1891

*May 13.
*Nov. 17.

THE QUEBEC, MONTMORENCY AND CHARLEVOIX RAILWAY COMPANY (PLAINTIFFS) ..... } APPELLANTS;

AND

PIERRE MATHIEU (DEFENDANT).....RESPONDENT.

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

Expropriation—R. S. Q. art. 5164 *ss.* 12, 16, 17, 18, 24—*Award—Arbitrators—Jurisdiction of—Lands injuriously affected*—43 *&* 44 *V. c.* 43 (*P.Q.*)—*Appeal—Amount in controversy—Costs.*

In a railway expropriation case the respondent in naming his arbitrator declared that he only appointed him to watch over the arbitrator of the company, but the company recognized him officially and subsequently an award of $1,974.25 damages and costs for land expropriated was made under art. 5164 R. S. Q. The demand for expropriation as formulated in their notice to arbitrate by the appellants was for the width of their track, but the award granted damages for three feet outside of the fences on each side as being valueless. In an action to set aside the award :

Held, affirming the judgment of the courts below, that the appointment of respondent's arbitrator was valid under the statute and bound both parties, and that in awarding damages for three feet of land injuriously affected on each side of the track the arbitrators had not exceeded their jurisdiction.

Strong and Taschereau JJ. doubted if the amount in controversy was sufficient to give the court jurisdiction to hear the appeal.

APPEAL from a judgment of the Court of Queen's Bench for Lower Canada (appeal side), confirming a judgment of the Superior Court in favour of respondent (1).

The following are the material facts of the case:—

*PRESENT :—Sir W. J. Ritchie C.J. and Strong, Fournier, Taschereau and Patterson JJ.

(1) Following *Mathieu* v. *The Quebec, &c., Ry. Co.* 15 Q. L. R. 300.

The railway built by the appellants traverses lands belonging to the respondent, in the parish of l'Ange-Gardien, county of Montmorency, and known as lots Nos. 20, 29, 36, 59 and 66 of the cadastre for said parish.

In order to obtain their right of way through said lots, on the 10th of November, 1887, appellants served on respondent a notice of expropriation informing the latter that for the building of their railway they required across the said lots a strip of land 62 feet (French measure) wide, by 651 feet long, forming a total area of 124½ perches, or 1 arpent 24½ perches.

By the same notice respondent was offered the sum of $125 as an indemnity for the said expropriation, and notified that should said indemnity not be accepted the appellants named as their arbitrator Louis Giroux, farmer, of Beauport.

The offer of the appellants was refused but on the 17th of November, 1887, an agreement was entered into by which appellants, on depositing double the amount of the indemnity offered, would have the right to take immediate possession of the land required by them from the respondent, reserving to respondent the right that if, later on, the parties should be unable to come to an amicable settlement, the respondent would be allowed to name his arbitrator, in the same manner as though the delay for him so to do had not expired.

In virtue of that agreement, on the 28th of November, 1887, appellants made a money deposit at the rate of $200 per superficial arpent, and took possession of their right of way through the lots of the respondent.

Subsequently, it being impossible for the parties to determine amicably the indemnity, the appellants, on the 7th of March, 1888, served the respondent with a notice calling upon him to name his arbitrator, so as to proceed with the arbitration.

On the following day, the respondent replied to the

1891

THE QUEBEC, MONTMORENCY AND CHARLEVOIX RAILWAY COMPANY v. MATHIEU.

appellants' notice as follows: "The said Pierre Mathieu, of l'Ange-Gardien, farmer, without waiving any of his rights, and without binding himself in any way by the present procedure, but with the sole object of watching and having a watch on the arbitrator of the company, does hereby inform you that he has named and by these presents names Charles Toussaint Coté, of the municipality of St. Roch North, manufacturer, as his arbitrator."

On the 15th of the same month of March Louis Giroux, the arbitrator of the appellants, and the said C. T. Coté, acting as arbitrator for the respondent, named F. X. Berlinguet, of Quebec, architect, as third arbitrator, and the three arbitrators were sworn.

Two days later, the three arbitrators appeared before Angers, notary public, and there two of them, Giroux and Coté, declared that they had examined the plans and documents filed, heard the sayings of the parties, taken cognizance of the incidental facts, and after mature deliberation, allowed to Pierre Mathieu, the proprietor, "a sum of $474.25 for the land expropriated, as well as for three feet outside the fences, on each side of the railway line, lost to him for cultivation; and that after having taken into consideration the increase of value resulting to the said lots from the building of a railway, they further allowed for damage and inconveniences resulting from the severing of lands which ought not to be divided, for the loss of time in the cultivation thereof on account of the passing of trains and of the crossing and recrossing cattle over the said railway for grazing purposes, a sum of $90 yearly, representing a capital of $1,500 at six per cent, which is the amount fixed and allowed to the said Pierre Mathieu for all indemnity for said damages, after deducting said increase of value as aforesaid, in all $1,974.25 and costs."

The third arbitrator, Berlinguet, finding the valuation exaggerated, declined to concur in that award.

By notarial protest dated the 23rd of said month of March the respondent had said award served upon the appellants, informed them that he was ready to give them a title, and requested from them the payment of the amount allowed by said award, with the costs of the arbitration, under pain of being sued therefor. Thereupon the appellants brought their action, to have said award set aside for the following reasons :—

1. The naming of an arbitrator by the respondent is null,—and as a consequence, the naming of the third arbitrator is null, and the tribunal which gave the award had no existence in law.

2. The award was not given faithfully and impartially, nor with the essential formalities ; but it is manifestly the result of a fraudulent agreement between Giroux and Coté and the respondent to rob the appellants.

3. The award is null as bearing on matters not submitted to arbitrators and thus *ultra vires* in giving the company more land than wanted.

The respondent pleaded the general issue.

The questions raised by this action having been examined in another cause under exactly similar circumstances between the appellants and one Joseph Mathieu, and having been decided by the Court of Queen's Bench for Lower Canada (appeal side) (1), in favour of Joseph Mathieu, the courts below in this case followed the same ruling as in the case of Joseph Mathieu.

On appeal to the Supreme Court of Canada the principal grounds relied upon by counsel were that the award was void because the arbitrators had no

(1) 15 Q. L. R. 300.

1891

THE QUEBEC, MONTMORENCY AND CHARLEVOIX RAILWAY COMPANY v. MATHIEU.

authority to value the indemnity for the two strips of land three feet wide on each side of the right of way, and that the appointment by respondent of his arbitrator with restrictions and reservations was null.

Mr. Justice Strong and Mr. Justice Taschereau expressed a doubt as to the jurisdiction of the court to hear the appeal, the amount of the award being under $2,000, and to make up the appealable amount either interest accrued after date of the award or the costs taxed on the arbitration proceedings would have to be added. The case, however, was allowed to be heard on the merits.

Irvine Q.C. and *Bédard* for appellants relied on Mr. Justice Andrews's judgment in the case of *The Quebec, Montmorency, &c., Ry. Co.* v. *Mathieu* (1).

Casgrain Q.C. for respondent contended that by their award the arbitrators allowed so much for the inconvenience caused, so much for the loss of land and so much for damage to the balance of the land not taken but rendered useless for the purposes of cultivation, and as the award states clearly the sum awarded, and the lands or other property, right or thing for which the sum is to be the compensation, the requirements of the law have been complied with.

Sir W. J. RITCHIE C.J.—The moment, in reply to appellants' notice, the respondent named his arbitrator he named an arbitrator under the statute and could not limit in any way the authority of an arbitrator conferred by the statute. The moment he named such arbitrator the person so named become clothed with all the power and authority vested in the arbitrators by the statute, and the respondent had no right to limit this power or authority, and could not appoint an arbitra-

(1) 15 Q. L. R. 300.

tor "only to watch over the arbitrator of the company," and if the award had been unsatisfactory to the respondent I do not think it would have been in his mouth to say that he was not bound by it on the ground that an arbitrator was not named by him; on the other hand the appellants having accepted the respondent's arbitrator as duly qualified, and the two arbitrators with the knowledge and express consent of the company having appointed an umpire and the appellants having furnished the arbitrators with all the information they required to enable them to discharge properly their duties, I do not see how it is possible for the appellants now to repudiate the action of the arbitrators on the ground that the respondent's arbitrator was not duly appointed.

The only point of the case that can raise any doubt, or that has raised any doubt in my mind, is as to the excess of jurisdiction by the arbitrators in reference to the three feet which it is alleged has been expropriated beyond the land required by the appellants. But the land expropriated is described in the award as the land described in appellants' notice. I think that the arbitrators having found that the three feet outside of and beyond and on each side of the land expropriated was lost to respondent as for the purpose of cultivation, and it not appearing that it can be used for any other purpose, I cannot say that the arbitrators were wrong in estimating by way of damage the full value of the land if they were of opinion the land, by reason of the railway, had become valueless to respondent. The estimate of the value of the damages appears to be sustained by the evidence of several witnesses, though in the absence of fraud, I do not place reliance on this evidence because the statute (1) declares that—

(1) R. S. Q. art. 5164.

1891

THE QUEBEC, MONTMORENCY AND CHARLEVOIX RAILWAY COMPANY v. MATHIEU.

Ritchie C.J.

The arbitrators.....being sworn.....shall proceed to ascertain the compensation which the company must pay in such a way as they or a majority of them deem best, and the award of such arbitrators, or any two of them or of the sole arbitrator shall be final and conclusive.

27. No award shall be invalidated for want of form or other technical objection.....

One of the arbitrators after pointing out how they arrived at the valuation, explained that they first established the value of the land, then how the damage was established, and he goes on to explain that all these inconveniences or damage were assessed at $90 a year, representing a capital at six per cent of $1,500, which with $474.25 for land taken and land injuriously affected, amounted to $1,974.25.

Under all these circumstances, I think no ground has been established for setting aside this award, and therefore the appeal must be dismissed.

STRONG J.—I am of the same opinion. I had come to that conclusion at the end of the argument. Assuming that we have jurisdiction, a point which I assume in deference to the opinion of the majority of the court, though I have doubts on the point myself, I am of opinion that upon the merits of the case, there is no ground for allowing the appeal.

FOURNIER J.—I am also of opinion on the merits that the appeal should be dismissed.

TASCHEREAU J.—This appeal must be dismissed, assuming, without deciding, that we have jurisdiction to entertain it. On the ground of fraud, the two courts below have found that there was no evidence of it, and we cannot interfere with that finding of fact, which is fully supported by the evidence.

As to the objections to the award as being irregular or excessive they have, in my opinion, been each and

all of them rightly dismissed by the two courts below. This appeal, in fact, should not have been taken. There was no reasonable ground for it.

PATTERSON J. agrees that the appeal should be dismissed.

Appeal dismissed with costs.

Solicitors for appellants: *Bedard, Dechène & Dorion.*

Solicitors for respondent: *Casgrain, Angers & Lavery.*

1891

THE QUEBEC, MONTMORENCY AND CHARLEVOIX RAILWAY COMPANY v. MATHIEU.

Taschereau J.