

*Judgment of the Lords of the Judicial Committee  
of the Privy Council on the Appeal of  
The James Bay Railway Company v.  
Samuel W. Armstrong, from the Supreme  
Court of Canada; delivered the 30th July,  
1909.*

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Present at the Hearing :

LORD MACNAGHTEN.

LORD DUNEDIN.

LORD COLLINS.

SIR ARTHUR WILSON.

[*Delivered by Lord Macnaghten.*]

This is an Appeal by special leave from an Order of the Supreme Court of Canada, dismissing as incompetent an Appeal and a Cross-Appeal from a judgment of the High Court of Ontario in the matter of an Arbitration under the Canada Railway Act, 1903.

The original question was, What sum was payable as compensation to the Respondent Armstrong in respect of a strip of land belonging to him taken by the James Bay Railway Company for the purposes of their undertaking? The land taken was a little more than 3 acres in extent. It was part of a dairy and grain farm, situated about 10 miles from the City of Toronto. The parties were unable to come to terms. So each named an Arbitrator and the two Arbitrators appointed a third. Eight days were employed, or wasted, in determining the simple

question referred to arbitration. The oral evidence occupied six whole days. In the Record it takes up more than 250 printed pages. In addition to the difficulty of sifting and weighing such a mass of undigested evidence, the issue was complicated and, to some extent, confused by an offer on the part of the Company of a cattle-pass under the track of the Railway which, in crossing Armstrong's farm, was raised on an embankment a few feet above the surface of the adjoining land. The offer was not accepted, as the conditions with which it was accompanied made the proposed accommodation, in the opinion of the claimant's advisers, worse than useless. But it was discussed at some length in the evidence at the hearing before the Arbitrators. The Arbitrators differed in opinion. The Award was made by a majority consisting of the Arbitrator appointed by the Railway Company and the third Arbitrator. They assessed the compensation at the sum of \$1,170, which was just \$2.50c. under the sum offered by the Railway Company. The dissenting Arbitrator, who is said to be the Official Arbitrator for the Province, stated that he thought the amount of the Award should have been \$3,809. Armstrong appealed from the Award to the High Court of Ontario. The jurisdiction of that Court under Sec. 65 of the Ontario Judicature Act (Rev. St. Ont., 1897, c. 51) is exercised by a single Judge. The Appeal was heard by Meredith, C.J. It was heard by him according to the ordinary practice in such cases, and without any objection on the score of jurisdiction. The learned Chief Justice increased the Award to \$2,250, and ordered the Railway Company to pay the costs of the Appeal. The Railway Company then appealed as of right to the Supreme Court, and Armstrong also entered a

Cross-Appeal claiming a larger sum than that which was given him by the High Court. The Supreme Court after argument rejected both the Appeal and the Cross-Appeal as incompetent. Then an application was made for special leave to appeal on the ground that there was much doubt and difficulty as to the proper course to be pursued in the case of Appeals from Awards made under the Canada Railway Act. Their Lordships thought proper to advise His Majesty to grant special leave to appeal from the Order of the Supreme Court and also from the judgment of the High Court in order that the whole case might be before this Board, and the expense and delay of a hearing before the Supreme Court might be saved in case their Lordships should think that an Appeal lay to that Court from the High Court of Ontario.

The case has been very fully and ably argued. It presents two questions of some difficulty:—

- (1) To what Court or Courts in Ontario does an Appeal lie from an Award under the Canada Railway Act, 1903 ?
- (2) If an Appeal to the High Court of Ontario is competent, does an Appeal to that Court preclude an Appeal to the Supreme Court of Canada ?

By Sec. 168 of the Railway Act, 1903, "whenever the Award exceeds \$600" an Appeal is given "upon any question of law or fact to a Superior Court." What is a Superior Court ? The expression has a different meaning in different Provinces. In the General Interpretation Act, Rev. St. Can., 1906, c. 1, Sec. 34 (26), Superior Court is defined to mean "In the Province of Ontario the Court of Appeal for Ontario and the High Court

"of Justice for Ontario." It seems to follow that a party desirous of appealing from an Award under the Canada Railway Act has in Ontario the option of going either to the High Court or to the Court of Appeal. This has uniformly been so held in Ontario, and it has also been held from the first that no Appeal lies from the High Court to the Court of Appeal in Ontario in the case of Railway Awards (see *Birely v. The Toronto, Hamilton & Buffalo Railway Company*, 25 Ont. Ap. Rep. 88).

The Supreme Court in the present case appear to think that this view is right. It is, however, objected that, if the Appellant has the option of going either to the High Court or the Court of Appeal, and if the Supreme Court is right in holding that no appeal lies from the High Court to the Supreme Court, an appellant has the power of shutting out any further appeal at his own will and pleasure. No doubt that privilege, whether it be a benefit to the litigants or a calamity, is somewhat anomalous, but it does not seem to their Lordships that the anomaly is so great or so startling as to make it necessary or permissible to confine the expression "Superior Court" to the Court of Appeal. In Ontario, when the right of appeal from Railway Awards was first given, the appeal "upon any question of law or fact" lay "to a Judge of any of the Superior Courts of Law or Equity;" 38 Vict. c. xv. Sec. 4 (Ontario), entitled "An Act respecting Railway Arbitrations." Under that Act, of course, there could be no further Appeal, and it may perhaps be doubted whether the unlimited right of appeal which now seems to be authorized generally has not gained admittance to the enactment by some oversight or inadvertence.

The other question is more difficult. The Supreme and Exchequer Courts Act, Rev. St. Can. 1886, c. 135, Sec. 26, provides that, with an exception which does not apply to the present case, "no appeal shall lie to the Supreme Court but from the highest court of last resort having jurisdiction in the Province in which the . . . matter or other judicial proceeding was originally instituted, whether the . . . matter or other judicial proceeding was or was not a proper subject of appeal to such highest court of last resort." Now, unquestionably the Court of Appeal in Ontario is the highest court of last resort having jurisdiction in the Province. The High Court is not. It was argued that in this particular case the High Court becomes "the highest court of last resort" when no appeal lies from it to the Court of Appeal, and it is placed by statute for the purpose in hand on an equal footing with the Court of Appeal. But their Lordships think that that result cannot be attained without unduly straining the words of the statute, and that, except in certain specified cases within which the present case does not come, an appeal to the Supreme Court lies only from the Court of Appeal.

There remains for consideration the judgment of the High Court from which special leave to appeal was granted.

It appears from the judgment of Meredith, C.J., that the case was discussed before the Arbitrators under four distinct heads. The Award of the Arbitrators in the majority does not give any indication of the way in which these several heads were dealt with or any clue to the reasons on which the Award was based. The very guarded answer which the two Arbitra-

tors gave to the statement of the dissentient Arbitrator, the fact that, when the learned Chief Justice expressed his willingness to receive an explanation from them, they abstained from giving him any assistance, and the line of argument adopted on behalf of the Railway Company, all lead to the inference that these Arbitrators were under the impression that they could prevent or nullify an appeal by giving merely a general verdict. It was argued at the Bar that the Judge on Appeal ought not to have disturbed the finding of the Arbitrators unless it was demonstrable that the Award was founded on some error in principle. But how is an error in principle to be detected when there is nothing to show what the principles were by which the tribunal was guided? The Statute gives a right to an appeal. That right was surely intended to be effective. It is impossible to suppose that the Arbitrators from whom the appeal lies can defeat that right by judicious silence. Such conduct rather tends to provoke an appeal. After all it only makes the task of the Judge on appeal a little more troublesome. It throws upon him the duty of going through all the evidence, and examining into the justice of the Award, paying, of course, due regard to the finding of the Arbitrators. That is what the learned Chief Justice has done. He seems to have considered the evidence most carefully, and he came to the conclusion that the sum awarded was not adequate. There is no ground for disturbing his judgment, which is quite in accordance with the view expressed in the *Atlantic & N.W. Railway Company v. Wood*, in 1895 A.C., p. 257.

Their Lordships concur with the Chief Justice in regretting the enormous expense incurred in this case in settling a very simple

question, and they share the hope that it may be found possible to devise some better way of ascertaining the compensation payable to a land-owner whose property is taken by a Railway Company under their statutory powers.

Their Lordships will humbly advise His Majesty that this Appeal should be dismissed.

The Appellants, in accordance with their undertaking, will pay the costs of the Appeal as between Solicitor and Client.

