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 \*Dec. 12, 13.  
 ec. 22.

THE INVERNESS RAILWAY AND } APPELLANTS;  
 COAL COMPANY (DEFENDANTS) }

AND

ANGUS McISAAC AND MURDOCH } RESPONDENTS.  
 McISAAC (PLAINTIFFS) . . . . . }

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA.

*Expropriation of land—Arbitration—Authority for submission—  
 Trespass—2 Edw. VII. c. 104 (N.S.)*

By statute in Nova Scotia if land is taken for railway purposes the compensation therefor, and for earth, gravel, etc., removed shall be fixed by arbitrators, one chosen by each party and the third, if required, by those two. A railway company intending to expropriate, their engineer wrote to M., who had acted for the company in other cases, instructing him to ascertain whether the owners had arranged their title so that the arbitration could proceed and, if so, to ask them to nominate their man who, with M., could appoint a third if they could not agree. The engineer added, "I will send an agreement of arbitration which each one can subscribe to or, if they have one already drafted, you can forward it here for approval." No such agreement was sent by, or forwarded to, the engineer, but the three arbitrators were appointed and made an award on which the owners of the land brought an action.

*Held*, reversing the judgment appealed from (38 N.S. Rep. 80), that as the company had not taken the preliminary steps required by the statute which, therefore, did not govern the arbitration proceedings, the award was void for want of a proper submission.

The company entered upon land and cut down trees and removed gravel therefrom without giving the owners the notice required by statute of their intention to take their property. The owners, by their action above mentioned, claimed damages for trespass as well as the amount of the award.

*Held*, that as the act of the company was not authorized by statute the owners could sue for trespass and as, at the trial, the action on this claim was dismissed on the ground that such action was prohibited there should be a new trial.

\*PRESENT:—Sir Elzéar Taschereau C.J. and Girouard, Davies, Idington and Maclellan JJ.

APPEAL from a decision of the Supreme Court of Nova Scotia(1) reversing the judgment at the trial in favour of the defendants.

The facts of the case are sufficiently set out in the above head note.

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*Newcombe K.C.* and *Mellish K.C.* for the appellants.

*Daniel McNeil* and *A. A. MacKay*, for the respondents.

THE CHIEF JUSTICE and GIROUARD J. concurred in the judgment allowing the appeal and ordering a new trial.

DAVIES J.—I agree with the judgment of Russell J. and would allow the appeal and order a new trial.

The appellant company entered upon the plaintiffs' lands, cut down and carried away trees, excavated a gravel pit, and otherwise damaged the property.

They had a legal right to do all this provided they had proceeded under the statute authorizing the construction of the road and given the plaintiff the statutory notices of their intention to take his property.

They did not, however, do this and, therefore, in all that they did with respect to plaintiffs' lands they were trespassers only.

If they had given the necessary notices defining what property they intended to take and had entered and taken the property in assertion of that right I should have been inclined to hold that the letter of the railway company's engineer to Mr. Sinclair might be

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construed as a sufficient and complete appointment of the company's valuator or arbitrator. In that case the arbitration would have been under the statute which in connection with the notice would contain a complete submission, and define not only what the arbitrators were to value, but the method of procedure.

I agree with Meagher J. that in such a case the latter words of the letter might be read as authorizing Mr. McKeen to

manage all the appraisal proceedings for them as well as to act as appraiser

because there could not be then any doubt as to what property or damages the arbitrators were appraising.

But as the defendants had not given the necessary notices and the statute did not apply, and no submission of any kind was executed defining what the arbitrators were to value, whether the plaintiffs' lands taken by the company, if any were taken, or merely the damages caused by digging the gravel pit referred to in Sinclair's letter or the latter damages plus those caused by the trees cut down and destroyed, I cannot agree that there was any legal or binding arbitration or award; or that the letter could be construed as in itself an authority to act until there had been an agreement defining what the arbitrators were to value. But I have no doubt whatever of the plaintiffs' right to recover for all the damages they have sustained at the company's hands against the defendants as trespassers and which damages, I think, should have been assessed under the alternative claim of the plaintiff at the trial.

While the appeal must be allowed with costs in this court our judgment should be the one which the court appealed from should have given, namely, that

proposed by Russell J., the costs of the appeal to the Supreme Court of Nova Scotia to be paid by the defendants and the costs of the first trial to be costs in the cause.

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IDINGTON J.—The appellants are a railway company, that by the law of Nova Scotia at the times in question had a right, upon giving of notice under the statute, to have done all that was done by them, and in question here.

They without such notice and without any other authority had entered upon respondents' lands and committed trespasses in the way of taking timber and gravel.

Some talk took place, after some of these trespasses, between one of the respondents and the agent of the company, that indicates an intention to have an arbitration in respect of these trespasses and of further appropriations by the company of the respondents' property of both land and gravel, but nothing definite was arrived at.

There was nothing from which either party could not in law have receded. The respondents could have sued for the trespasses.

There was no express license for the continuation of such trespasses.

There was nothing passed between the parties that could in any way be said to have defined the extent to which the company had a right to go, or expected and intended to go.

About a year later, on the 20th day of July, 1901, the appellants filed a plan by which they indicated an intention to expropriate the land in question, but the extent of their intended expropriation thereby dis-

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closed did not cover all the land over which they had trespassed.

There were thus existing in law at the time when the alleged submission to an arbitration, which resulted in the award sued upon, was written, at least three distinctly separate claims, relative to which disputes might arise, and for settlement of which one or more arbitrations might furnish appropriate remedies; one for the trespasses done before anything passed between the parties, another for those done after the talk between them, for which there might be said to have been given, by one of the respondents, an assent that might possibly be held to have been as to him a license, to do what was done thereafter, but did not constitute a bargain between all the parties.

The damages, arising from these later acts thus assented to, could not be measured upon any principle of vindictive damages, though what arose from the earlier acts might, by reason of the high-handed methods adopted, well have such measure applied in regard to them.

Then there was a third claim, for the price of, or compensation for the acquisition desired by the company, of the fee simple in the land, in respect of which the plan was filed.

There may not have been any such power of expropriating the fee simple as the company thought there was. There is no doubt a provision under which the company might have entered for the purposes of taking gravel, without seeking to acquire the fee simple in the land from which the gravel was to be taken.

It does not become necessary in the way this case strikes me to decide whether or not there was such a

power of expropriation as the company believed there was.

It is sufficient for my present purpose to point out that this company, clearly in good faith, believed that they had such power of expropriation, and that it was in light of that belief that their agent carried on his negotiations with the respondents and proceeded to consider the business of the proposed arbitration when he wrote the letter I am about to quote.

If ever there existed need for a clear, comprehensive and well considered submission defining exactly what arbitrators were expected to pass upon, this remarkable jumble of a variety of causes of action, resulting from illegal and unbusinesslike acts of the company together with intentions to acquire property by virtue of such a proceeding, resting upon statute or agreement, seemed to demand it.

Yet we have an attempt made by this suit to rest an award, said to relate to some or all of these matters against the appellants, upon nothing but the following letter, written by an agent of appellants:

Toronto, Canada, March 31st, 1902.

Lewis McKeen, Esq., Mabou, C.B.:

Dear Sir,—Will you please ascertain if the McIsaacs of Strathorne have arranged their title to the ballast pit at Loch Ban in such a way that the arbitrators can get to work. If they have please let them know that you are prepared to act, and ask them to appoint their man so that you two if you cannot agree as to the valuation may select a third.

Do nothing in the case of Dr. Gunn at present. I want to get the McIsaac's matter out of the way first, and then we can take up his claim afterwards. I will send an agreement of arbitration which each one can subscribe to, or if they have one already drafted, you can forward it here for approval. I expect to get away every week, but something turns up to keep me here, and you had better take the case up without me.

Yours truly,

Dict. A.S.

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It seems that the man to whom the letter was addressed never answered it, but proceeded without further authority, with some one named by respondents, to nominate a third man. And the three, thus constituted so-called arbitrators, without notice to the company or hearing evidence or counsel or agent on behalf of the parties except the respondents, awarded that the appellants pay the respondents \$957 together with \$1.00 each to said arbitrators. The award is not before us. What it covers or purports to cover is left for us to guess until produced.

There is not the slightest doubt but that the company's agent who talked over the matter with the respondent Murdoch McIsaac intended to acquire the land, and that the arbitration he suggested was to cover that acquisition.

His evidence shews that, and is not contradicted. The plan filed would indicate that also.

The pleadings indicate that the award was in relation to what had been taken from the land, or injury to the land, but not the value of the land itself.

There is no means of being certain from the evidence whether the arbitrators considered land, or gravel and damage to land, as combined in submission and award.

It seems abundantly clear from the letter quoted that the title to the land had been in question and was present to the writer's mind.

The terms of the letter itself, and the facts, may indicate that land as well as gravel were to have been considered.

It seems hopeless to try and support any such award upon a submission so clearly indicating that it was not a final document, but that if the respond-

ents would name a man a proper submission would be drawn up and signed.

It is useless to try, as was urged, to reject the latter part of the letter or to impute it only to matters concerning Dr. Gunn and his claim.

This latter part of the letter refers to the possibility that "*they* have one already drafted" and if they had "*you can forward it here for approval.*"

But as the proposal on the writer's part, to send an agreement of arbitration, comes after the interjected sentence, "Do nothing in the case of Dr. Gunn at present," we are asked to attribute these later remarks to Dr. Gunn's business and not to that of the respondents.

I strongly dissent from that proposed method of interpreting a document.

But for this argument, and what appears in the court below, I would not have thought it possible to claim any but the one meaning for this letter, and that clearly to be, as I certainly never have doubted it meant, to have proper articles of agreement settled before proceeding at all with arbitration.

Surely the consideration the parties had in mind, those the so-called arbitrators bore in mind, and the numerous legal difficulties surrounding the relations of the parties in regard to this property, ought to have been thought of by all concerned before adopting this kind of authority for the disposal of such matters in difference as had arisen between those parties.

I am quite sure a moment's consideration of all those things would have stayed those arbitrators. Such methods of arbitration as they adopted ought not to be encouraged.

The judgment on this award ought to be set aside and judgment be entered for plaintiffs in respect of

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the trespasses and the case go back for assessment of the damages arising from such trespasses with costs of appeal to the company here and possibly in the court below, and costs of the action and of the reference to be in the discretion of the judge who assesses the damages.

I do not, however, dissent from the disposition made of the costs.

MACLENNAN J. concurred in the judgment allowing the appeal and ordering a new trial.

*Appeal allowed with costs.*

Solicitor for the appellants: *W. H. Fulton.*

Solicitor for the respondents: *J. D. Matheson.*

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