Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of The Atlantic and North-West Railway Company v. *Wood and others, from the Court of Queen's Bench for Lower Canada, Province of Quebec; delivered 23rd February* 1895.

Present:

The LORD CHANCELLOR.
LORD WATSON.
LORD MACNAGHTEN.
LORD SHAND.
LORD DAVEY.

[*Delivered by Lord Shand.*]

The appeal in this case is presented against a judgment of the Court of Queen's Bench for Lower Canada, reversing a judgment of the Superior Court in the District of Montreal. The subject of the litigation is an award in an arbitration under the Canadian Railway Act of 1868 (51 Vict. c. 29), by which the majority of the arbitrators awarded a sum of $16,308 as compensation for land taken and injury done to the property of the Respondents by the Appellant Company, in the exercise of their statutory powers by the making of a railroad passing through the City of Montreal. The Respondents are the trustees of Calvary Congregational Church, Montreal, and owners in possession of the property on which the church is built. A small part of the Respondents' land only, consisting mainly of part of a

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lane leading to the rest of their property, was taken and occupied by the Company, by their line being carried over it on trestles or arches, and by much the greater part of the compensation claimed was on account of injury done to the remainder of the property by the use of the line in the working of the railway. The Appellants maintained that they were not liable to pay compensation for injury so caused to the part of the property which was not taken, and stated other defences arising from the particular state of the Respondents' title, but after much discussion these pleas were disallowed by the Court of Queen's Bench which reversed the judgment of the Superior Court by which the amount of compensation awarded had been greatly reduced. The decision on these points has been acquiesced in, and the only question on which any argument has been presented by the Appellants under the present appeal relates to the nature of the review to be exercised by the Court, under the Statute, of an award by arbitrators on the merits of a claim for compensation on which they have given their decision as to the amount of compensation to be paid.

The contention of the Appellants on this question is thus stated in their case (page 6) :—

" The Appellants are willing to admit for the purposes of " the present Appeal that the construction of the railway over " the lane in question constituted such an expropriation of " a real right belonging to the Respondents as to entitle the " proprietors to recover under the Act such direct damages, " contemplated by the Act, as are caused and to be caused to " the remainder of the property by the intended use of such " expropriated real right by the Railway Company ; but they " submit that the Court of Queen's Bench was under the " Act bound either (1) itself to examine and weigh the evi- " dence and decide upon it as in a case of original jurisdiction, " not whether the award of the Arbitrators was manifestly " incorrect and unreasonable, but what upon the evidence " taken before the Arbitrators was the just amount of damages " or (2) to remit that question to the Superior Court for its " decision."

The decision of the question depends on the meaning to be given to the 161st section of the Railway Act already mentioned, (sub-section 2) which is in these terms :—

"Whenever the award exceeds $400 any party to the "arbitration may within one month after receiving written "notice from any one of the arbitrators or the sole arbitrator, "as the case may be, of the making of the award, appeal "therefrom upon any question of law or fact to a superior "court of the province in which such lands are situate and "upon the hearing of the appeal the court shall, if the same is "a question of fact, decide the same upon the evidence taken "before the arbitrators as in a case of original jurisdiction."

It is maintained by the Appellants that, where an appeal from the award of arbitrators involves questions of fact, the Court considering for themselves the evidence taken by the arbitrators ought to deal with the case as if the whole question of the amount of compensation to be awarded had come before them in the first instance, and ought not to pay regard to the decision of the arbitrators or to give weight to their award, as they might do in dealing with a decision on facts coming before them otherwise for review. The view maintained by the Appellants is thus stated in their case :—

"Paragraph 2 of Section 161 of the Railway Act is express "that upon the hearing of the Appeal, the Court shall, if the "same is a question of fact, decide the same upon the evidence "taken before the Arbitrators as in a case of original juris-"diction. This, it is submitted, has not been done; but on the "contrary, the Court appears to have laid down the principle "that the Arbitrators had a discretion which was not to be "interfered with unless exercised in a manner unreasonable or "manifestly incorrect. It is submitted that the Arbitrators "allowed an excessive and unreasonable amount of compensa-"tion, based upon exaggerated estimates of the value of the "property and of its depreciation by the near presence of the "railway, and upon the mere hypothesis, inadequately "supported by evidence, that the church must and would be "removed and a new one built in another place. . . . . "It is submitted that the Court was bound to examine and "weigh the evidence on these various grounds of estimated "damage, and to decide the case upon and in accordance with "their own appreciation of that evidence and not the apprecia-"tion of the Arbitrators, or to remit the case for such action "by the Superior Court.

"The Appellants . . . submit that the Appeal should " be allowed on the ground that neither of the Courts below " has decided the facts according to the law now laid down " upon the evidence as in a case of original jurisdiction, and " that the Appellants are entitled to such decision, and they " submit that the case should be remitted for such decision to " the proper Court, or that it should be so decided here, or that " such other relief be granted to them as their Lordships may " deem just."

In the evidence laid before the arbitrators there appears to have been a wide conflict of views, as is common in such cases, as to the nature and extent of the injury to be inflicted on the property of the Respondents by the use of the railway. It is sufficient for the present purpose to observe that several witnesses, whose evidence seems to have commended itself to the judgment of the arbitrators, considered that the church and the property on which it was built would be so injuriously affected by the use of the line in the running of trains that it might be necessary to have the church removed to another site to be acquired by the trustees, and in any view that serious injury was done to the property, and that a very substantial sum was due by way of compensation.

The view which the Court of Queen's Bench took of the evidence and of the arbitrators' award on the amount of compensation and the grounds of the award is expressed by Mr. Justice Hall in delivering the judgment of the Court, Mr. Justice Bossé dissenting. After laying down the principle that a railway company is bound to compensate a proprietor, not only for land actually taken but for the direct damage to his remaining land, " resulting either from " construction and severance, or from the use of " the railway line and the operation of its traffic service," the learned Judge added :—

" Applying that principle and the jurisprudence I have " quoted, to the facts of the present case, we must conclude " that the arbitrators were justified in taking into consideration " the injurious effect upon the present occupation of Appel-

" lants' premises, resulting from the noise and vibration caused " by the train service in such close proximity to their church. " That it is a direct and tangible and appreciable damage, in " the sense of the Act, will be apparent from considering the " result if the Appellants were the tenants only, and not the " proprietors of the church in question. Would they be " content to pay the same rental for the use of a church " edifice thus situated as for one as free from disturbance as " Calvary church was before the construction of the railway? " Clearly not; and if its rental availability and value are " diminished, certainly its use by its own proprietors has " suffered a corresponding depreciation, for which it is possible " to establish a pecuniary estimation and enforcement. Is that " estimate which the present arbitrators have made, judicious " and suitable? In the face of the evidence adduced, it cannot " be said to be unreasonable nor manifestly incorrect, and we " do not feel warranted, therefore, by substituting our discre- " tion for theirs, to adopt an estimate of damage which might " be open to equal criticism, and even less defensible according " to the evidence by which both they and we are bound."

From these observations their Lordships think it is clear that the Court for themselves fully considered and weighed the evidence taken before the arbitrators on the facts on which the amount of compensation depended, and decided the question of amount (which in such cases must generally be a matter of estimate) according to their own judgment. The learned Judges, as the result of their examination of the evidence, came to the conclusion that if they were to adopt a different estimate of damage from that to which the arbitrators gave effect the result might be liable to criticism equal to that to which the award was open (and to which it had no doubt been subjected in the argument) and their estimate might be even "less defensible, according " to the evidence" than that of the arbitrators, and therefore they sustained the award, among the considerations stated in the formal judgment being the following, viz.:—

" Considering that amongst the powers thus conferred is the " right not only of expropriating the land of third parties and " of laying tracks upon such expropriated land, but of operating " a train service thereon.

" Considering that in the present case the maintenance of " such train service will cause direct damage, loss, and in-

" convenience to said trustees, and greatly injure the use and " enjoyment of their remaining property for church purposes to " which use it had been applied and dedicated for many years " prior to the date of said expropriation notice, and that the " Arbitrators acted within their legal powers and functions in " taking into consideration not only the value of the expro- " priated premises, but the direct damage caused and to be " caused to the remainder of the property by the intended use " of such expropriated real right by said Railway Company."

The Court dealt with the award as one which it was their province to review on the facts as appearing on the evidence adduced before the arbitrators, and in so doing in the opinion of their Lordships they acted rightly and in accordance with the Statute. It would be a strained and unreasonable reading of the words of the Statute "as in a case of original " jurisdiction" to hold that the evidence was to be taken up and considered as if it had been adduced before the Court itself in the first instance and not before the arbitrators, and entirely to disregard the judgment of the arbitrators and the reasoning in support of it. Such a reading of the Statute would really make the Court the arbitrators and the sole arbitrators in every arbitration in which an appeal on questions of fact was brought against an arbitrator's award. It appears to their Lordships that this was not the intention of the legislature, and that what was intended by the Statute was not that the Court should thus entirely supersede and take the place of the arbitrators, but that they should examine into the justice of the award given by them on its merits, on the facts as well as the law. Previously to this enactment the Court had power, only to approve of or set aside the award of arbitrators. This might often cause much expense and inconvenience, in renewed proceedings before the arbitrators, and the purpose of the legislature seems to have been to enable the Court to avoid this, by giving power to make or rather to reform the award

by correcting any erroneous view which the arbitrators might have taken of the evidence; that in short they should review the judgment of the arbitrators as they would that of a Subordinate Court, in a case of original jurisdiction, where review is provided for. And it is in this view worthy of notice that the enacting words of sub-section 2 of section 161 are followed by this provision of sub-section 3. "Upon such "appeal the practice and proceedings shall be as "nearly as may be the same as upon an appeal "from a decision of an Inferior Court to the said "Court."

The Court of Queen's Bench has, in their Lordships' opinion, rightly acted on this view, and their Lordships will therefore humbly advise Her Majesty that the appeal should be dismissed. The Appellants must pay the costs of the appeal.