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*Oct. 27.

*Dec. 14.

E. BEAUDET *et al*.....APPELLANTS;

AND

THE NORTH SHORE RAILWAY CO...RESPONDENTS.

ON APPEAL FROM THE COURT OF QUEEN'S BENCH FOR LOWER CANADA (APPEAL SIDE).

43-44 *Vic. ch.* 43 *sec.* 9 (*P. Q.*)—*Award—Validity of—Faits et articles—Art.* 225 *C. C. P.*

E. B. *et al*. joint owners of land situate in the city of Quebec were awarded $11,900 under 43-44 Vic. ch. 43 sec. 9, for a portion of said land expropriated for the use of the North Shore Railway Company.

On the 12th March, 1885, E. B. *et al.* instituted an action against the North Shore Railway Company, based on the award. The company not having pleaded foreclosure was granted, and on the 21st April, process for interrogatories upon *faits et articles* was issued, and returned on the 20th April. The company made default. On the 18th June, the *faits et articles* were declared taken *pro confessis*. On the 16th May E. B. *et al.* consented that the defendants be allowed to plead, but it was only on the 7th July that a plea was filed, alleging that the arbitration had been irregular and was against the weight of evidence. On the 2nd September, E. B. *et al.* inscribed the case for hearing on the merits, on which day the railway company moved to be authorized to answer the *faits et articles* and the motion was refused.

The notice of expropriation and the award both described the land expropriated as No. 1, on the plan of the railway company deposited according to law, but in another part of the notice it described it as forming part of a cadastral lot 2345 and in the award as forming part of lots 2344-2345. On the 5th December, judgment was rendered in favor of E. B. *et al.* for the amount of the award. From this judgment the railway company appealed to the Court of Queen's Bench (appeal side) and that court reversed the judgment of the Superior court, holding *inter alia* the award bad for uncertainty, and that the case should also be sent back to the Superior Court to allow the defendants to answer the *faits et articles*.

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*PRESENT.—Sir W. J. Ritchie C.J. and Strong, Fournier, Henry, Taschereau and Gwynne JJ.

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On appeal to the Supreme Court of Canada it was

Held, 1, reversing the judgment of the court of Queen's Bench (appeal side, that there was no uncertainty in the award as the words of the award and notice were sufficient of themselves to describe the property intended to be expropriated and which was valued by arbitrators.

2. That the motion for leave to answer *faits et articles* had been properly refused by the Superior Court. Taschereau J. dissenting.

APPEAL from the judgment of the Court of Queen's Bench for Lower Canada (appeal side) reversing the judgment of the Superior Court in favor of the appellants.

This was an action brought by the appellants against the respondents claiming the sum of $11,000, being the amount of an award made under the provisions of "The Quebec Consolidated Railway Act, 1880."

The notice by the North Shore Railway Company to appellants was as follows:—

"NOTICE BY THE NORTH SHORE R.R. CO. TO E. BEAUDET *et al.*

"L'An mil huit cent quatre-vingt-trois, le quinzième jour de juin, à la réquisition de la Compagnie du Chemin de fer du Nord, corps politique et incorporé.

"Je, Notaire public pour la Province de Québec, residant en la cité de Québec, soussigné, me suis exprès transporté au bureau de Monsieur Amedée Auger, Secrétaire Trésorier d'une association de construction portant le nom de Elisée Beaudet, ou étant et parlant à Monsieur Jacques Onésiphore Trudel, commis dans le dit Bureau, j'ai déclaré et signifié aux dits Elisée Beaudet et autres: que la dite Compagnie du Chemin de fer du Nord requiert pour la construction et le déplacement d'une partie de son chemin autorisé par l'acte quarante cinq Victoria 2eme section, chapitre vingt, une portion de terre de deux arpents et quarante perches en superficie tel que maintenant jalonnée et

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faisant partie du lot numéro (2345) deux mille trois cent quarante cinq du cadastre pour la paroisse de St-Sauveur de Québec, et portant le numéro un sur le plan du tracé du Chemin de fer tel que déposé suivant la loi."

The award was as follows :—

"AUTHENTIC AWARD OF THE ARBITRATORS.

"L'An mil huit cent quatre-vingt-trois le vingt huitième jour d'août.

"Ont comparu, devant le Notaire pour la Province de Québec, en la Puissance du Canada, résidant en la cité de Québec, soussigné.

"Monsieur Jean-Baptiste Bertrand de la paroisse de St-Roch de Québec, marchand de bois.

"Arbitre nommé par la Compagnie du Chemin de fer du Nord.

"Monsieur David Bell, de la paroisse de St-Sauveur de Québec, manufacturier, arbitre nommé par l'Association de Construction portant les noms de Elisée Beaudet et autres, et Monsieur Joseph Grondin de la paroisse de Charlesbourg, agent d'assurance, tiers arbitre nommé par Messieurs Bertrand et Bell, le tout conformément aux dispositions de l'acte refondu des chemins de fer de Québec 1880.

"Lesquels ont déclaré ;

"Que sous l'autorité de l'acte 45 Victoria chap., XX la dite Compagnie du Chemin de fer du Nord requiert, pour la construction et le déplacement d'une partie de sa voie ferrée, le terrain suivant. Savoir :

"Un certain terrain situé en la paroisse de St-Sauveur de Québec, contenant deux arpents et quarante perches en superficie, borné au Nord-Ouest, au Sud-Est et à l'Ouest par la dite association et à l'Est par les héritiers Tourangeau, et faisant partie des lots numéros (2344-2345) deux mille trois cent quarante quatre et deux mille trois cent quarante cinq du cadastre pour la

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dite paroisse de St. Sauveur et portant le numéro un sur le plan du tracé du chemin de fer tel que déposé suivant la loi.

Qu'après avoir au préalable prêté le serment requis par la loi ainsi qu'il appert par les certificats ci-annexés sauf quant au certificat de M. J. Bertrand, qui n'est pas produit, ils ont procédé à l'examen du dit terrain et dépendances et pris tous renseignements nécessaires.

"Et qu'après avoir mûrement délibéré, Messieurs Bell et Grondin se sont accordés sur le montant de l'indemnité qui doit être constatée par leur sentence arbitrale.

"Et procédant en conséquence, par les présentes, à la reddition de la dite sentence les dits arbitrees David Bell et Joseph Grondin, ont fixé à la somme de onze mille neuf cent piastres l'indemnité que la dite Compagnie du Chemin de fer du Nord aura à payer à la dite association de construction pour le terrain sus décrit.

"A la charge par ces derniers de libérer le terrain précité de toutes rentes constituées hypothéques, servitudes et autres charges quelconques affectant le dit terrain. Messieurs Grondin et Bell réclament en sus de l'indemnité ci- haut, l'intérêt de cette indemnité à six pour cent depuis la possession par la Compagnie du terrain exproprié.

"Dont acte fait et passé à Québec, sous le numéro cinq cent quarante deux des minutes de François Eusèbe Blondeau, Notaire soussigné.

"En foi de quoi Messieurs David Bell et Joseph Grondin, ont signé avec le Notaire, Monsieur Bertrand s'étant absenté avant la reddition et la lecture de la dite sentence.

Signé, DAVID BELL.
JOSEPH GRONDIN.
F. E. BLONDEAU, N. P.

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A proper notice was given to all the arbitrators of the day on which it was to be made, viz., 14th August, but it was adjourned and the award was rendered on the 23th August, at which meeting Bertrand withdrew during the sitting. In his evidence at the trial he said :—

> The two other arbitrators have concurred in the award which has been rendered after the fulfilling of all the essential formalities. I received all the necessary notices, and all the proceedings have been regular before the arbitrators. I only refused to sign because I considered that the amount awarded was exaggerated and unjust.

The pleadings sufficiently appear in the head note and in the judgment of Fournier J. hereinafter given.

Pelletier for appellant.

As to the objection regarding the *faits et articles*.

The default of the defendants was first recorded on 26th April, 1885, then on a formal motion the interrogatories were held *pro-confessis*. Over two months afterwards the defendants apply to answer, without filing their answers, without offering to pay the costs incurred, and in spite of the terms of the consent in virtue of which they had—long after the delays,—filed their plea, which they were only entitled to do on condition that the case would not be delayed. There must be a certain limit to delays obtained by means of omissions on behalf of parties. Pending the long *délibéré*, was it not the duty of the defendants to make a motion accompanied, as usual, with their answers and with the offer of paying the costs as required by law in such instances? The defendants have not thought fit to act in that way. Is it not probable that they were afraid of being allowed to file their answers? Then the case might have gone back on the enquête roll and evidence might have been adduced proving that the plaintiffs' pretentions were correct.

The Superior Court was obviously right in granting some kind of protection to the plaintiffs against the

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extraordinary delays, omissions and defaults of the defendants. The same court could not, on motion, reverse and annul the judgment already rendered, declaring the *faits et articles* taken *pro-confessis*.

Then the Court of Appeal orders the case to be sent back to the Superior Court, for the defendant to answer upon *faits et articles*, and new arbitrators to be appointed.

Why then order the case back to the Superior Court in order that the *faits et articles* should be answered?

What benefit would result from that for either party?

If the *faits et articles* are to be answered, what is the use of appointing new arbitrators?

As to uncertainty the lot described in the notice, is exactly the same as the one mentioned in the award, to wit: "lot number one upon the plan of the *tracé* of "the railroad as deposited according to law."

The plan of the railroad, "deposited according to law," became the real and only legal plan and description of the lot in question. Both the notice and the award give its area: "2 *arpents et* 40 *perches*." So soon as that plan was deposited it was by law substituted for the general cadastral plan, which can no longer apply to the lot of which the said plan is a parcelling out and sub-division.

The second objection raised by the defendants in their factum before the Appeal Court is that there seems to be no notice to the arbitrators of their sitting on the 28th August.

It is alleged by the action—not specifically denied, and proved by the *faits et articles*—that such meeting was an adjourned one, as decided by the arbitrators at their meeting of the 14th, duly called by the notice produced in the record. Subs. 18 (of said Sec. 9) provides for those adjourned meetings.

But let us go a step further. The three arbitrators

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appeared before the notary on the 28th of August. Bertrand, the defendants' arbritrator, who withdrew during the sitting of the 28th, when examined as a witness by the defendants, says that they have examined many witnesses, and adds: That he had received all the necessary notices and all the proceedings had been regular.

The third objection raised is that the plaintiffs have no juridical existence as a company. The defendants' notice served on the plaintiffs shows that defendant had accepted them as joint proprietors; they sued as such; no exception to the form has denied their qualities (Code of Procedure arts 116 et 119).

The defendants, not having denied the qualities assumed by the plaintiffs in the writ of summons, must be held to have admitted them and to have waived all possible objection. It is too late to have the award invalidated for defect of form.

Subs. 27 of the said section 9 is also a peremptory answer to that objection. It says: "Nor shall it be "necessary that the party or parties to whom the sum is to be paid be named in the award."

Duhamel Q.C. and *Drouin* for respondents.

The illegalities on which we based our plea are the following:

1. That there is no identity between the ground valued by the arbitrators, and the one that they were charged to valuate.

In fact, by the notice given by the respondents to the appellants in conformity with sub-sec. 13 of sec. 9 of the Quebec Consolidated Railway Act, notice which according to this sub-section must contain "a description of the lands to be taken, &c.," the respondents requested two arpents and forty perches forming part of the lot 2345 of the official cadastre for the parish of St. Sauveur. But the majority of the arbitrators with-

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out taking account of this injunction, adjudged on another parcel of land, on a parcel forming part of the lots 2344 and 2345 of the official cadastre for the parish of St. Sauveur.

Consequently there is no conformity between the designation inserted in the notice and the one contained in the sentence ; and on the part of the arbitrators there was adjudication on a litigation not submitted to them

2. Sub-sec. 22 of sec. 9 of the same act decrees that: " A majority of the arbitrators at the first meeting of their appointment, or the sole arbitrator, shall fix a day on or before which the award shall be made." It does not appear by the record that there was any such day fixed. There is in the record a notice from one of the arbitrators but this notice, which could not fulfil the prescription of the above disposition, is made for the 14th of August, and the pretended sentence has been rendered on the 28th of August

3. The pretended sentence of arbitrators does not mention the names of the owners on the ground expropriated and on which it is adjudged. They are there designated in this manner " *l'association de con-* " *struction portant les noms de Elisée Beaudet et autres.*" But this association not being incorporated has no juridical existence. It is true that it is alleged in the declaration, " Que les mots 'Association de construction portant les noms de Elisée Beaudet et autres' employés dans les titres sont une expression de convention employée pour désigner les Demandeurs comme propriétaires indivi des dits immeubles," but this allegation is of no value because it is not proved, and even if proved it could not cover this absence of designation of parties required by the law. One of two things, either the proceedings and the sentence of the arbitrators have a judicial quality and then no

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doubt that the names and qualities of all the parties ought to be mentioned, at least in the sentence ; or, they have an extra judicial quality and the designation of names and qualities is still rigorously exacted by the Article 1344 of the Civil Code of Procedure of Lower Canada.

In any case the judgment of the Court of Appeal was correct in ordering the record to be sent back to the Superior Court in order to allow the respondents to answer the *faits et articles*, for it is in accordance with the jurisprudence and the law (Article 225 Civil Code of Procedure Bas Canada). The circumstances and excuses set forth on the motion, the impossibility for the respondents to assemble their board, and above all, the fact that the answers were made and deposited in the prothonotary's office, at the time of its presentation,—implied certainly good faith on the part of the respondents.

Sir W. J. RITCHIE C.J.—I think the judgment of the Superior Court should be restored. I think the arbitration was quite regular and the award perfectly good and binding on the parties; that there is no object whatever to be gained by sending the case back to answer upon *faits et articles* and that there is nothing in the objection that the award does not mention the names of the owners of the ground expropriated. The names in the award are the same as those used by the railway company in their notice of expropriation and in the arbitration throughout, and as to the *considérant*:

Considérant qu'il y a aussi erreur dans le jugement final rendu le cinq décembre mil huit cent quatre-vingt qnatre, approuvant la sentence arbitrale, en autant que la dite sentence contient une description du terrain évalué, différente de celle du terrain dont l'appelante a demandé l'expropriation, et que cette différence dans cette description rend la sentence arbitrale incertaine quant au terrain exproprié

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I think this view cannot prevail. This, in my opinion, is just a case where the maxim *falsa demonstratio non nocet* applies. There is adequate and sufficient definition with convenient certainty of what was intended on the application and award, that is to say, the words of the notice and award, exclusive of the *falsa demonstratio*, are sufficient of themselves to describe the property intended to be expropriated and which was valued by the arbitrators. As has been stated the characteristic of cases strictly within the above rule is this, that the description, so far as it is false, applies to no subject, and so far as it is true it applies to one subject only; and the court, in these cases, rejects no words but those which are shown to have no application to any subject.

Now in this case the words " Et portant le numero " un sur le plan du tracé du chemin de fer tel que " déposé suivant la loi " must be referred to for the purpose of determining the land the company sought to expropriate. Without these words it would be impossible to locate the lands to be expropriated.

The land valued by the arbitrators is described as

Une portion de terre de deux arpents et quarante perches en superficie, tel que maintenant jalonnée, et faisant partie du lot numero (2345) deux mille trois cent quarante cinq du cadastre pour la paroisse de St. Sauveur de Quebec, et portant le numéro un sur le plan du tracé de chemin de fer tel déposé suivant la loi.

And in the award the land is described as follows:

Un certain terrain contenant deux arpents et quarante cinq perches en superficie, borné au nord-ouest, au sud-est et à l'ouest par la dite association, et à l'est par les héritiers Tourangeau et faisant partie des lots numéros (2344 et 2345) deux mille trois cent quarante-quatre et deux mille trois cent quarante cinq du cadastre pour la dite paroisse de St. Sauveur, et portant le numéro un sur la plan du tracé du chemin de fer tel que déposé suivant la loi.

So that whether it was part of lot 2345 or part of lots 2844 & 2345, or these numbers be rejected altogether, the rest of the description specifies the land

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beyond all doubt as part of lot number one of the railway plan. It is therefore clear that the notice and the award refer precisely to the same parcel of 2 arpents & 40 perches of land and is the same land taken possession of by the defendants, viz; lot number one upon the plan of the *tracé* of the railroad, as deposited according to law and which they sought to expropriate. Under these circumstances there can be no doubt there was a good and sufficient description. The arbitrator of the company under oath says all the proceedings were regular and that he differed from the other arbitrators only as regards the amount. The appeal, in my opinion, should therefore be allowed.

STRONG J.—I have read the judgment which will be delivered by Mr. Justice Fournier and I fully concur in the reasons given by him for reversing the judgment appealed from.

The appeal should be allowed with costs.

FOURNIER J.—L'action des appelants demandait la confirmation d'une sentence arbitrale rendue par des arbitres nommés en vertu de l'acte consolidé des chemins de fer de Québec, 43-44 Vict., ch. 43, pour faire l'évaluation du terrain exproprié pour le passage du chemin de fer de la compagnie intimée. Celle-ci a plaidé la nullité de cette sentence, sans, cependant, indiquer par sa défense un seul moyen de nullité. Elle en a aussi attaqué le mérite en prétendant que le montant accordé excède la valeur réelle de la propriété et n'est pas justifié par la preuve. Quant à ce dernier moyen il est évident qu'en vertu des arts. 1353 et 1354 du code de procédure l'intimée n'avait aucun droit de remettre en question devant la Cour Supérieure le mérite de la contestation qui avait été soumise aux arbitres. Elle ne devait attaquer cette sentence que par des moyens de nullité pouvant l'affecter, ou des questions

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de forme pouvant en empêcher l'exécution. Elle n'en a allégué ni prouvé aucun, et en conséquence la Cour Supérieure a renvoyé son plaidoyer, confirmé la dite sentence et condamné l'intimée à en payer le montant.

Ce jugement a été porté en appel à la Cour du Banc de la Reine, et là, pour la première fois, l'intimée a invoqué, pour attaquer la sentence en question, des moyens de nullité qu'elle n'avait pas plaidés.

Le premier est que la propriété requise par l'intimée et désignée dans l'avis qu'elle a donné n'est pas la même que celle décrite dans la sentence arbitrale. 2° Qu'il n'apparaît pas avoir été donné avis aux arbitres de leur séance du 28 août, à laquelle la dite sentence a été rendue. 3° Que les appelants n'ont pas d'existence légale comme compagnie.

La première et la deuxième de ces questions seules méritent une réponse ; car la cour du Banc de la Reine en a fait des considérants de son jugement, infirmant celui de la cour Supérieure. Quant à la troisième, la cour d'Appel n'ayant pas jugé à propos d'en faire mention, je ne crois pas devoir m'y arrêter. Les motifs qui ont fait le base de son jugement sont : 1° le refus de permettre à l'intimée de répondre aux interrogatoires sur faits et articles auxquels elle avait fait défaut de comparaître. 2° Le défaut d'identité de la propriété requise avec celle décrite dans la sentence arbitrale. 3° Le défaut des arbitres d'avoir fixé à leur première séance la date de la prononciation de leur sentence.

La plus importante de ces questions est celle concernant le refus de la cour Supérieure de permettre à l'intimée d'être relevée de son défaut sur faits et articles et d'offrir ses réponses. En général, il est assez facile dans une contestation sérieuse de se faire relever de ce défaut. L'article 225 du C. P. C. dit :—

The party who thus makes default may, however, answer the interrogatories afterwards, before the hearing of the case, but he must bear

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whatever costs are occasioned by his default.

L'art. 221 dit que les parties peuvent être interrogées en tout état de cause mais sans retardation du procès ou jugement.

En consultant le dossier on voit que l'intimée n'a guère attaché d'importance à sa contestation. L'action est entrée en cour le 24 mars 1884; l'intimée a été forcée de plaider le 16 avril, et la cause a été inscrite aux enquêtes *ex parte* pour le 26. Les appelants avaient obtenu une règle pour faits et articles rapportable ce jour-là, à laquelle l'intimée fit défaut. Le 23 juin les faits et articles sont pris et considérés comme avoués et confessés, *pro confessis*. L'enquête des appelants est close et celle de l'intimée fixée péremptoirement au 26 juin sans opposition de sa part. Ce jour là son enquête est déclarée close généralement sous la réserve du droit d'entendre deux témoins qui le sont plus tard. Ce n'est que le 7 juillet, plus de deux mois après l'entrée de l'action et après la clôture de l'enquête que l'intimée produit ses plaidoyers. Les parties soumettent la cause au juge le 8 juillet et le délibéré est déchargé le 9 sans qu'on sache pour quel motif. Le 2 septembre la cause est de nouveau inscrite pour audition finale au mérite pour le 17 du même mois. Le 16 l'intimée produit l'affidavit de T. E. Normand avec un avis de motion pour permission de répondre aux faits et articles. Le 19 cette motion est renvoyée avec dépens. On voit par les dates de la procédure que c'est plus de quatre mois et demi après l'enregistrement du défaut sur faits et articles que la demande d'en être relevée a été faite, et au moment où la cause était inscrite pour audition finale. Cette permission n'était évidemment demandée que dans le but gagner du temps. L'honorable juge a compris que dans des circonstances où l'intimée avait fait preuve de tant de négligence, il ne pouvait sans violer l'article 221 accorder cette demande. Cet

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article déclare que l'interrogatoire sur faits et articles aura lieu sans retardation de cause. L'enquête étant close généralement, permettre alors de répondre aux interrogatoires, c'était priver les appelants du bénéfice de la preuve leur résultant du défaut de comparution et du jugement déclarant les interrogatoires comme avoués et confessés, et les obliger à refaire leur enquête. C'était évidemment retarder la cause, en violation de l'article 221. Indépendamment de cette objection insurmontable, il en existe encore plusieurs autres pour justifier le refus de l'honorable juge. D'abord cette permission de répondre après le défaut ne peut être accordée qu'avant l'audition de la cause, "*before the hearing of the case.*" La cause avait déjà été entendue lorsque la demande a été faite, et elle était au moment d'être entendue pour la deuxième fois. L'art. 225 ne donne pas la facilité de répondre à l'audition, mais avant, "*before the hearing*," il était trop tard pour faire cette demande qui, d'ailleurs, n'était pas faite conformément au dit article. En effet cet article impose à l'octroi de cette permission une condition absolue, c'est celle de payer les frais occasionnés par le défaut "*but he must bear the costs occasioned by his default*" Il aurait dû accompagner sa motion du montant de la différence de frais et honoraires entre l'état où en était alors la procédure, et celui où il aurait fallu la remettre pour continuer l'enquête. L'intimée ne s'étant pas conformée à cette condition, la motion ne devait pas être reçue. De plus l'excuse que le bureau de direction ne s'est réuni que le 4 septembre pour autoriser les réponses est insuffisante. Normand ne jure pas qu'il n'y a pas eu de réunion du bureau entre le 26 avril et 4 septembre, et d'ailleurs l'absence de réunion du bureau n'est pas une excuse acceptable, c'était le devoir des officiers de la compagnie d'en convoquer une spécialement pour cet objet s'il ne devait pas y en

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avoir pour d'autre affaire. Convaincu que le bénéfice du défaut doit rester acquis aux appelants, et qu'il en résulte une preuve complète de toutes les allégations de sa demande, je suis d'avis que ce motif seul serait suffisant pour faire infirmer le jugement de la Cour du Banc de la Reine.

Si bien fondé que soit le refus de permettre la production des réponses sur faits et articles, j'inclinerais probablement à les recevoir, si les deux autres considérants du jugement étaient bien fondés en fait, mais je regrette d'avoir à dire que je ne partage pas l'opinion de la cour du Banc de la Reine à cet égard. Je crois que, comme question de fait, l'identité de l'immeuble dont il s'agit, tel que décrit dans l'avis d'expropriation et dans la sentence arbitrale, est parfaitement établie. Il en est de même de la présence de l'intimée, ou plutôt de son arbitre, lorsque la sentence a été prononcée. L'objection à l'identité du terrain consiste dans le fait que l'avis d'expropriation ne fait mention que de partie du lot cadastral 2345, tandis que la sentence mentionne partie des lots 2344, 2345 du même cadastre. Toutes les propriétés dans la province sont cadastrées et désignées par numéros. C'est leur désignation officielle tant qu'elle n'est pas modifiée en vertu d'une loi. Dans ce cas-ci elle l'a été en vertu de l'acte des chemins de fer 43-44 Vict., ch. 43. En vertu de la section 8, lorsqu'une compagnie de chemin de fer veut exproprier des terrains pour le passage de son chemin, elle doit faire faire une carte ou plan du chemin de fer, son cours, des terrains qu'il doit traverser et qui devront être expropriés à cette fin; aussi, un livre de renvoi pour le chemin de fer qui contiendra :—

a. Une description générale des terrains ;

b. Les noms des propriétaires des terrains et occupants, en tant qu'ils pourront être constatés ; et

c. Tous les renseignements nécessaires pour bien

comprendre la carte.

Ces procédés doivent être examinés et certifiés par le Commissaire d'agriculture et des travaux publics.

Dans la carte préparée par les ingénieurs de la Cie., les lots ou partie de lots requis pour le passage du chemin de fer ont été désignés par des numéros particuliers. Celui des appelants est désigné par le n° 1 sur la carte du chemin de fer et il est désigné par le même n° dans l'avis et dans la sentence arbitrale, et c'est maintenant sa description légale, il ne peut être connu autrement et la référence aux n^{os} du cadastre dans l'avis n'était qu'une indication sans utilité et nullement obligatoire après l'approbation officielle et le dépôt du plan du chemin de fer. Dans l'avis et dans la sentence la description devenue la seule légale et officielle est donnée comme étant de deux arpents et 40 perches avec référence au plan du chemin de fer et en indiquant le n° de ce plan. L'identité est parfaite et l'erreur impossible. Si cette objection avait quelque fondement, l'intimée n'aurait-elle pas dû en prendre avantage par son plaidoyer et mettre les appelants en demeure de faire la preuve de cette identité, si elle n'était pas déjà suffisamment prouvée par l'avis et la sentence ainsi que par les autres documents en preuve? Je considère donc cette objection comme une pure technicité qui ne peut aucunement affecter la sentence ni en empêcher l'homologation.

Quant au défaut d'avis du jour où devait être prononcée la dite sentence arbitrale, la réponse est que la déclaration contient une allégation qui n'a pas été niée spécialement que cet avis a été donné et que la réunion des arbitres le 28 juin avait eu lieu en vertu d'un ajournement. Si ces faits n'étaient pas amplement établis par la preuve au dossier, ils le seraient dans tous les cas par l'absence de réponse aux faits et articles. Mais il y a plus que cela, le procès-verbal

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authentique de la réunion des arbitres, le 28 juin, rédigé par le notaire Blondeau, fait preuve de la réunion des trois arbitres. Cette réunion n'a pu avoir lieu qu'en vertu d'un ajournement que la loi déclare un avis suffisant (voir sec. 9, ss. 18). De plus la preuve de la présence de l'arbitre de l'intimée déjà faite par le procès-verbal, est encore confirmée par son propre témoignage dans lequel il déclare positivement y avoir été présent et n'avoir laissé la séance que parce qu'il différait d'opinion d'avec ses collègues. Voici ce qu'il dit à ce sujet :—

J'étais l'un des experts choisis pour faire l'arbitrage dont il est question en cette cause. Je n'ai pas concouru dans la sentence rendue. Nous avons examiné plusieurs témoins et dans mon opinion cette sentence n'est pas conforme à la preuve faite devant nous.

Dans ses transquestions il ajoute :—

C'était là mon opinion, mais j'étais seul de mon opinion; les deux autres arbitres, formant la majorité, ont concouru dans la sentence rendue après l'observation de toutes les formalités essentielles. J'ai reçu tous les avis nécessaires et toutes les procédures ont été régulières devant les arbitres. J'ai seulement refusé de signer parce que je considérais le montant adjugé exagéré et injuste. J'étais l'arbitre nommé par la défenderesse.

Ainsi, il est évident que le considérant fondé sur le défaut d'avis n'est pas fondé. Par tous ces motifs, je suis d'avis que le jugement de la Cour du Banc de la Reine doit être infirmé avec dépens, et celui de la cour Supérieure rétabli.

HENRY J.—This is an action to recover the amount of an award made by arbitrators in favor of the appellant for lands taken from him and others for the railway of the respondent company.

No objection to the appointment of the arbitrators, who were nominated by the parties, was made, but two objections were taken to the award.

One, that the arbitrators did not at their first meeting appoint a time for the final meeting to make their award. I will deal with this objection first. In the

first place it is not shown that they did not do so. The proof of that issue was on the respondent company and not having adduced the proof of the allegation we have no right to assume it was not done. The respondent company was represented at the final meeting by their own arbitrator who attended and took part with the two other arbitrators in respect to the subject matter of the reference and in the deliberations as to the award, which was made in his presence. The company having been present by their arbitrator are estopped from making the objection.

The provision in the statute upon which the respondent company relies to sustain the objection was made solely to limit the time for making the award, which by the proceedings was not otherwise done, and when the time for making the award is so limited and no award be made within the time so limited the power of the arbitrator ceases and any award subsequently made would not be binding; but if before an award should be made the parties interested should mutually extend the time in a proper manner, or the arbitrators should extend it, it would be binding. Sub-section 22 of section 9 provides "and if the same (the award) is not made on or before such day or some other to which the time for making it has been prolonged either by consent of the parties, or by resolution of the arbitrators, then the sum offered by the company, as aforesaid, shall be the compensation to be paid by them." I therefore think the objection on that ground must fail.

Another objection was made that the description of the lands in the award differs from that in the submission. Such an objection was not pleaded, and I am of opinion that to get any benefit from the contention it should have been. By the statute the award might have been invalidated if it did not clearly state th

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sum awarded, or did not describe clearly the property expropriated, but I think such a defence cannot be considered unless specially pleaded.

The Court of Appeal rested its judgment on two points:

1. That of variance in the description of the land between the notice of expropriation and the description in the award, and

2. That the respondent company was not present when the award was made.

I have already stated that, in my opinion, the respondent company was present by its arbitrator.

We have now to compare the description of the lands in the notice of expropriation with that in the award.

The land expropriated is described in the notice for that purpose as:

Une portion de terre de deux arpents et quarante perches en superficie, tel que maintenant jalonnée, et faisant partie du lot numéro (2345) deux mille trois cent quarante-cinq du cadastre pour la paroisse de St. Sauveur de Québec, et portant le numéro un sur le plan du tracé du chemin de fer tel que déposé suivant la loi.

The description in the award is:

Un certain terrain contenant deux arpents et quarante-cinq perches en superficie, borné au nord-ouest, au sud-est et à l'ouest par la dite association, et à l'est par les héritiers Tourangeau et faisant partie des lots numéros (2344 et 2345) deux mille trois cent quarante-quatre et deux mille trois cent quarante-cinq du cadastre pour la dite paroisse de St. Sauveur, et portant le numéro un sur le plan du tracé du chemin de fer tel que déposé suivant la loi.

There was no evidence produced to show that the land described in the award differs on the ground from that described in the notice of expropriation; there was none to show that the boundaries mentioned in the award are not exactly the same as cover the same two acres and forty perches staked off as stated in the notice —the quantity is the same in both. The plan in question is referred to in both, and with it both agree as

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far as shown and which appears on reference to it. The only difference that can be discovered is that two numbers of the cadastre are stated in the award while but one is stated in the notice. That however is unimportant for if the plan, which the statute refers to as settling the size and shape of the lot expropriated, is referred to in both the notice and award, there can arise no doubt as to the land mentioned in the award being the same as that expropriated in quantity and shape, and the other parts of the description in the notice and award may be rejected as surplusage.

There is therefore no variance as contended for by the respondent company.

There was another point referred to in the argument which was that the plaintiffs could not sue jointly on the award, but I am of the opinion their action will lie. The land belonging to them was expropriated in one lot. The notice was directed to the appellant and others. It was served, we must assume, on all of them. They were treated, therefore, as owners jointly, or as tenants in common. There is no evidence that I can see that they did not so hold. The award declares that the sum awarded should be paid to the same parties and I think that without any plea or evidence adduced we must assume them to be entitled to recover. I am of opinion that the appeal should be allowed and the judgment of the Superior Court affirmed with costs.

TASCHEREAU J.—I would dismiss this appeal. The plaintiffs' action cannot stand upon the record as it now is. They are not the parties in favor of whom the award was made. They have not alleged nor proved that they are the association in favor of whom the award was made. Then there is no proof of Dr. Trudel's death, as alleged in the declaration. Even the *faits et articles* do not cover that fact. The 26th

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relates to a Dr. Dorion. The case should be remitted to the Superior Court, with permission to the defendant to answer the *faits et articles*.

GWYNNE J.—This is an action upon an award made by two of three arbitrators appointed under the provisions of the statute in that behalf to assess the value of a piece of land belonging to the plaintiffs and required by the defendants to be expropriated for the purposes of their railway. The declaration specially alleges the award and the performance of all matters necessary to be performed to give effect to it. Interrogatories sur *faits et articles* served upon the defendants were ordered to be taken *pro confessis* for default in answering them. The defendants having neglected to plead to the action were, by special consent of the plaintiffs, allowed to plead upon certain conditions which, however, never were fulfilled. They filed however pleas besides the general issue to the following effect:

1. That the said award had no legal validity and had been irregularly and illegally made. 2. That the said award is completely at variance with the proof advanced before the said arbitrators and

3rd. That the award made by the said arbitrators is much more extensive than the evidence and the value of the piece of land in question warranted.

A motion made by the defendants two months after the interrogatories sur *faits et articles* had been taken *pro confessis*, and without performance of the conditions upon which the plaintiffs had consented to the defendants pleading to the action, for leave to produce answers to the interrogatories having been refused by the court, the case was heard upon the merits. The defendants examined two witnesses which were the only witnesses

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offered by them in support of their pleas. In the Superior Court judgment was rendered in favor of the plaintiffs upon the ground that the defendants wholly failed to support their pleas impeaching the award. The Court of Queen's Bench in appeal reversed this judgment upon the grounds that the motion of the defendants for leave to file answers to the interrogatories had been wrongly refused, and that in the judgment of the majority of the said Court of Appeal the piece of land mentioned in the award was different from the piece of land of which the defendants by their notice required the expropriation; and on the ground further that the arbitrators had not, at their first meeting, appointed a day on or before which their award should be made; wherefore the Court of Appeal set aside the award and ordered and adjudged that the parties should proceed anew to the appointment of arbitrators to determine the value of the piece of land which the defendants required to be expropriated. It is from this judgment that the present appeal is taken.

The appeal must in my opinion be allowed, for not only was there no evidence offered sufficient to invalidate the award, but the pleas themselves contained no allegation sufficient for that purpose. To a declaration averring as the declaration in this case does, the performance of all acts essential to give validity to the award, it is no plea to say that the award has been illegally and irregularly made, or that it has no legal validity. If any thing which was necessary to give the award validity had been omitted to be done, such matter should have been specially pleaded in a plea stating what was the particular matter which was omitted, the omission of which is relied upon as making the award null and void; for if the omission should appear to have been in respect of some matter of mere form, such an omission would not make the

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award null. As to the plea that the award is more extensive than the evidence and the value of the piece of land warranted that was a matter not open in the present action; and if it had been, the evidence offered by the defendants upon the point, only went to this that the defendants' arbitrator was of opinion that the amount awarded by the other two arbitrators was excessive. Then the grounds upon which the Court of Queen's Bench in appeal have annulled the award are, in my opinion, neither raised upon the record, nor, if they were, are they established by the evidence.

It is not pleaded that the piece of land in respect of which the award was made is a different piece of land in whole or in part from that of which the defendants required the expropriation, and assuming such an objection to be open on the record there was no evidence offered in support of it. The grounds upon which the Court of Appeal arrived at the conclusion that the piece of land in respect of which the award has been made is a piece of land different from that of which the defendants by their notice required the expropriation, are quite inadequate.

The piece of land required by the defendants is by their notice declared to be a piece of land containing precisely two arpents and 40 perches and designated as number one upon a plan of the railway deposited according to law and which piece of land the notice describes as forming part of a cadastral plan No. 2345 of the Parish of St-Sauveur de Quebec. The material part of this notice is that the defendants require the piece of land designated as No. 1 on the railway plan as deposited according to law. Now the award is made in respect of the same piece of land containing just two arpents and forty perches, and designated as number one on the plan of railroad deposited according to law, and further describing it as forming parts

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of cadastral numbers 2344 and 2345 in the Parish of St-Sauveur de Quebec. Now whether the piece of land so required by the defendants, and which was designated on the plan upon which they were by law required to designate it as number one, was situated wholly on the piece of land known as the cadastral plan No. 2345, or partly upon that cadastral lot and partly upon an adjoining lot designated as cadastral lot No. 2344 in the Parish of St-Sauveur, makes no difference whatever, the plaintiffs being, as is admitted, owners of the whole piece required by the defendants and designated on their plan deposited according to law as No. 1. There can be no uncertainty for the defendants could only have taken possession of, and have only taken possession of, and are by the award required to pay for, the piece of land containing the two arpents and forty perches which they have designated on their plan deposited according to law as number one. Then again, there is no plea upon the record that the arbitrators had not at their first meeting appointed a day on or before which the award should be made nor, assuming such a plea, without more to offer a good defence to the action did the evidence warrant the conclusion that no such day had been appointed or an adjudication of nullity of the award for that reason; in fact no evidence was offered to establish the default suggested by the Court of Appeal, nor does the point appear to have been noticed in the Superio Court. If there had been such default and if it had been legally established, and if the effect of the fault was to nullify the award, then the judgment of the Court of Appeal was erroneous in ordering a new arbitration to be had, for in the event of the section, which directs the arbitrators at their first meeting to appoint a day on or before which their award shall be made, applying so as to nullify their award if made in contravention of

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of that section, then in such a case the act directs that the amount tendered by the defendants shall be the compensation to be paid by them.

The appeal should be allowed with costs and the judgment of the Superior Court restored.

Appeal allowed with costs (1).

Solicitors for appellants: *Blanchet, Amyot & Pelletier.*

Solicitors for respondent: *Drouin & Flynn.*

(1) Application for leave to appeal to the Privy Cuncil was refused.