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\*Feb. 24.

\*May 6.

MARY SHANNON (MISE EN CAUSE).....APPELLANT;

AND

THE MONTREAL PARK AND }  
 ISLAND RAILWAY COMPANY } RESPONDENTS.  
 (PETITIONERS) .....

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

*Appeal—Jurisdiction—54 & 55 V. c. 25, s. 2—Prohibition—Railways—  
 Expropriation—Arbitration—Death of arbitrator pending award—  
 51 V. c. 29, ss. 156, 157—Lapse of time for making award—Statute,  
 construction of—Art. 12 C. C.*

The provisions of the second section of the statute, 54 & 55 Vict. ch. 25, giving the Supreme Court of Canada jurisdiction to hear appeals in matters of prohibition, apply to such appeals from the Province of Quebec as well as to all other parts of Canada.

In relation to the expropriation of lands for railway purposes, sections 156 and 157 of "The Railway Act" (51 V. c. 29, D.) provide as follows:—

"156. A majority of the arbitrators at the first meeting after their appointment, or the sole arbitrator, shall fix a day on or before which the award shall be made; and, if the same is not made on or before such day, or some other day 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 the company."

"157. If the sole arbitrator appointed by the judge, or any arbitrator appointed by the two arbitrators dies before the award has been made, or is disqualified, or refuses or fails to act within a reasonable time, then, in the case of the sole arbitrator, the judge, upon the application of either party, and upon being satisfied by affidavit or otherwise of such death, disqualification, refusal or failure, may appoint another arbitrator in the place of such sole arbitrator; and in the case of any arbitrator appointed by one of the parties, the company and party respectively may

PRESENT:—Taschereau, Gwynne, Sedgewick, King and Girouard JJ.

each appoint an arbitrator in the place of its or his arbitrator so deceased or not acting; and in the case of the third arbitrator appointed by the two arbitrators, the provisions of section one hundred and fifty-one shall apply; but no recommencement or repetition of the previous proceedings shall be required in any case."

(Section 151 provides for the appointment of a third arbitrator either by the two arbitrators or by a judge.)

*Held*, that the provisions of the 157th section apply to a case where the arbitrator appointed by the proprietor died before the award had been made and four days prior to the date fixed for making the same; that in such a case the proprietor was entitled to be allowed a reasonable time for the appointment of another arbitrator to fill the vacancy thus caused and to have the arbitration proceedings continued although the time so fixed had expired without any award having been made or the time for the making thereof having been prolonged.

**APPEAL** from the judgment of the Court of Queen's Bench for Lower Canada (appeal side) reversing the judgment of the Superior Court, District of Montreal, which quashed the writ of prohibition in this matter with costs.

The following statement of the facts in the case is taken from the judgment of the court rendered by His Lordship Mr. Justice Taschereau:

The controversy between the parties arises from proceedings upon an arbitration under the Railway Act of Canada, 51 V. c. 29. The respondents on the 19th of June, 1896, gave the statutory notice to appellant of their intention to expropriate part of her land, offering \$600 as compensation, and appointing one Brodie as their arbitrator. The appellant thereupon named one Davidson as her arbitrator, and the two named one McArthur, as a third. On the 12th of August, 1896, at their first meeting, the three arbitrators, as required by the statute, fixed the 15th of October following as the day on or before which the award had to be rendered. Meetings were

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held on the 17th and 22nd of August. On the latter date the meeting was adjourned *sine die*. On the 11th of October, Davidson died. On the 15th the two surviving arbitrators met and, seeing that no other arbitrator had been appointed by the appellant, adjourned *sine die*. On the 6th of November following, appellant gave notice of the appointment of one Hadley as her arbitrator; and on the 10th of November notice was given by two of the arbitrators, McArthur and Hadley, that the arbitration would be proceeded with on the 14th. The company's arbitrator, though present, refused to take part in this meeting as he considered that his functions had ceased on the 15th of October preceding. The arbitrators having adjourned to the 30th of November and named the 30th of January, 1897, for the rendering of the award, were about to proceed, when a writ of prohibition was served on them by the company. The petition set out the above facts and prayed that a writ should issue against the arbitrators, enjoining them to cease and discontinue to receive evidence, examine witnesses, or do any official act in connection with the above expropriation. Appellant was *mise-en-cause* in the case and contested the petition. The Superior Court maintained her contestation, dismissed the petition and quashed the writ of prohibition. But the Court of Queen's Bench maintained the writ and granted the conclusions of the company's petition. It is from this judgment that the present appeal is taken.

*Holt* for the appellant. The judgment of the Court of Queen's Bench, (two out of the five learned judges dissenting,) was based upon the ground that the arbitrators did not extend the time for rendering their award which had been fixed, and that thus the arbitrators had on the 15th October become *functi officio*, and had no right to proceed and therefore declared the

prohibition absolute against the arbitrators. This judgment gave no effect to section 157, under which appellant had appointed another arbitrator in place of Davidson, deceased, and assumed that, the time for rendering the award having expired, there was no provision in the statute for relief. The appellant submits that section 157 gives the party whose arbitrator dies the right to name another arbitrator, and the right once given, the power and the time to exercise that right is necessarily also given, and that section 157 contains an exception to the general rule laid down in section 156. On the death of any of the arbitrators the provisions of section 157 apply and necessarily the general rule in section 156 is modified. The party whose arbitrator dies must then have reasonable time allowed to find a new arbitrator, give notice of his appointment and to have him sworn in, and the three arbitrators must then give notice calling a new meeting of the completed board of arbitrators for the purpose of proceeding. This appears to be the meaning and intention of the Act, and we respectfully submit it to be the duty of the court to give it effect. We refer to the general principle laid down in the Interpretation Acts (1).

The arbitrator, Davidson, died on the 11th October, a Sunday, the date for the award being fixed for the 15th. It is quite clear that no one but his relatives would know of his death before, in all probability, the Tuesday following which would give the appellant one day only in which to search for a new arbitrator, explain the position of matters so as to induce him to act, give notice to the company, have the arbitrator sworn in, and allow the new arbitrators time to call a meeting. It would be impossible to do this.

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(1) R. S. C. c. 1, sec. 7, s.s. 37; R.S.Q. Arts. 12 and 13; Art. 12 C. C.

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To show further the disastrous results which might ensue if the respondents' pretensions were to prevail, appellant respectfully submits, that if the railway company's arbitrator were to die or resign upon the day fixed for the award, and that in consequence no award should be given, respondents could consistently claim that the proprietor must take the amount offered by them. The proprietor might object that it was through no fault of his that the company's arbitrator had died, but the company could consistently invoke section 156, and insist that time having expired the owner must take what they offered. It is immaterial for the purposes of this argument which arbitrator has died. The company admits the right to appoint a new arbitrator, but denies the time within which to do so. The proprietor claims the right to name a new arbitrator and also to the time to find him and appoint him.

As to the objection raised to the jurisdiction of this court to hear the present appeal the appellant submits that there is no limitation in the second section of the statute 54 & 55 Vict. ch. 25, and that it gives the right of appeal in all matters of prohibition irrespective of the question or amount in controversy.

*Lajoie* for the respondents. This appeal is entirely upon the writ of prohibition. The question is whether the arbitrators had or not jurisdiction; there can be no question of title to lands or value in controversy being over \$2,000, because, even should this appeal be dismissed, respondents will have to take other and further proceedings to obtain title to the land. The only point at issue is the right of the arbitrators to arbitrate, and in such a case, the Supreme Court Act gives no appeal from judgments rendered in matters of prohibition in the Province of Quebec. We therefore submit that the court has no jurisdiction to hear the appeal.

The arbitrators were *functi officio* after the 15th of October, the date fixed for the rendering of the award. The 156th and 157th sections of the Railway Act cause a forfeiture to operate in the nature of *péremption*. In the absence of any consent or resolution prolonging the time for making an award the court can give no relief. See Russell on Arbitration (7 ed.) p. 147; Rolland de Villargues, vo. "Arbitration," No. 99. The powers of arbitrators are strictly limited by the statute and no power to extend the time is given in the event of the death of one of their number. The Railway Act must govern, and it makes no distinction. Once the time has expired any rights the parties may have had are determined by the statute.

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The judgment of the court was delivered by :

TASCHEREAU J.—This is an appeal from a judgment upon a writ of prohibition. The respondent raised an objection to the jurisdiction of this court on the ground that the Act 54 & 55 V. c. 25, sec. 2, which gives the right to appeal in such cases, does not apply to the Province of Quebec. But this contention cannot prevail. The enactment applies to the whole Dominion.

(His Lordship then stated the circumstances under which the controversy arose as given above.)

The sections of the Railway Act that govern the case are sections 156 and 157, which read as follows :

156. A majority of the arbitrators at the first meeting after their appointment, or the sole arbitrator, shall fix a day on or before which the award shall be made ; and if the same is not made on or before such day or some other day to which the time for making it has been prolonged, either by the 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 the company.

157. If the sole arbitrator appointed by the judge, or an arbitrator appointed by two arbitrators dies before the award has been made, or is disqualified, or refuses or fails to act within a reasonable time, then,

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in the case of the sole arbitrator, the judge, upon the application of either party, and upon being satisfied by affidavit or otherwise of such death, disqualification, refusal or failure, may appoint another arbitrator in the place of such sole arbitrator; and in the case of any arbitrator appointed by one of the parties, the company and party respectively may each appoint an arbitrator in the place of its or his arbitrator so deceased or not acting; and in the case of the third arbitrator appointed by the two arbitrators, the provisions of section one hundred and fifty-one shall apply; but no recommencement or repetition of the previous proceedings shall be required in any case.

The company's contention is that, as the time for making the award had elapsed, and not been extended under section 156, the appellant has to be satisfied with the \$600 they had originally tendered as compensation for the land taken from her. No fault or negligence on the part of the appellant can be reasonably contended for. She could not have been expected between the 11th and 15th of October to find another arbitrator willing to act, and have him sworn in. She possibly was not even then aware of Davidson's death. The company contends that, in the case of a sole arbitrator, if he dies say the day before the date fixed for the award, the proprietor's claim is gone altogether. Can it be that the statute is so unreasonable and unjust? It should require a very clear text to have a court of justice so decide.

We are bound to construe the sections in question so as to ensure the attainment of their object, and the carrying out of their provisions according to their true intent, meaning and spirit.

The company would have us read section 156 textually and gain an advantage over the expropriated owner by a fortuitous event. But section 157 cannot so be read out of the statute, and that section clearly provides for the appointment of another arbitrator when one of the two named by the parties or both

of them, or the third arbitrator, die, at any time before the arbitration is at an end, be it the day before.

That is conceded, but it is argued on behalf of the company, that if the delay has not been extended, the award, not being made on the day fixed, section 156 ends the arbitration. That cannot be. The right to name an arbitrator to replace a deceased one would be vain and illusory if the company's contentions were to prevail. It would be virtually refusing to a party whose arbitrator dies under these circumstances, the right to appoint another one, whilst section 157 clearly gives him that right. Nay, more, if it was the company's arbitrator who had so died, the arbitration would likewise be at an end, and the owner's claim extinguished, according to the judgment under review.

We cannot, in my opinion, so construe this legislation. I would allow the appeal with costs, and restore the judgment of the Superior Court.

*Appeal allowed with costs.*

Solicitors for the appellant: *Morris & Holt.*

Solicitors for the respondents: *Bisaillon, Brousseau  
& Lajoie.*

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