questions of law, recourse against an assessment lies to them alone. The significance of this is that matters within their competence become *res judicata* whether or not resort is had to them by way of appeal. In *Bennett & White,* at p. 808, Lord Reid, on this point, said:—

> This could only be a valid distinction if the law were that a person aggrieved by an assessment has an option either to appeal in the manner

(1) [1951] A.C. 786.
(2) [1950] S.C.R. 450.
(3) [1929] S.C.R. 484.
(4) [1933] O.R. 21.

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provided by the Act or to raise the matter in the ordinary courts. Their Lordships have seen nothing in the Act from which an intention to create such an unusual option could be inferred.

But the present language of s. 83 of the Ontario statute is the same as that on which *Sifton* v. *Toronto* and *Ottawa* v. *Wilson* were decided. If that section was valid to create a jurisdiction in the Court of Appeal to pronounce upon the validity of the tax, then a collateral attack on the assessment in the civil courts could not succeed. But in each of those cases that attack was held to be open and it follows that the appeal to the Court of Appeal under s. 83 does not embrace the determination of taxability either appellate or original. Consistently with this, the subordinate bodies are limited to administrative functions, including questions of law not going to jurisdiction.

In its application to the Court of Appeal, s. 83 must be held to give an appeal only on a question of law properly arising before the lower tribunals: I find it impossible to attribute to the legislation the intention to attempt to make that Court as such a final revising body in administrative matters. It would verge on absurdity to have that Court pronounce an opinion on such a matter in another than a judicial sense. The questions in this case, in the administrative sense, could not, therefore, be carried there for final revision.

But the appeal to the Ontario Municipal Board would be concerned with administrative jurisdiction only, dealing with the question raised here only in the sense of being the final tribunal in review of the original assessment and having no greater effect judicially than the act of the assessor. That body can, then, be called upon by way of appeal to revise the acts of the assessor, to amend the assessment roll and to give it administrative finality.

The judgment in *Quance* v. *Ivey*, (1) interpreted s. 83 as purporting to give jurisdiction to the assessment tribunals to determine judicially their own jurisdiction and that it was therefore ultra vires. The court in that case did not consider the administrative function of the Ontario Municipal Board in the sense in which that of the similar body in Alberta was held to be effective in *Bennett & White*. On

(1) [1950] O.R. 397.

the assumption made, the decision of the Court of Appeal is in accordance with the view I have here expressed, but it does not go to the contention now urged.

On this view of the statute, the jurisdiction of this Court to hear the appeal was challenged by Mr. Manning. That depends upon whether or not the judgment in appeal is one rendered in the course of a judicial proceeding. The taking of an appeal to the Court of Appeal on the question of the jurisdiction of the Board is a proceeding of that nature which this Court is competent to review.

The object sought by the legislation is undoubtedly to provide a machinery of adjudication which can settle the question of taxability with despatch, and the desirability of concluding these questions within a fixed time seems to be obvious. To obtain that needs only some mode of resort to the appropriate tribunals, the civil courts. If by way of appeal or *certiorari* the Court of Appeal was given original jurisdiction to deal with such questions, including appropriate provision for furnishing the facts, with power to refer the roll back to the Board or County Judge for amendment in accordance with the judgment, and fixing the time within which the motion or application must be made, the difficulty facing municipal assessments would appear to be removed. But the existing language of the statute, as the cases cited show, is not sufficient to that end.

I would, therefore, allow the appeal and direct judgment declaring the Ontario Municipal Board to possess jurisdiction to consider the appeal made to it for the purpose of completing the assessment roll. The appellant will have its costs in this Court, but there will be no costs in the Court of Appeal.

KELLOCK J. (*dissenting*):—The respondent, the owner of certain premises in the city, was successful, on appeal to the Court of Revision against assessments for the years 1950 and 1951, in securing a reduction to the extent of the value of the bowling alleys installed in the building. An appeal by the present appellant to the county judge was dismissed. A further appeal by the appellant to the Ontario Municipal Board was dismissed on the ground that the Board was without jurisdiction to make any determination as to

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whether or not the alleys, i.e., the floors, came within the definition of "land", "real property" and "real estate" contained in s. 1(i) (iv) of the *Assessment Act,* which reads:

all buildings, or any part of any building, and all structures, machinery and fixtures erected or placed upon, in, over, under or affixed to land,

Considering itself bound by the decision of the Court of Appeal in *Quance* v. *Ivey* (1). The Board distinguished the judgment of the Privy Council in *Bennett & White* v. *Sugar City* (2), which affirmed, on the matter here relevant, the judgment of Rand J., speaking for the majority in this court.

Under the scheme provided by the *Assessment Act,* complaints by a person of an error or omission in regard to himself as having been "wrongfully inserted in or omitted" from the roll, or as having been "undercharged or overcharged" by the assessor in the roll are to be dealt with by the Court of Revision, s. 69. From the Court of Revision an appeal lies to the county judge, s. 72(1), who, in my view, is here *persona designata,* or directly to the Board, s. 80(1). If the first course be taken, an appeal lies from the county judge to the Board under s. 80(1) or, on consent of all parties, directly to the Court of Appeal; s. 81(1) and (7). In the case of appeals to the Board, a similar right of appeal lies to the Court of Appeal under s. 80(7).

S. 83 of the statute, which was first enacted in 1910 by c. 88, s. 19, provides:

83. It is hereby declared that the court of revision, the county judge, the Ontario Municipal Board, and every court to which and every judge to whom an appeal lies under this Act have jurisdiction to determine not only the amount of any assessment, but also all questions as to whether any persons or things are or were assessable or are or were legally assessed or exempted from assessment. R.S.O., 1950, c. 24, s. 83.

A similar provision limited to the Board is contained in s-s. (6) of s. 80, this provision having been enacted at the time of the creation of the Board in 1906 by c. 31, the relevant provision being s. 51, s-s. (2). The jurisdiction of the Court of Appeal in the case of appeals from the Board, is provided for by s-s. (7) of s. 80 of the *Assessment Act.* This provision also derives from the statute of 1906, s. 51(3). As originally enacted, the sub-section read:

An appeal shall lie from the decision of the Board under this section to the Court of Appeal upon all questions of law.

(1) [1950] O.R. 397. (2) [1951] A.C. 786.

The additional words now found in s. 80(7) were added in 1916 by c. 41, s. 6(2), as follows:

> 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 Board.

By the same statute the jurisdiction of the Court of Appeal in the case of appeals from the county judge, now found in s. 81(1), was provided for in similar terms by s-s. (1) of s. 6.

The contention of the respondent is that given effect to in the *Quance* case, namely, that s. 80(6) and s. 83 purport to vest in the Board and the other assessment tribunals a jurisdiction to determine finally the question as to whether property is or is not assessable under the Act, and that that jurisdiction, being already vested in the superior courts of the province prior to 1867, the above provisions are ultra vires. It is also contended that the jurisdiction given the Court of Appeal by s. 80(7) and s. 83 is limited to matters within the jurisdiction of the lower tribunals and is not, therefore, to be taken as including jurisdiction to determine such a question.

The appellant contends, on the other hand, that the assessment tribunals (not including in this description the Court of Appeal) were obligated by the terms of the statute to determine all questions arising upon the assessment roll, for the purpose of settlement of that roll, without regard to the question as to whether or not any such determination would, if not appealed against, be final so far as liability to taxation may be concerned. It is further contended that the jurisdiction given to the Court of Appeal is an original jurisdiction entitling that court to decide finally such questions, including such a question as that involved in this litigation.

As the legislation under consideration in the *Sugar City* case is to all intents and purposes the same as the corresponding provisions of the *Assessment Act,* with the exception that the Alberta Act makes no provision for appeal to a court, it will be convenient at the outset to consider the judgment of the Judicial Committee in that case.

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The question there was as to whether or not a decision of the Assessment Commission of Alberta that the appellants were assessable in respect of certain personal property as to part of which the appellants contended was not their property but that of His Majesty, and as to another part was exempt under the statute, was *res judicata,* or whether it was open to the appellants to litigate the matter in the ordinary courts. It was held that they were so entitled.

In delivering the judgment of the Board, Lord Reid referred to certain earlier decisions under the Ontario statute, namely, *Toronto Ry. Co.* v. *Toronto* (1), *Sifton* v. *Toronto* (2), and *Ottawa* v. *Wilson* (3), and continued at p. 808:

> In their Lordships' judgment the effect of these authorities is that a taxpayer called on to pay a tax in respect of certain property has a right to submit to the ordinary courts the question whether he is *taxable* in respect of that property unless his right to do so has been clearly and validly taken away by some enactment, and that the fact that the statute which authorizes assessment allows an appeal or a series of appeals against assessments to other tribunals is not sufficient to deprive the taxpayer of that right.

These decisions referred to by Lord Reid are not, of course, based upon the view of the legislation now put forward by the respondent and accepted in *Quance* v. *Ivey,* (*supra*) namely, that the legislation is to be construed as conferring upon the assessment tribunals a jurisdiction formerly exercised by the courts and therefore ultra vires. They are based upon the view that it did not confer any such jurisdiction at all. The same is true of the judgment of this court in *Phillips & Taylor* v. *Sault Ste. Marie* (4).

Quance v. *Ivey* cannot, therefore, stand with the later decisions referred to and must be taken to have been wrongly decided. It may, moreover, be pointed out that in none of the Ontario cases above referred to did the courts have occasion to consider whether there was any duty of an administrative character resting upon the assessment appeal tribunals as was considered to be the case under the legislation in question in the *Sugar City* case.

S. 53 of the Alberta Act in question in that case corresponds to s. 83 of the Ontario Act except that s. 53 contains

(1) [1904] A.C. 809.
(2) [1929] S.C.R. 484.
(3) [1933] O.R. 21.
(4) [1954] S.C.R. 404.

no provision for a further appeal to a court. Their Lordships, adopting the view of Rand J., held that the section, in its setting in the statute, was not to be construed as an optional method of proceeding in contradistinction to proceeding in the ordinary courts but as laying upon the Commission a duty to determine the matters mentioned in the section

> in so far as it is necessary for it to determine these matters in order to carry out its statutory duty to determine whether the assessment roll should be amended, but only for that purpose.

That being so, their Lordships held that the Court of Revision *must* have jurisdiction to determine those same matters for the same purpose because "the grounds on which the Act allows complaint to be made to it may involve those matters" and the statutory function of the Assessment Commission was only to hear and determine appeals from Courts of Revision.

The Privy Council did not consider that either in s. 45, which corresponds essentially to the Ontario s. 70, or elsewhere in the statute was there any indication that an entry in the assessment roll upheld by the Commission was in any different position from any other entry in the roll or any less subject to challenge in the courts. Such a provision, they considered, was "plainly only what their Lordships in *City of Victoria* v. *Bishop of Vancouver Island* (1), referred to as a machinery section"; per Lord Reid, at p. 810.

Unless, therefore, the Ontario legislation is to be distinguished by reason of the existence of the right of appeal to the Court of Appeal and the reference in s. 83 to that court, the judgment of the Privy Council requires this court to hold that, while it is competent and indeed mandatory, for the assessment tribunals, including the Municipal Board, to exercise their judgment upon all questions arising in the course of the preparation of the assessment roll, including the question of assessability or exemption, nevertheless, when it comes to a question of determining finally a question of the latter character so as to entail liability to taxation, such jurisdiction is not to be considered as having been conferred upon these assessment tribunals.

(1) [1921] 2 A.C. 384.

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It will be convenient at this point to consider some of the provisions of the statute relating to the duty of the assessor and other municipal officials as to the preparation of the assessment roll. These provisions are expressed in the clearest mandatory terms.

By s. 16(1), it is provided that every assessor "shall" prepare an assessment roll in which "after diligent inquiry" he "shall" set down according to "the best information to be had" the particulars mentioned in the section and in so doing he "shall" observe the provisions therein set out. Under clause (*a*) the assessor "shall" set down the names and surnames in full, if they can be ascertained, of all persons, resident or non-resident, who are "liable to assessment therein". By clause (*b*), he is required to set down in the proper column opposite each name the amounts "assessable" against such person.

S-s. (2) requires that the assessor "shall" set down in column 14 the "actual value" of the parcel of real property exclusive of buildings; in column 15, the value of buildings as determined under s. 33; in column 16, the total actual value of the land; in column 17, the total amount of "taxable" land; in column 18, the total value of the land "if liable for school rates only"; in column 19, the total value of land "exempt from taxation" or "liable for local improvements only"; and in column 22, the "total assessment". In my view, it is impossible, in the face of these provisions, to say that the assessor is not required to exercise his judgment as between assessability and exemption and make up his roll accordingly.

By s. 33, s-s. (1), it is provided that, subject to the other provisions of the section, "land" shall be assessed at its actual value. In s-ss. (2) and (3), the considerations entering into the ascertainment of that value in the case of both vacant land and land having buildings thereon are given. By s-s. (4), it is provided that the buildings, plant and machinery in or under "mineral land" and used mainly for obtaining minerals, as well as certain named mining equipment, and the minerals themselves "shall not be assessable". The definition of "land" in s. 1(i) of the statute has already been referred to. All of these provisions

must be interpreted by the assessor and the entries he makes in his roll are the result, as they are by the statute intended to be, of the exercise of his judgment.

It is therefore impossible, in my view, to contend that where a question arises such as in question in these proceedings, that is, as to whether a given piece of property is or is not "land" or is assessable or exempt, the assessor can do other than enter such property upon the roll because he cannot decide that question. It is true that he cannot decide such a question finally, but he is required by the statute to form his own judgment and act upon that judgment. A contrary conclusion would be in the very teeth of the statute.

Moreover, by s. 50 it is provided that if at any time it "appears" to any treasurer or other officer of the municipality that "land" "liable to assessment" has not been assessed in whole or in part for the current year or for either or both of the next two preceding years, he "shall" report the same to the clerk of the municipality, who "shall" thereupon, or upon the omission to assess coming to his knowledge in any other manner, enter the land on the collector's roll at its average valuation as assessed in the three previous years. If the land had not been so assessed, then the clerk "shall" require the assessor to value the land and

it shall be the duty of the assessor to do so when so required, and to certify the valuation in writing to the clerk.

It is clear that the officers of the municipality here mentioned are also required to exercise their judgment on the question as to assessability or exemption in the same way as is the assessor under the earlier provisions already discussed, and if it "appears" to them there has been an omission from the roll of land which ought to have been assessed by the assessor, they are required to enter it. The same rights of appeal are provided for by s-s. (3) as if the land "had been assessed in the usual way."

If such be the statutory duty of the assessor and these other municipal officers, it is equally for the Court of Revision to exercise its judgment upon the same questions in order to carry out its statutory duty to determine whether the assessment roll should be amended, but only for that purpose. The Court of

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Revision *must* have jurisdiction to determine those matters for that purpose because the grounds upon which the Act allows a complaint to be made to that court may involve those matters,

to refer again to the language of Lord Reid in the *Sugar City* case at p. 811, already quoted. The same is true of the county judge and Municipal Board for the reason that, to quote further from the same page,

the statutory function of the Commission (here the judge or Board) is only to hear and determine appeals from Courts of Revision.

It may be again observed that s. 35 of the Alberta statute, which provides for appeals to the Court of Revision does not, for present purposes, differ in any material respect from s. 69 of the Ontario statute. The same comparison is true as between s. 47(1) of the Alberta statute and ss. 72(1) and 80(1) of the Ontario Act as to appeals from the Court of Revision.

This being then the function of the assessment tribunals, it follows that, as the jurisdiction conferred upon the Court of Appeal cannot be taken to be other than one to be exercised judicially, that jurisdiction, with respect to a question such as is here involved, is limited to determining upon the true interpretation of the statute the nature of the duty resting upon the Board and the inferior tribunals. It has already been pointed out that the decisions to which I have referred, approved as they were in this respect in the *Sugar City* case, involve the finding that, notwithstanding the breadth of the language employed, the Court of Appeal has no jurisdiction with respect to such a question as that raised in these proceedings.

It is not necessary for the purposes of this appeal to determine the extent of the jurisdiction committed to the Court of Appeal or the kind of question upon which, should there be no appeal, the decision of any of the inferior assessment tribunals would be final. Illustrations may be found in the authorities referred to by their Lordships in *Toronto Ry. Co.* v. *Toronto City* (1). In the course of his judgment in that case Lord Davey said at p. 815:

In *London Mutual Insurance Co.* v. *City of London* (2), the decision of the county court judge was treated as final, because the question was within the jurisdiction of the assessor; but Hagarty C.J. held that if the property had not been assessable that would have shewn that *ab initio*

(1) [1904] A.C. 809. (2) 15 O.A.R. 629.

the assessor and the appellate tribunals had been dealing with something beyond their jurisdiction, and their confirmation of the assessor's act would go for nothing.

That is not to say that the assessor or the assessment tribunals must any the less carry out the duty laid upon them by the statutory provisions to which I have referred but merely that it is open to the person affected to apply to the ordinary courts in the case of such a question as is involved between the parties to this appeal.

The whole matter, in my opinion, comes to this, that the legislature, having laid upon the assessor and the several assessment tribunals the statutory duty of preparing and settling the assessment roll, who is to say that duty is not to be performed? The function of the courts is to determine in any given case to what extent, if any, liability to taxation follows.

I would allow the appeal with costs in this court and in the Court of Appeal and refer the matter back to the Municipal Board for its decision.

The judgment of Estey and Fauteux JJ. was delivered by:

ESTEY J.:—The appellant, in assessing respondent's land and building in 1950 and 1951, included, as part of the latter, its bowling alleys. Upon respondent's appeal to the Court of Revision these were held not to be part of the building and, therefore, not taxable as such. This decision was affirmed by the County Court judge. Upon further appeals to the Ontario Municipal Board and the Court of Appeal both followed the decision in *Quance* v. *Ivey* (1), under which neither of these tribunals had jurisdiction to finally determine such a question of law. In the course of his judgment Mr. Justice Laidlaw, speaking on behalf of the Court, stated:

> It appears to me to be settled beyond controversy that the Legislature of a Province, acting within its legislative powers, cannot constitute a tribunal composed of a member or members appointed by provincial authority and empower that tribunal to determine conclusively questions of a character that fall for determination within the jurisdiction of a superior court. Thus, the Legislature could not give jurisdiction to such a tribunal to finally determine the question whether a taxpayer is taxable in respect of certain property. Such a tribunal could not finally decide whether an assessor exceeded his powers in assessing property which was not liable in law to assessment.

(1) [1950] O.R. 397.

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The issues in this appeal are, therefore, (*a*) is the question whether the bowling alleys are part of the real estate one of law and (*b*) if so, is it one that must be determined by a court presided over by a judge appointed under s. 96 of the *B.N.A. Act*.

With respect to (*a*) the facts are not in dispute. If the bowling alleys were personalty rather than real estate the assessor had imposed liability in respect of property not taxable under the statute. The respondent, to that extent, would not be liable and there was, therefore, an important question of law to be determined rather than a mere question of valuation, as the appellant contended. *Township of London* v. *The Great Western Ry. Co.* (1); *Toronto Ry. Co.* v. *Toronto* (2).

As to (*b*), in *Quance* v. *Ivey, supra,* the respondent contended that under the statute it was exempt from a business tax. The County Court judge agreed with the respondent and held that upon a construction of the statute it was exempt. The Ontario Municipal Board reversed the decision of the County Court judge. The Court of Appeal held the construction of an act was a question of law and that none of the tribunals sitting in an appeal under the *Assessment Act* (R.S.O. 1950, c. 24) had any jurisdiction to finally determine this question. In the course of the reasons written by Robertson C.J.O. and concurred in by Laidlaw, Roach and Hope JJ.A., and those written by Hogg J.A., the Ontario cases prior to Confederation, certain provisions of the *B.N.A. Act* (ss. 92(14), 96, 99 and 100), as well as the authorities to that date were all considered and the conclusion arrived at that similar tribunals sitting in appeal from an assessor existed prior to Confederation, but that a question of law such as that here submitted could be finally decided only in the courts of law of that period; that under the *B.N.A. Act,* while these tribunals may be competently created by the legislature, questions of law such as that here considered can only be finally determined by a court presided over by a judge appointed under s. 96 of the *B.N.A. Act* and, therefore, the above-mentioned tribunals, including the Court of Appeal sitting in appeal under the

(1) 17 U.C.Q.B. 262.

(2) [1904] A.C. 809.

provisions of the *Assessment Act*, could not finally determine such a question. At p. 408 Robertson C.J.O. stated:

> In my opinion it is well established by decisions of highest authority that jurisdiction to decide disputed questions of liability to assessment, such as were raised in the cases I have referred to, and in the present case, was vested in the superior Courts of the Province, and not in the bodies having jurisdiction to hear assessment appeals under the provisions of The Assessment Act. It is also clear that that jurisdiction was so vested prior to Confederation, and continued to be so vested thereafter.

To much the same effect is the statement of Lord Atkin when, in dealing with the jurisdiction of the Ontario Municipal Board, he stated:

> It is primarily an administrative body; so far as legislation has purported to give it judicial authority that attempt must fail. It is not validly constituted to receive judicial authority; so far, therefore, as the Act purports to constitute the Board a Court of Justice analogous to a Superior, District, or County Court, it is *pro tanto* invalid; not because the Board is invalidly constituted, for as an administrative body its constitution is within the Provincial powers; nor because the Province cannot give the judicial powers in question to any Court, for to a Court complying with the requirements of ss. 96, 99 and 100 of the British North America Act the Province may entrust such judicial duties as it thinks fit; but because to entrust these duties to an administrative Board appointed by the Province would be to entrust them to a body not qualified to exercise them by reason of the sections referred to. The result is that such parts of the Act as purport to vest in the Board the functions of a Court have no effect. *Toronto Corporation* v. *York Corporation* (1).

The contention that, in effect, the subsequent decisions of *Bennett & White (Calgary) Ltd.* v. *Municipal District of Sugar City* (2), and *Phillips & Taylor* v. *Corporation of Sault Ste. Marie* (3) are in conflict with *Quance* v. *Ivey, supra,* does not appear to be well founded. In the *Bennett & White* case the precise point here in question was neither raised nor considered. There the personal property of the appellants was assessed and appeals taken to the Court of Revision and the Alberta Assessment Commission, being the only appellate tribunals provided under the *Assessment Act* of that province. In both of these tribunals the appellant was unsuccessful and when the municipality sought to enforce the tax it commenced this action for a declaration that the assessment was invalid. It was contended on behalf of the municipality that the matter was res judicata by virtue of the decision of the Alberta Assessment Commission. The Privy Council held that upon a construction

(1) [1938] A.C. 415 at 427. (2) [1951] A.C. 786.
(3) [1954] S.C.R. 404.

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of s. 53, upon which the respondents relied, the legislature had not purported to give to the tribunal under the *Assessment Act* jurisdiction to decide such a question. It was, therefore, unecessary to consider the legislative competence of the province to deprive the courts of the jurisdiction to determine the question of liability. In fact, Lord Reid, speaking on behalf of their Lordships, stated at p. 811:

> Some indication that the scope of s. 53 is not unlimited may also be got from the fact that it only confers jurisdiction to deal with questions of assessment and is silent as to questions of liability to taxation, whereas ss. 4 and 5, which are the leading sections in the Act, deal with liability to and exemption from both assessment and taxation.

That in the *Bennett & White* case it was not the intention of the Privy Council to in any way limit or qualify their decision in *Toronto Ry. Co.* v. *Toronto, supra,* is apparent from their reference to that case and the statement of Lord Reid in relation thereto at p. 806:

> Their Lordships held that the Court of Revision and the courts exercising the statutory jurisdiction of appeal from it "had no jurisdiction to determine the question whether the assessment commissioner had exceeded his powers in assessing property which was not by law assessable. In other words, where the assessment was *ab initio* a nullity they had no jurisdiction to confirm it or give it validity." Their Lordships pointed out that this decision was in accordance with earlier Canadian authorities.

The question in the *Toronto Railway* case was not unlike that here raised. The city imposed a tax upon the street cars as part of the appellant's real estate. After being unsuccessful in its appeals provided for under the *Assessment Act,* the appellant commenced an action for a declaration that its street cars were personalty. The Privy Council held the matter was not res judicata, that the street cars were personalty and directed a declaration accordingly. At p. 815 Lord Davey stated:

> In other words, where the assessment was *ab initio* a nullity they had no jurisdiction to confirm it or give it validity. The order of the Court of Appeal of June 28, 1902, was not, therefore, the decision of a Court having competent jurisdiction to decide the question in issue in this action, and it cannot be pleaded as an estoppel.

See also *Sifton* v. *City of Toronto* (1).

In *Phillips & Taylor* v. *The Corporation of Sault Ste. Marie, supra,* the taxpayers had failed in their respective appeals to certain of the appellate tribunals under the *Assessment Act* and thereafter brought this action for a

(1) [1929] S.C.R. 484.

declaration that the assessments were invalid. The respondent pleaded, *inter alia, res judicata.* Mr. Justice Taschereau, writing the judgment of this Court, in dismissing that plea adopted the reasons of Mr. Justice Laidlaw in the Court of Appeal. There Mr. Justice Laidlaw referred to many of the authorities and quoted a passage from *Bennett & White (Calgary) Ltd.* v. *Municipal District of Sugar City, supra,* at 808 and 809:

> . . . that a taxpayer called on to pay a tax in respect of certain property has a right to submit to the ordinary courts the question whether he is taxable in respect of that property unless his right to do so has been clearly and validly taken away by some enactment, and that the fact that the statute which authorizes assessment allows an appeal or a series of appeals against assessments to other tribunals is not sufficient to deprive the taxpayer of that right.

Mr. Justice Laidlaw then continued:

> I apply that principle to the instant case and conclude that the plaintiffs had a right to submit to the Supreme Court of Ontario the question whether they were liable to assessment and taxation. The argument that that question is *res judicata* therefore fails.

It is clear that a county court judge, sitting in appeal under the *Assessment Act,* is not acting by virtue of his appointment under s. 96 of the *B.N.A. Act,* but rather as a person selected and designated by the legislature in the *Assessment Act.* The same is true of the members of the Court of Appeal and, therefore, sitting in appeal under the *Assessment Act,* they possess only such appellate jurisdiction as the Provincial Legislature may competently vest in them.

This must follow from *Toronto Ry. Co.* v. *Toronto, supra,* where the taxpayer unsuccessfully appealed to the appellate tribunals under the *Assessment Act,* including the Court of Appeal, and thereafter brought an action for a declaration that a portion of the property included in the assessment was not assessable and, in the course of their reasons directing that the declaration should be made, it was stated at p. 815:

> It appears to their Lordships that the jurisdiction of the Court of Revision and of the Courts exercising the statutory jurisdiction of appeal from the Court of Revision is confined to the question whether the assessment was too high or too low, and those Courts had no jurisdiction to determine the question whether the assessment commissioner had exceeded his powers in assessing property which was not by law assessable.

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That the legislature of a province may, within the field of its legislative competence, impose original jurisdiction upon courts presided over by judges appointed under s. 96 does not in any way assist the respondent in this litigation. It is sufficient, for the purpose of this discussion, to point out that the legislature is not here purporting to do so, but rather it designates the judges of the respective courts as the parties it desires to constitute certain of these tribunals, including the Court of Appeal when sitting as such.

While the work of an assessor is largely administrative, he must, of necessity, make judicial as well as administrative decisions. The nature and character of his work and its importance in relation to the financing of a municipality make it desirable that there should be, at least with respect to the major portion of his duties, a summary and expeditious appeal available to the taxpayer. The legislature, in appreciation of such, has set up these tribunals and given to them, as it appears by virtue of the provisions of ss. 69 to 83 inclusive of the *Assessment Act,* such jurisdiction and authority as it has deemed appropriate and within its legislative competence. When, however, there is, as here, an important question of law involving the liability of the taxpayer, which prior to and since Confederation has never been within the jurisdiction of these tribunals, it must be decided by a court presided over by a judge appointed under s. 96 of the *B.N.A. Act.*

That such was the position prior to Confederation is illustrated by *Township of London* v. *The Great Western Ry. Co. supra.* There the assessor, in valuing the defendant railway company's land, included as part thereof the rails and other superstructure upon the land. No appeal was taken. When, however, the municipality brought action to realize the amount of the taxes the railway defended. It admitted the assessment upon its land and paid into court the amount of the tax thereon, but contended that the rails, etc. were improperly included in the valuation. At the trial a verdict was directed for the plaintiffs, but upon appeal this was reversed and in the course of his judgment Mr. Justice Burns stated at p. 266:

> The distinction where it is necessary to appeal, and where the claim may be resisted by an action of trespass or replevin, is this: if the power existed to make the assessment, then there is a jurisdiction in those doing

it, and in such case the remedy is by appeal only; but if the assessment be illegal, then there is no jurisdiction to do it, and in such case the person resisting is not compelled to resort to the remedy of appeal, but may resist the illegal exaction.

The court held that inclusion in the valuation of that which was not part of the land raised a question of liability which must be decided by the courts. On the other hand a fourth plea was raised as to the amount of the assessment upon the property which the company had admitted was subject to assessment. The plaintiff demurred to this plea and the court upheld the demurrer on the basis that this did not raise a question of liability, but only as to the amount thereof, which was a matter of which the appellate tribunal, under the *Assessment Act,* was the proper body to make a final disposition.

Tribunals such as the appellate tribunals under the *Assessment Act* were continued under s. 29 of the *B.N.A. Act* and in relation thereto the provincial legislatures are competent to legislate. *Re Adoption Act* (1).

The tribunals set up under the *Assessment Act* are in no different position from others similarly constituted with respect to their jurisdiction to determine questions of law.

The decision in *Quance* v. *Ivey, supra,* clearly expresses the relevant law. It restricts these tribunals to those matters over which they may deal effectively and avoids for the taxpayer an expenditure of time and money in pursuing before these tribunals an issue which can only be finally and competently disposed of in the courts.

It was submitted at the hearing that notwithstanding the inability of the legislature to vest in these appellate tribunals authority to deal finally with such issues as that with which we are here concerned, the legislature may impose and, in fact, has particularly in s. 83 of the *Assessment Act* imposed upon these tribunals a duty to determine such issues, even though without any degree of finality. The imposition upon a tribunal of such a duty or to encourage a taxpayer to submit to an expenditure of time and money that can accomplish nothing in any legal sense and which, if ultimately determined by a competent tribunal in favour of the taxpayer, will mean that what was done by the

(1) [1938] S.C.R. 398.

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assessor or any appellate tribunal under the *Assessment Act* was, in effect, a nullity and void *ab initio,* ought to be set forth in language that clearly discloses such an intention.

No such intention is to be found in s. 83. On the contrary, the legislature in that section discloses a clear intention that the appellate tribunals shall deal effectively and finally with the duties and responsibilities imposed upon them.

It was suggested that such a course may avoid delays in the final determination of the roll. Such a suggestion does not appear to be well founded. When completed, and on or before the required date, the assessment roll, as prepared by the assessor, must be returned "to the clerk" of the municipality (s. 53(1)).

Section 54(5) reads:

> 54(5) Nothing in this section shall in any way deprive any person of any right of appeal provided for in this Act, and the same may be exercised and the appeal proceeded with in accordance with this Act, notwithstanding that the assessment roll has been certified by the court of revision and become the last revised assessment roll.

The effect of subpara. (5) is that the assessment roll is completed, notwithstanding that appeals may be carried to the other appellate tribunals, and certainly where an issue such as we are here concerned with is raised under proceedings in a court presided over by a judge appointed under s. 96 of the *B.N.A. Act.*

The decisions of these appellate tribunals, when made within the scope of their respective authorities and subject to any right of appeal under the *Assessment Act,* are final and binding upon the parties. This has been repeatedly recognized by the courts. The question with which we are here concerned is that of liability, admittedly one of law, in respect of which only courts presided over by a judge appointed under s. 96 of the *B.N.A. Act* may make a final decision. If it is finally determined in favour of the taxpayer, the assessments were made without authority. The true position with respect to the only issue with which we are here concerned is clearly stated by Strong C.J. in *The Corporation of the City of London* v. *George Watt & Sons* (1):

> If there is no power conferred by the statute to make the assessment it must be wholly illegal and void *ab initio* and confirmation by the Court of Revision cannot validate it.

(1) (1893) 22 Can. S.C.R. 300 at 302.

See also to the same effect *Toronto Railway Co.* v. *Corporation of the City of Toronto, supra; Bennett & White (Calgary) Ltd.* v. *Municipal District of Sugar City, supra.*

Moreover, the position with respect to the roll is aptly explained in *Shannon Realties* v. *Ville de St. Michel* (1), where the Privy Council quoted with approval the statement of Duff J. (later C.J.):

> There remains the argument based upon the Municipal Charter, s. 28. This section deals with the subject of taxation rather than the subject of valuation. It can afford no basis for impeaching the assessment roll. Nor do I think it is a ground for impeaching the collector's roll except as an answer to a claim for taxes. The contention now raised will be open to the respondents in answer to such a claim. *La Ville St-Michel* v. *Shannon Realties Ltd.* (2).

The Ontario Municipal Board held that the question here raised was one of law upon which it had no jurisdiction to adjudicate. The Court of Appeal affirmed this decision and held also that, sitting as an appellate tribunal under the *Assessment Act,* it had no jurisdiction to deal therewith. The effect of this decision and that of *Quance* v. *Ivey, supra,* upon which it is founded, is that if either of the parties desires a final determination of the question of law here raised it can only be had, as already intimated, by a court presided over by a judge appointed under s. 96 of the *B.N.A. Act.*

The appeal should be dismissed with costs.

LOCKE J. (dissenting):—This is an appeal from a judgment of the Court of Appeal of Ontario, by which the appeal of the City of Toronto from a decision of the Ontario Municipal Board given on December 15, 1952, was dismissed.

The respondent company is the owner of a property in Toronto upon which it caused to be erected a two storey brick building, to be used for the purpose of the operation of bowling alleys. The construction and the installation of these alleys was completed in the year 1950. While the question as to whether the alleys were land, real property or real estate within the meaning of those expressions as used in the *Assessment Act* (R.S.O. 1950, c. 24) is a matter of controversy between the parties, it is unnecessary for the

(1) [1924] A.C. 185.

(2) (1922) 64 Can. S.C.R. 420 at 441.

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disposition of this appeal to determine this question, and sufficient to say that the alleys were laid upon frame stringers placed, in turn, upon what were described as sleepers laid along the concrete floors of the building but in no way attached to them, being kept in place by their own weight.

The City gave notice of assessment to the respondent on December 22, 1950, for a period of the last two months of the year 1950 and for the calendar year 1951: in respect of the stated period for 1950 the notice of assessment stated that the building had been assessed at $305,000 and for the year 1951 at $274,000. Other than to say that the assessments were for the "value of buildings" no further particulars were given.

Under the appropriate provisions of the *Assessment Act* the respondent appealed to the Court of Revision. The reasons assigned in the notices of appeal read merely "building assessment too high." By that body the assessment for each year was reduced by an amount of $96,000. Other than the endorsements made on the notices of assessment that in respect of the year 1950 the assessment of the buildings had been reduced to $209,000 and as to the year 1951 to $178,000 there is no written record of the proceedings before the Court of Revision before us.

The city appealed from this decision to a judge of the County Court of the County of York and the appeals were dismissed. No written reasons were given.

From this decision the city appealed to the Ontario Municipal Board. Evidence was taken before that body and, apparently with the concurrence of the respondent, the assessor of the city stated that the action of the Court of Revision in reducing the assessment by the amount stated was based upon the view that the bowling alleys were not assessable and their replacement value fixed at $96,000 had accordingly been deducted from the values stated in the notices of assessment. The Municipal Board dismissed the appeal on the ground that the only question involved was whether the bowling alleys were liable to assessment or exempt therefrom, the members considering that, in view of the decision of the Court of Appeal in *Quance* v. *Ivey* (1), they were without jurisdiction to determine the matter.

(1) [1950] O.R. 397.

The appeal of the City to the Court of Appeal was dismissed, Mr. Justice Laidlaw, delivering the unanimous judgment of the Court, finding that the Ontario Municipal Board was right in deciding that it was without jurisdiction to decide the question: consequently, he considered that the Court of Appeal was also without jurisdiction.

By s. 1(i) of the *Assessment Act*, "land," "real property" and "real estate" include, all buildings and all structures, machinery and fixtures erected or placed upon, in, over, under or affixed to lands. By s. 40, real property in Ontario is declared to be liable to taxation, subject to certain exemptions, none of which touch the present matter.

Before the completion of the assessment roll, the assessor or his assistant is required to send to every person named therein a notice in a prescribed form, notifying him of the sum for which he has been assessed (s. 46). Provision for the disposition of complaints against the assessment is made in s. 69 and following sections of the Act. These may be summarized as follows:—Any person complaining of an error or omission in regard to himself as having been wrongly inserted in or omitted from the roll, or as having been undercharged or overcharged by the assessor in the roll, may give notice in writing to the clerk of the municipality or the Assessment Commissioner that he considers himself aggrieved (s. 69(1)). The appeal is heard by a court of revision, provision for the constitution of which is made by ss. 58, 59 and 60. Included in the powers of this court is authority to reopen the whole question of the assessment and to direct any correction necessary to be made in the roll (s. 69(20)). The roll as finally revised and certified by the Court of Revision is declared to be valid and, subject to the right of appeal, to bind all parties concerned (s. 70).

S. 72 provides that an appeal shall lie to the County Judge at the instance, *inter alia*, of any person assessed and the procedure to be followed for the disposition of the appeal is prescribed. S. 74(2) reads:—

> The hearing of the appeal by the county judge shall, where questions of fact are involved, be in the nature of a new trial, and either party may adduce further evidence in addition to that heard before the court of revision, subject to any order as to costs or adjournment which the judge may consider just.

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S. 80(1) permits an appeal from the decision of the county judge to the Ontario Municipal Board, a body constituted under the provisions of the *Ontario Municipal Board Act* (c. 262 R.S.O. 1950) or, where no appeal has been taken to the county judge, direct from the decision of the court of revision. By s. 80(6):—

> 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.

S. 83 reads:—

> It is hereby declared that the court of revision, the county judge, the Ontario Municipal Board, and every court to which and every judge to whom an appeal lies under this Act have jurisdiction to determine not only the amount of any assessment, but also all questions as to whether any persons or things are or were assessable or are or were legally assessed or exempted from assessment.

S. 80(7) provides for an appeal from a decision of the Board under that section, *inter alia,* upon a question of law or the construction of a statute. No provision is made for an appeal from a finding of that body upon a question of fact.

In cases where an appeal lies from the decision of the judge to the Board under s. 80, the judge may, with the consent and at the request of both parties, state a case on, *inter alia,* a question of law or the construction of a statute for the decision of the Court of Appeal (s. 81).

S. 82(1) gives to the judge of a county court and the court hearing an appeal under s. 80 and the Court of Appeal powers similar to those given to the court of revision by s. 69(20) to reopen the whole question of the assessment, so that the assessment roll may be corrected and the accurate amount for which the assessment should be made stated in it.

The respective contentions of the parties may be briefly stated. The respondent contends that the Ontario Municipal Board, a body appointed by the Lieutenant Governor of the Province, was without jurisdiction to decide the legal question as to whether under the provisions of the *Assessment Act* it was liable to assessment in respect of the value of the bowling alleys, as distinct from the building in which they are situate. It submits that the powers sought to be vested in the Board by ss. 80(6) and 83 are ultra vires a

provincial legislature, in that they purport to vest in its powers which broadly conform to those generally exercisable by judges of Superior, District or County Courts referred to in s. 96 of the *British North America Act*. The appellant and counsel for the Attorney General of Ontario contest this position, saying that the functions of the Court of Revision, the County Court Judge and the Ontario Municipal Board under the sections referred to are administrative in their nature, being the machinery devised for the purpose of settling an assessment roll for the purpose of imposing municipal taxation and that they may accordingly decide questions of this nature for the purpose of enabling them to discharge those functions. While s. 83 declares the power of the court, the county judge and the Board to determine the question of law as to whether any persons or things are assessable or have been legally assessed, neither counsel contend that their decisions in such matters render the question of liability *res judicata*.

The record does not disclose whether this issue was raised either before the court of revision or the county judge. Before the Municipal Board, however, the respondent took the position, which was upheld by the Board, that the only question to be determined was as to whether the bowling alleys were liable to assessment or exempt therefrom. Upon this issue, the Board considered itself bound by the judgment of the Court of Appeal to which reference has been made. It does not appear from the reasons for judgment delivered by the members of the Board that it was contended before them that its function in determining this disputed issue was simply administrative, or that its decision upon the question of law involved would not be binding upon both parties. That question was, however, argued before the Court of Appeal (1), Laidlaw J.A. saying (at p. 22) that it had been contended before them that the Court of Revision, the County Court judge and the Board had jurisdiction:—

> To decide the question in issue as an administrative matter and "on that level" have power to decide whether the assessor was right or wrong when he included the value of the bowling alleys in the assessment made by him of the building.

(1) [1954] O.R. 14.

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As to this, that learned Judge said that:—

The court of revision and the courts of appeal therefrom cannot assume jurisdiction in that way or upon that basis decide the real question in issue between the parties as I have stated it above.

S. 96 of *The British North America Act, 1867* reads:—

The Governor General shall appoint the Judges of the Superior, District, and County Courts in each Province, except those of the Courts of Probate in Nova Scotia and New Brunswick.

S. 129 reads in part:—

Except as otherwise provided by this Act, . . . all Courts of Civil and Criminal Jurisdiction, and all legal Commissions, Powers and Authorities, and all Officers, Judicial, Administrative and Ministerial, existing therein at the Union, shall continue in Ontario . . . as if the Union had not been made; subject nevertheless . . . to be repealed, abolished or altered by the Parliament of Canada, or by the Legislature of the respective Province, according to the Authority of the Parliament or of that Legislature under this Act.

Prior to Confederation, by an Act to amend and consolidate the assessment laws of Upper Canada (c. 182, 16 Vict.) provision was made for the assessment of lands for the purpose of municipal taxation. By s. 26 of that statute it was provided that any party who:—

Shall deem himself wrongfully inserted in or omitted from the Roll or undercharged or overcharged by the assessor.

might appeal to a court of five members of the municipal Council designated a court of revision. That court was empowered to determine the question raised and the assessment roll as passed by it and certified by the clerk was declared to be binding on all parties concerned, except in so far as it might be further amended on appeal. S. 28 provided for an appeal from the decision of the Court of Revision to the "Judge of the County Court" who was required, after hearing, to transmit his decision to the Clerk of the Division Court to be forthwith transmitted to the Clerk of the Municipality, such judgment to be final and the assessment roll amended accordingly.

The decision of a county court judge upon a question as to whether certain property of a railway company was subject to assessment was held not to be final by Robinson C.J. in *Great Western Ry. Co.* v. *Rouse* (1).

(1) (1857) 15 U.C.Q.B. 168.

It is unnecessary, in my opinion, to discuss the changes made in the appeal provisions between 1853 and 1904, when *Toronto Ry* v. *Toronto Corporation* (1), was decided by the Judicial Committee.

The *Assessment Act* which affected the matter to be determined in that case was c. 224, R.S.O. 1897, which did not contain provisions similar to the present sections 80(6) or 83. The question was whether the electric cars of the railway company were personal estate and thus not liable to assessment. S. 71 of that Act which provided for an appeal to the Court of Revision, in so far as it affected the nature of the appeal, was in the language of s. 26 of the statute of 1853 above referred to. The street cars having been assessed as real estate within the meaning of that term in the statute, the railway company appealed successively to the Court of Revision, the County Court judge (to whom an appeal was permitted under the terms of the statute) and to the Court of Appeal and, these appeals having failed, it was contended on behalf of the City before the Board that the question of liability to assessment was *res judicata*. In rejecting this contention, Lord Davey, by whom the judgment of the Board was delivered, said in part (p. 815):—

> It appears to their Lordships that the jurisdiction of the Court of Revision and of the courts exercising the statutory jurisdiction of appeal from the Court of Revision is confined to the question whether the assessment was too high or too low, and those Courts had no jurisdiction to determine the question whether the assessment commissioner had exceeded his powers in assessing property which was not by law assessable. In other words, where the assessment was *ab initio* a nullity they had no jurisdiction to confirm it or give it validity. The order of the Court of Appeal of June 28, 1902, was not, therefore, the decision of a Court having competent jurisdiction to decide the question in issue in this action, and it cannot be pleaded as an estoppel.

In considering this decision, it is to be noted that nothing was said as to that portion of s. 71 also authorizing an appeal by a person claiming to be "wrongfully inserted in or omitted from the Roll" and there was no discussion as to the powers of the Province to enact the relevant portions of the *Assessment Act* or any part of them. An earlier decision to the same effect as that of the Judicial Committee is *Nickle* v. *Douglas* (2), where the authorities are reviewed.

(1) [1904] A.C. 809.

(2) [1875] 37 U.C.Q.B. 51.

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By c. 31 of the statutes of 1906 the Ontario Railway and Municipal Board, the predecessor of the Ontario Municipal Board, was constituted and provision made for appeals to that board in lieu of the appeal to the Board of County Judges theretofore provided for by the *Assessment Act*. By s. 51(2) of that Act it was declared that the Board should have power upon such appeals to decide not only as to the amount at which the property should be assessed but also all questions as to whether any persons or things were liable to assessment or exempt from assessment under the provisions of the *Assessment Act*.

By c. 88 of the statutes of 1910 the *Assessment Act* of 1904 was amended by adding thereto as s. 78(*a*) language to the same effect as the present s. 83.

By c. 27 of the statutes of 1932, s. 6, it was provided that the Ontario Railway and Municipal Board, as theretofore constituted, should hereafter be called the Ontario Municipal Board. Members of the Board were declared to hold office during pleasure and a wide variety of functions were assigned to the Board.

In *Toronto Corporation* v. *York Corporation* (1) while the question to be determined was the power of the Board to make an order for discovery of documents, authorising the respondents to inspect the appellant's water work system and directing an examination of the appellant's Commissioner of Works under oath, the Judicial Committee considered generally the nature of the functions assigned to the Board. It was there contended for the city that the Act of 1932 and in particular ss. 41 to 46 and 54 and 59 were ultra vires, in that the Board was entrusted with the jurisdiction and powers of a Superior Court and within the purview of those sections was, in fact, constituted a Superior Court.

The judgment delivered by Lord Atkin, after finding that the Board was primarily, in pith and substance, an administrative body, said (at p. 427) in respect to the powers contained in the above mentioned sections (which, with immaterial changes, appear as ss. 37 to 42 and 52 and 55 of R.S.O. 1950, c. 262) p. 427:—

> It is difficult to avoid the conclusion that, whatever be the definition given to Court of Justice, or judicial power, the sections in question do

(1) [1938] A.C. 415.

purport to clothe the Board with the functions of a Court, and to vest in it judicial powers. But, making that assumption, their Lordships are not prepared to accept the further proposition that the Board is therefore for all purposes invalidly constituted. It is primarily an administrative body; so far as legislation has purported to give it judicial authority that attempt must fail. It is not validly constituted to receive judicial authority; so far, therefore, as the Act purports to constitute the Board a Court of Justice analogous to a Superior, District, or County Court, it is pro tanto invalid; not because the Board is invalidly constituted, for as an administrative body its constitution is within the Provincial powers; nor because the Province cannot give the judicial powers in question to any Court, for to a Court complying with the requirements of ss. 96, 99 and 100 of the British North America Act the Province may entrust such judicial duties as it thinks fit; but because to entrust these duties to an administrative Board appointed by the Province would be to entrust them to a body not qualified to exercise them by reason of the sections referred to. The result is that such parts of the Act as purport to vest in the Board the functions of a Court have no effect.

The argument in support of the legislation in that case was that the administrative powers vested in the Board and the powers sought to be given by the sections above referred to were severable and that the powers, the exercise of which was attacked as ultra vires, were properly exercisable only as incidental to and as appropriate machinery for the exercise of administrative functions. This contention was upheld in the judgment delivered, it being considered that the powers of examination, inspection and discovery of documents, even though couched in terms of similar powers of a court of justice, were not inconsistent with the powers of an administrative body whose duty it may be to ascertain the facts with which they are dealing.

The effect of s. 129 of the British North America Act must be considered. As I have pointed out, the Court of Revision and the County Court Judge were by the statute of 1853 respectively empowered to consider and determine the question as to whether the name of a person had been wrongfully inserted on the roll or whether he had been undercharged or overcharged by the assessor. It cannot be said, for the reasons so clearly pointed out by Sir Lyman Duff C.J. in delivering the judgment of this Court in the *Reference Re the Adoption Act and other Acts* (1), that it is not within the power of a provincial legislature to give additional powers to bodies such as courts of revision and other courts constituted under provincial authority which do not answer to the description of Superior, District and

(1) [1938] S.C.R. 398.

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County Courts in s. 96. That judgment expressly dissented from the view that the jurisdiction of inferior courts, whether within or without the ambit of s. 96, was by the *B.N.A. Act* fixed forever as it stood at the date of Confederation. May it not, therefore, properly be said that to confer the power to determine questions of law of this nature for the purpose of discharging the administrative functions assigned to these various appellate bodies is within the powers of a province?

In *Quance* v. *Ivey* (1), Robertson C.J.O., in delivering the judgment of the majority of the Court, reviewed certain of the legislation dealing with municipal assessments in Upper Canada prior to Confederation and the subsequent legislation of the Province leading up to the amendment of the *Assessment Act* of 1910, purporting to grant to the Municipal Board the powers now defined in s. 83 of the Act. The learned Chief Justice concluded that the powers sought to be conferred on the Board by s. 83, which would include the power to decide whether a person is liable or exempt from assessment, attempted to confer jurisdiction over a subject matter that, both before and after Confederation, had been dealt with by the Superior Courts. It does not appear from the judgments delivered in that case that the question as to whether the legislation, while ineffective to give the Board jurisdiction to decide the question of law involved so that the matter would be *res judicata* as between the parties and their privies, might not validly empower it in the discharge of its administrative functions to decide the question for the purpose of enabling the municipality to complete the assessment roll. Reference was made to that portion of the judgment of Lord Atkin in *Toronto Corporation* v. *York Corporation,* above referred to, in which, after saying that the Board was primarily an administrative body and that, so far as legislation had purported to give it judicial authority, that attempt must fail, it was said that (p. 427):—

> The result is that such parts of the Act as purport to vest in the Board the functions of a court have no effect.

The reference in Lord Atkin's judgment was to ss. 41 to 46, 54 and 59 of the *Municipal Board Act, 1932,* but there

(1) [1950] O.R. 397.

seems to me to be no answer to the contention that they apply with equal force to s. 83 of the *Assessment Act*, if that section is to be construed literally.

That it should not be so construed appears to me to follow from what was said in the judgment of the Judicial Committee in *Bennett & White* v. *Municipal District of Sugar City* (1). In that case, the statutory provision considered was s. 53 of the *Assessment Act* of Alberta, the meaning of which, in so far as it purported to vest jurisdiction in the Alberta Assessment Commission, seems to me to be indistinguishable from that to be assigned to s. 83 of the *Assessment Act* of Ontario. The question as to whether the section of the Alberta Act was intra vires the Legislature was not argued in the Sugar City case, and that portion of the reasons for judgment which I have mentioned referred to the contention of the Municipal District that, since an appeal from the assessment had been taken to the Court of Revision and the Alberta Assessment Commission, the matter was *res judicata*. In rejecting this contention, which had also been rejected in this Court, the Board found that both the Court of Revision and the Alberta Assessment Commission had jurisdiction to deal with the question, in discharge of their statutory functions.

In *Ladore* v. *Bennett* (2) Lord Atkin, in delivering the judgment of the Judicial Committee, pointed out (p. 480) that the Province has exclusive legislative power in relation to municipal institutions by reason of s. 92(8) of the *British North America Act, 1867* and that:—

> Sovereign within its constitutional powers, the Province is charged with the local government of its inhabitants by means of municipal institutions.

In the exercise of this power and the discharge of this duty, the Legislature has provided by the *Assessment Act* the machinery by which municipal institutions are required, as a necessary step in imposing taxation upon property within their territorial limits, to prepare an assessment roll, value the property for the purpose of an assessment and afford to those who claim that they are improperly assessed, or that their names should or should not appear on the roll, the right of recourse to tribunals to which appeals may

(1) [1951] A.C. 786 at 811, 812. (2) [1939] A.C. 468.

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be taken. To the powers given to the Court of Revision, the County Court Judge and the Municipal Board by the earlier sections, there have been added the further powers now given by s. 83. The power given by that section to decide whether property is or is not assessable may properly, in my opinion, be exercised by them respectively, in discharge of their statutory duties as administrative acts to enable municipal institutions to complete their assessment rolls with reasonable promptness and raise the moneys necessary for their government.

It was not contended by any of the parties to this appeal that a decision by the Municipal Board in the present matter that the bowling alleys, if part of the real property of the respondent within the meaning of that expression in s. 1 (i) of the *Assessment Act,* are or are not liable to assessment would render that question *res judicata* or oust the jurisdiction of the courts to determine it.

In the result, this appeal should, in my opinion, be allowed with costs and the order of the Court of Appeal set aside and the matter referred back to the Ontario Municipal Board to be decided. I think there should be no costs for or against the intervenants.

CARTWRIGHT J. (dissenting):—This is an appeal, brought pursuant to leave granted by this Court on February 15, 1954, from a judgment of the Court of Appeal for Ontario, pronounced on December 2, 1953, affirming a decision of the Ontario Municipal Board, hereinafter referred to as the Board, rendered on December 16, 1952.

The decision of the Board dealt with two appeals from orders of His Honour Judge McDonagh, a judge of the County Court of the County of York, dismissing appeals from decisions of the Court of Revision of the City of Toronto which had reduced, by $96,000 in each case, an assessment made in 1950 for levying additional taxes for that year and an assessment made in the same year upon which taxes for the year 1951 were to be levied.

The Court of Appeal and the Board were of the opinion, with which I respectfully agree, that notwithstanding the form of the notice of appeal to the Court of Revision the only question decided by the Court of Revision and by the learned County Court Judge and raised for decision before

the Board was whether certain bowling alleys contained in the assessed building and valued by the assessor at $96,000 were liable to assessment or exempt therefrom. The Board decided that it was bound by the decision of the Court of Appeal for Ontario in *Quance* v. *Ivey* (1), to hold that it was without jurisdiction to decide this question and consequently made no order other than a direction that the appellant should pay the costs of reporting the proceedings. This decision was affirmed by the Court of Appeal. Laidlaw J.A. who delivered the unanimous judgment of the Court concludes his reasons as follows:—

> On this appeal the only question for determination is whether the Ontario Municipal Board has jurisdiction to decide the question in issue between the parties. Having reached the conclusion that it has no such jurisdiction it follows that this Court has no jurisdiction on this appeal to decide the question and I refrain from expressing any views in respect of it.
>
> I would direct that the appeal be dismissed with costs.

In *Quance* v. *Ivey* (*supra*), the appellant had been assessed, in the year 1948, in the sum of $12,700 for "business assessment" in respect of the premises in which it carried on its business. It appealed to the Court of Revision on the ground that owing to the nature of its business it was exempt from business assessment. This appeal was dismissed. The appellant then appealed to the County Judge who allowed the appeal. The assessor appealed from the decision of the County Judge to the Board. The Board allowed the appeal and restored the "business assessment". The appellant then appealed from the decision of the Board to the Court of Appeal. The Court of Appeal set aside the order of the Board on the ground that the Board was without jurisdiction and made no further direction.

There appears to be no ground on which the case at bar can be distinguished from *Quance* v. *Ivey* and it becomes necessary to consider whether that case was rightly decided.

The judgments delivered in *Quance* v. *Ivey* contain a review of the legislation and the relevant decisions. Robertson C.J.O., with whom Laidlaw, Roach and Hope JJ.A. agreed, after quoting from the judgment of the Privy Council in *Toronto Ry Co.* v. *Toronto* (2), said at page 408:—

> In my opinion it is well established by decisions of highest authority that jurisdiction to decide disputed questions of liability to assessment, such as were raised in the cases I have referred to, and in the present case,

(1) [1950] O.R. 397.
(2) [1904] A.C. 809 at 815.

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was vested in the superior Courts of the Province, and not in the bodies having jurisdiction to hear assessment appeals under the provisions of The Assessment Act. It is also clear that that jurisdiction was so vested prior to Confederation, and continued to be so vested thereafter.

The learned Chief Justice then reviewed the legislation constituting the Board and its predecessor the Ontario Railway and Municipal Board and assuming to give them jurisdiction to hear assessment appeals and continued at page 412:—

> We have the Board, at its origin given jurisdiction by the Legislature to deal with, and to adjudicate upon, a subject-matter that always, both before and after Confederation to that time, had been dealt with by the Superior Courts in formal actions as within their jurisdiction exclusively, subject to strictly limited rights of appeal. The Legislature, at the same time, has purported "to clothe the Board with the functions of a Court and to vest in it judicial powers." And these are severable from the Board's administrative functions and duties, as Lord Atkin has said in the case of *Toronto* v. *York Tp., supra.* In my opinion it is clear that the Board has assumed, under an authority that the Legislature has assumed to give it, to exercise the jurisdiction of a Superior Court, or a tribunal analogous thereto, in dealing with the appeal before it, and has made an order that it could make only if there had been observance, in its members, appointment to and tenure of office, of the provisions of ss. 96, 99 and 100 of the B.N.A. Act. Without such observance, the Board could not, in my opinion, exercise jurisdiction in the appeal brought before it by the respondent, and could not make the order now appealed from.

Hogg J.A., who delivered reasons reaching the same result, in summarizing his conclusions, said in part at page 427:—

> It is not within the legislative power of the provincial Legislature to confer on the Board, the members of which are appointed by the Government of Ontario, the jurisdiction purported to be given to it by ss. 84 (5) and 87 of the Assessment Act, nor for the Board to exercise such jurisdiction.

S. 84 (5) and 87 referred to by Hogg J.A. are now ss. 80 (6) and 83 of the *Assessment Act.*

While it is nowhere explicitly so stated in the reasons delivered by the Court of Appeal in *Quance* v. *Ivey* it is I think clear from reading them as a whole that in the view of that Court the amendments made to the Assessment Act subsequent to the decision of the Privy Council in *Toronto Ry. Co.* v. *Toronto* (*supra*), on their true construction, expressed the intention of the Legislature to confer upon the Board jurisdiction to finally decide all questions of the nature referred to in what are now ss. 80 (6) and 83 so that

its decision of such questions would be *res judicata inter partes,* subject only to the right of appeal given by what is now s. 80 (7).

Counsel for the appellant and for the Attorney General for Ontario submit, if I have apprehended their arguments correctly, that on a true construction of the relevant sections of the Assessment Act the powers conferred on the Court of Revision, the County Judge, the Board and the Court of Appeal by ss. 80(6), 82 (1), 83 and other related sections are limited, as regards disputed questions of liability to assessment the jurisdiction to decide which was vested in the Superior Courts of the Province prior to Confederation, to deciding such questions as an administrative matter only, so as to make the assessment roll correct as the assessor would have done had he not fallen into error; that the jurisdiction of the Courts is not ousted by the decisions of the tribunals mentioned and that none of such decisions would support a plea of *res judicata* if the same questions were raised in an action between the same parties for a declaration that the property assessed was exempt from assessment and taxation. It is said that the nature of the power given to the assessment tribunals by the Ontario Statute is the same as that conferred on the Alberta Assessment Commission by the Alberta Assessment Act; and that the reasoning which in *Sugar City* v. *Bennett and White Ltd.* (1), brought Rand J. and Lord Reid to the conclusion that the decision of the Alberta Assessment Commission would not support a plea of *res judicata* requires a similar conclusion in regard to the decisions of the assessment tribunals provided by the Ontario Statute upon questions of the nature above mentioned. In my view this argument is sound in so far as it relates to the nature of the powers conferred upon the Court of Revision, the County Judge and the Board.

In the *Sugar City* case it was not argued that the sections of the Alberta Assessment Act conferring jurisdiction on the Assessment Commission were *ultra vires* of the Legislature.

(1) [1950] S.C.R. 450; [1951] A.C. 786.

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The constitutional validity of the Act being assumed the problem considered was that of its proper construction. Section 53 of the Alberta Act is as follows:—

> 53. In determining all matters brought before the Commission it shall have jurisdiction to determine not only the amount of the assessment, but also all questions as to whether any things are or were assessable or persons were properly entered on the assessment roll or are or were legally assessed or exempted from assessment.

It will be observed that there is no substantial difference between the words of this section conferring jurisdiction on the Commission and those of s. 83 of the Ontario Statute conferring jurisdiction on the tribunals therein mentioned including the Board.

It was pointed out in argument however that there are certain substantial differences between the provisions dealing with assessment appeals in the Alberta Act and those in the Ontario Act, an example being that the latter Act gives rights of appeal to both a County Judge and the Court of Appeal while the former Act does not. This is quite true, but in the *Sugar City* case in the Privy Council and in this Court the Ontario decisions were carefully considered and both Lord Reid, who delivered the judgment of the Judicial Committee, and Rand J., who delivered the judgment of the majority in this Court, disapproved of the decision in *Hagersville* v. *Hambleton* (1), in which the provisions of the Ontario Assessment Act had been construed as giving binding and conclusive effect to the decisions of the assessment tribunals.

In *Phillips and Taylor* v. *City of Sault Ste. Marie* (2), the question of the construction of the sections of the Ontario Assessment Act which confer jurisdiction on the assessment tribunals came before this Court for decision. That was an action brought in the Supreme Court of Ontario for a declaration that the appellants were not liable to taxation in respect of their occupancy of certain lands belonging to the Crown in the right of Canada. This was clearly a question the jurisdiction to decide which was prior to Confederation vested in the Superior Courts of the Province. Prior to the commencement of the action each of the appellants had appealed to the Court of Revision against the assessments made upon the sole ground that they were

(1) (1929) 63 O.L.R. 397. (2) [1954] S.C.R. 404.

not assessable. That Court having confirmed the assessment, each appellant appealed to the District Judge upon the same ground and the appeals were dismissed. They took no further appeal. In defence to the action the City pleaded that the issues raised were *res judicata* by reason of the decisions of the Court of Revision affirmed by the District Judge. In this case also the constitutional validity of the sections of the Act conferring jurisdiction on the assessment tribunals was assumed but the plea of *res judicata* was rejected. In giving the judgment of the majority in the Court of Appeal, Laidlaw J.A. applied to the Ontario Act the principle stated by Lord Reid in *Sugar City* in the following words:—

> . . . that a taxpayer called on to pay a tax in respect of certain property has a right to submit to the ordinary courts the question whether he is taxable in respect of that property unless his right to do so has been clearly and validly taken away by some enactment, and that the fact that the statute which authorizes assessment allows an appeal or a series of appeals against assessments to other tribunals is not sufficient to deprive the taxpayer of that right.

Taschereau J., who gave the unanimous judgment of this Court, said at page 409:—

> . . . It is now the contention of the respondent that the judgment given by the Judge of the District Court was final and that the question of the validity of the assessments is, therefore, *res judicata*. For the reasons given by Laidlaw J.A. in the Court of Appeal, I believe that this argument fails.

It therefore appears to me that judgments which are binding upon us have construed the provisions of the sections of the Ontario Assessment Act which confer jurisdiction upon the assessment tribunals as not giving to such tribunals jurisdiction to determine conclusively questions the jurisdiction to decide which was prior to Confederation vested in the Superior Courts. The jurisdiction with which the assessment tribunals are clothed by the statute thus construed is described by Rand J. in *Sugar City* (*supra*) at page 465 as follows:—

> In dealing with taxation, from assessors to taxation commissions, the provisions of the statute regarding liability and exemption are necessarily taken into account by lay persons and bodies. The determination of an exemption involves an interpretation of the statute, and it thus affects a civil right. But the assessor must have regard to exemptions for the purpose of the administrative integrity of the roll; and although it is his duty to follow the provisions of the statute to the extent his judgment

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permits him to do so, it is undoubted that that preliminary judgment is essentially different from a judicial determination of the legal question.

The assessor, as part of his administrative duty, and as distinguished from purely administrative acts, exercises a lay judgment in the interpretation of the statute. From the whole of his exercise of authority, the statute ordinarily gives a right of appeal. By the nature of appeala, in the absence of special and original powers given to the revising body, it is to be taken as limited to examination of the matter that was before the assessor and to the giving, in the same sense, of the decision which he should have given.

I conclude, therefore, that the Ontario Assessment Act, on its proper construction, by s. 83 and the related sections, confers upon the Court of Revision, the County Judge and the Board jurisdiction to decide all questions not only as to the amount of any assessment but also as to whether any persons or things are or were assessable or are or were legally assessed or exempted from assessment, but that any decision given by such tribunals on questions the jurisdiction to decide which was prior to Confederation vested in the Superior Courts is to be regarded only, as it was put by Rand J. in the passage quoted above, as a decision given in the same sense as the decision of the assessor.

Neither in the *Sugar City* case nor in *Phillips* v. *Sault Ste. Marie* was it necessary for the courts to deal expressly with the nature of the right of appeal to the Court of Appeal given by ss. 80 (7), 82 (1) and 83 of the *Assessment Act*. That court is of course one whose members' appointment to and tenure of office are in accordance with the provisions of ss. 96, 99 and 100 of the *British North America Act*. In this it differs from the Court of Revision and the Board. The powers conferred upon the County Judge are conferred upon him as *persona designata* while those conferred upon the Court of Appeal are conferred upon it as a Court and not upon its members as *personae designatae*. I have had the advantage of reading the reasons of my brother Rand and I agree with his conclusion as to the nature and extent of the jurisdiction which is conferred upon the Court of Appeal by the sections referred to.

It remains to consider the question, which was not raised in either *Sugar City* or *Phillips* v. *Sault Ste. Marie,* whether it is within the power of the Provincial Legislature to confer upon the Court of Revision, the County Judge and the Board the powers conferred upon them by the relevant sections as above construed. In my opinion, it is. The

attack on the constitutionality of the sections in question is based upon the contention that they purport to confer upon the tribunals mentioned the powers of a superior court. But it is of the essence of the nature of a superior court that it has jurisdiction to give a decision which, subject to such rights of appeal as may be given by statute, is final and binding between the parties. The statute, as it has been construed, does not purport to confer upon the assessment tribunals any such power in regard to questions the jurisdiction to decide which was prior to Confederation vested in the superior courts.

While, of course, the fact that the Attorney General for Canada and the Attorney General for Ontario have taken certain positions on the argument of the appeal does not relieve the Court of its responsibility in deciding a constitutional question, it is to be observed that the former contended that the sections in question were *ultra vires* of the Provincial Legislature only if they were construed as conferring jurisdiction on the assessment tribunals "to determine finally whether persons or things are or were assessable or are or were legally assessed or exempted from assessment" while the latter did not argue that they should be so construed.

As to our jurisdiction to hear this appeal I agree with the reasons and conclusion of my brother Rand.

I would allow the appeal, set aside the order of the Court of Appeal and the decision of the Board and direct that the matter be referred back to the Board in order that it may decide the question raised before it. The appellant should recover its costs in the Court of Appeal and in this Court from the respondent. There should be no order as to the costs of the intervenants.

ABBOTT J.:—The relevant facts in this appeal as well as the statutory provisions and the authorities bearing on the questions in issue, are fully discussed in the judgments of my Lord the Chief Justice and my brother Estey. I agree with their reasons and I desire to add only a few brief observations.

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It appears to me that the question to be determined in this appeal is identical with that which arose in *Quance* v. *Ivey* (1), which in my view was rightly decided.

As my brother Rand has pointed out the assessment of property for taxation is primarily an administrative function directed by statute, and in making an assessment the assessor must decide whether a particular person or piece of property is taxable or not. Other questions will arise in the course of establishing an assessment such as the basis upon which the valuation of property is to be made and, since before Confederation, questions of this kind have been passed upon by appellate tribunals such as the Ontario Municipal Board, the decisions of which if not appealed from are final. An example of a case where such a question arose is *City of Toronto* v. *Ontario Jockey Club* (2), where following successive appeals to the Court of Revision, a County Court Judge, the Ontario Municipal Board, the Ontario Court of Appeal and this Court, the valuation of certain buildings in the original assessment was held to have been made on an improper basis. Liability to payment of some tax was not disputed.

Where, as in the present case, the sole question in issue is whether certain property is assessable, it is clear on the authorities that prior to Confederation the power to decide such a question judicially was vested in the Superior, County, or District Courts, and has continued to be so vested.

This question of liability to assessment is one of law upon which in my opinion tribunals such as the Court of Revision or the Ontario Municipal Board are not competent to pronounce. It follows that where they purport to do so such action is without effect.

As Lord Reid said in *Bennett & White (Calgary) Ld.* v. *Municipal District of Sugar City No. 5* (3), referring with approval to the previous decision of the Judicial Committee in *Toronto Railway Co.* v. *Corporation of the City of Toronto* (4):—

> Their Lordships held that the Court of Revision and the courts exercising the statutory jurisdiction of appeal from it "had no jurisdiction to determine the question whether the assessment commissioner had exceeded his powers in assessing property which was not by law assessable. *In*

(1) [1950] O.R. 397.
(2) [1934] S.C.R. 223.
(3) [1952] A.C. 786 at 806.
(4) [1904] A.C. 809.

other words, where the assessment was ab initio a nullity they had no jurisdiction to confirm it or give it validity". Their Lordships pointed out that this decision was in accordance with earlier Canadian authorities.

The italics are mine.

The constitutional question in this appeal was not raised in either the *Sugar City Case supra* or in *Phillips & Taylor* v. *City of Sault Ste. Marie* (1) and the learned judges who decided those cases do not appear to have directed their attention to it.

So far as this appeal is concerned, the *Sugar City* case and the *Sault Ste. Marie* case, are in my opinion authority for no more than the proposition that an assessment tribunal such as the Ontario Municipal Board cannot determine conclusively whether a particular property is liable to assessment. I agree with the view expressed by my Lord the Chief Justice that nowhere in those judgments is it suggested, that where the sole question in issue is the fundamental legal one of liability to assessment, these tribunals have any authority to decide it.

The appeal should be dismissed with costs. There should be no costs for or against the intervenants.

Appeal dismissed with costs. No costs to or against either Attorney General.

Solicitor for the appellant: *W. G. Angus.*

Solicitors for the respondent: *Armstrong, Kemp, Young & Burrows.*

Solicitor for the Attorney General for Ontario: *C. R. Magone.*

Solicitor for the Attorney General of Canada: *F. P. Varcoe.*

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(1) [1954] S.C.R. 404.