THE CANADIAN NORTHERN ONTARIO RAILWAY COMPANY.. } APPELLANTS;

AND

ERNEST HOLDITCH ..... RESPONDENT.

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*May 26, 27.
*Oct. 13.

ON APPEAL FROM AN APPELLATE DIVISION OF THE SUPREME COURT OF ONTARIO.

Expropriation—"Railway Act"—Municipal plan—Severance of lots—Injurious affection—Reference back to arbitrators—R.S.C., 1906, c. 37.

For the purposes of expropriation under the Dominion "Railway Act," unless lots laid out on the owner's registered plan are so united as to form one complete whole, each lot taken by the railway company is an independent, separate and complete property in itself and the owner is not entitled to compensation for injurious affection to any such lot, of which no part is taken and which is severed from the land expropriated by a railway or by land sold to another person. *Cooper-Essex* v. *Local Board for Acton* (14 App. Cas. 153), distinguished. Duff and Anglin JJ. *contra.*

The owner of land adjacent to or abutting upon the street over which a railway passes is entitled, by 1 & 2 Geo. V., ch. 22, sec. 6, to compensation for injury to such land, but the compensation can only be awarded by the Board of Railway Commissioners and is not a matter for arbitration under the "Railway Act."

Held, per Duff and Anglin JJ.—The arbitrators appointed to value land so expropriated are *functi officio* when their award is delivered and an appellate court has no power to remit the matter to them for further consideration. *Cedars Rapids Manufacturing Co.* v. *Lacoste* ((1914) A.C. 569), referred to.

APPEAL from a decision of an Appellate Division of the Supreme Court of Ontario varying an award of

*PRESENT:—Sir Charles Fitzpatrick C.J. and Idington, Duff, Anglin and Brodeur JJ.

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arbitrators appointed to fix the value of land expropriated and remitting the case to them for further consideration and assessment on one branch of damages as to which they had held that they had no jurisdiction.

On and prior to the 13th day of July, 1912, the respondent Ernest Holditch was the owner of a block of land situate in the Town of Sudbury, in the Province of Ontario, which block of land had been sub-divided into different lots laid out upon a registered plan. In expropriation of their right of way the railway by their notice expropriated and took absolutely lots according to the registered plan numbered as follows (the numbers follow).

An arbitration was had, pursuant to the provisions of the "Railway Act," before three arbitrators, Robert Spence Mitchell, appointed by William Ernest Holditch; David Marr Brodie, appointed by the Canadian Northern Railway Company; and His Honour John James Kehoe, Judge of the District Court of the District of Sudbury, the third arbitrator chosen by Messrs. Brodie and Mitchell. The arbitrators heard a considerable amount of evidence, examined the property and subsequently an award was made by the majority of the arbitrators, His Honour Judge Kehoe and Robert Spence Mitchell, which award is exhibit No. 21 at page 109 of the appeal case. By this award the majority arbitrators awarded the respondent William Ernest Holditch the sum of $5,315 for the lands entirely taken by the railway. The majority arbitrators found as a fact appearing on the face of the award that the following additional lands of William Ernest Holditch, namely, lots (numbers), in the subdivision,

by reason of being severed from the other lands, and on account of their being rendered more difficult of access by reason of the construction of the railway and the grade thereof, and their being impaired in value, were injuriously affected to the extent of $4,800, but they made no award as to this, as they considered they were not warranted under the "Railway Act" or by law in making any such award, finding further that they could not make any award as to damages claimed by the respondent on account of lands injuriously affected on account of vibration that would be caused by trains and by noise and smoke.

Mr. David Marr Brodie, the other arbitrator, filed a minority award, in which he gives his opinion as to the value of the lands taken at $3,415, being $1,900 less than that by the majority arbitrators. He further places the damages to the other lots mentioned in the majority award at a less sum than the majority arbitrators, he stating a figure of $3,432 in lieu of the figure of $4,800 stated by the majority arbitrators, the difference of $1,368, and concurs in awarding no damages for smoke, noise or vibration.

The present respondent, William Ernest Holditch, appealed from the award of the majority arbitrators on the grounds, amongst others, that compensation should be allowed for the property of the owner not taken by the company, but injuriously affected by the construction of the railway in question, such property being the remaining lots in the subdivision, and for damages or compensation for the intercepting and destroying of the ingress and egress from the remainder of the subdivision; also for damage sustained by the construction of the roadbed and grade higher

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than the natural level of the property and for the blocking of the streets; that upon a consideration of the physical characteristics of the land and the running of the railway immediately north of a base line of high rock on the property, the access was seriously interfered with and the value of a number of lots thereby depreciated.

Upon appeal the Appellate Division, after argument and upon a consideration of the authorities, were clearly of the opinion, first, that they would not upon the evidence disturb the findings as to the value of the land taken, and secondly, that as a matter of law upon the finding of the majority arbitrators the respondent was clearly entitled to $4,800 found by the majority arbitrators; that for the same reasons, and it appearing on the face of the award that there was some damage by smoke, noise and vibration, the respondent was entitled to an allowance of damages on this heading, and counsel for both the appellant and the railway company agreed that they would prefer a reference back to the arbitrators upon this heading rather than having the Court deal with it upon the evidence already in, and the Appellate Division directed that on this heading there should be a reference back to the arbitrators to ascertain the amount of damage to the lots enumerated in paragraph three of the judgment.

Armour K.C. and *G. N. Macdonnell* for the appellants.

McKay K.C. for the respondent.

THE CHIEF JUSTICE.—I would allow this appeal with costs. I agree with Mr. Justice Idington.

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Idington J.

IDINGTON J.—This appeal raises the questions of whether an owner of land expropriated under and by virtue of the "Railway Act" has as an incident to such expropriation the right to claim damages for injury done to his other lands beyond the bounds of the lot so expropriated by reason either of the railway crossing the street or highway leading to such other lands and rendering them thereby less easily accessible and hence less marketable, or of the smoke, noise and vibration incidental to the use of the railway when constructed.

The lands expropriated and those other lands alleged to be so injuriously affected formed part of the same subdivision according to a registered plan, or registered plans which I assume harmonized with the first plan of subdivision.

It is not made quite clear in the evidence whether the major part of such subdivisions had been made by the respondent or his father through whom I infer he claims.

No importance seems to have been attached at the trial to any such distinction and possibly in law nothing in question herein can be made to depend on any distinction such as I suggest.

In considering the opinion judgments delivered by some of their Lordships in the case of *Cowper-Essex* v. *Local Board for Acton*(1), if this case had to be governed thereby a good deal might be made to turn upon such distinction in the origin of the subdivisions made, though in appearance constituting now one scheme of subdivision.

In the view I take of this case it is not necessary

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I should dwell upon such considerations or in detail upon the facts of the numerous sales of lots in such survey which render those lots in question remaining anything but a connected compact piece of land. They can be joined only by the imagination to those actually taken.

The respondent's contentions herein were discarded, by the arbitrators who made the award, because in their opinion the "Railway Act" under which they acted did not authorize them to make any allowance in respect of injurious affection suffered in respect of those other lands.

The appellant expropriated the entire lots touched by the railway allowance according to the route plan approved by the Board of Railway Commissioners, and thus there is no question raised as to the severance of any such lot injuriously affecting the land of which part has been taken.

The *Cowper-Essex Case*(1), referred to and which is relied upon by respondent, and no doubt that upon which the judgment appealed from was rested, though we have no written reasons given therefor, was dependent upon the peculiar facts there in evidence and the construction of the "Lands Clauses Consolidation Act," 1845, secs. 49 and 63, which are as follows:—

49. Where such inquiry shall relate to the value of lands to be purchased, and also the compensation claimed for injury done or to be done to the lands held therewith, the jury shall deliver their verdict separately for the sum of money to be paid for the purchase of the lands required for the works, or of any interest therein belonging to the party with whom the question of disputed compensation shall have arisen, or which under the provisions herein contained he is

(1) 14 App. Cas. 153.

enabled to sell or convey, and for the sum of money to be paid by way of compensation for the damage, if any, to be sustained by the owner of the lands by reason of the severing of the lands taken from the other lands of such owner, or otherwise injuriously affecting such lands by the exercise of the powers of this or the special Act or any Act incorporated therewith.

63. In estimating the purchase money or compensation to be paid by the promotors of the undertaking, in any of the cases aforesaid, regard shall be had by the justices, arbitrators, or surveyors, as the case may be, not only to the value of the land to be purchased or taken by the promotors of the undertaking, but also to the damage, if any, to be sustained by the owner of the lands taken from the other lands of such owner, or otherwise injuriously affecting such other lands by the exercise of the powers of this or the special Act or any Act incorporated therewith.

I cannot think that section 155 of our "Railway Act" and the sections therein provided for giving it effect, especially as interpreted and construed in many other cases, can be said to have contemplated any such results as that decision upon said sections.

The said section 155 is as follows:—

155. The company shall, in the exercise of the powers by this or the special Act granted, do as little damage as possible, and shall make full compensation, in the manner herein and in the special Act provided, to all persons interested, for all damage by them sustained by reason of the exercise of such powers.

Let any one carefully read and compare the language of this section and the said two sections and then observe and consider the reasoning of the judgments in that case, and if that does not lead to the conviction that the decision should not govern this case, I fear I cannot hope to convince.

The section 155 of our "Railway Act" was taken I rather think from section 16 of the "English Railway Clauses Consolidation Act," though the word "compensation" is used where the word "satisfaction" was placed in section 16.

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Then the case of *Hammersmith Railway Co.* v. *Brand*(1), decided that said section 16 of the English Act would not give relief to any one whose lands or part thereof had not been taken.

When the matter is thus reduced by judicial construction, from which Lord Cairns dissented, to a question of the taking of such lands then we must read the section accordingly and turn to the specific provisions of sections 192, 193, and 194 of the "Railway Act" upon which the jurisdiction of the arbitrators rests.

The second of these sections, 193, is as follows:—

193. The notice served upon the party shall contain,—

(*a*) a description of the lands to be taken, or of the powers intended to be exercised with regard to any lands therein described; and,

(*b*) a declaration of readiness to pay a certain sum or rent, as the case may be, as compensation for such lands or for such damages.

Read this as if both lands and power were combined though apparently disjoined, and whence can we draw the power of the arbitrators to assess and award damages in respect of other lands? Each lot taken by appellant is an independent, separate and complete property in itself. It is easily conceivable that a number of such properties might be so united together as to render them one compact whole, but that is not what in fact exists here.

In the Act upon which the *Cowper-Essex Case*(2) turned, it will be observed that the injuries to "lands held therewith" and "other lands" than taken and the "severing" of those from lands taken, are expressly provided for as subjects of compensation.

(1) L.R. 4 H.L. 171. (2) 14 App. Cas. 153.

I may repeat what I have said in the case of same appellant v. Billings, heard this term, that if the views probably held by Lord Cairns when forming part of the court which decided the *Hammersmith Case*(1), and expressly so by Lord Westbury in *Ricket* v. *Metropolitan Railway Co.*(2), relative to the meaning of section 16, had prevailed, then the language of section 155 might have been held as wide enough to cover what is claimed herein.

Hammersmith Railway Co. v. *Brand*(1) is decisive of any claim founded upon the crossing of streets *per se* being a ground of claim under our "Railway Act."

Indeed, it so restricts the operation of that Act that the only sensible meaning to be given it must relate, so far as injurious affection of any kind is concerned, to those lands physically connected with the part taken and not even then as in cases of subdivision for general sale to the public where the owner is thereby treating each parcel as a special lot.

With the claim, for injuries to other lands than those taken or directly interfered with, thus failing, as I hold it must, falls also the claim relative to what might arise herein from smoke, noise or vibration, even if such claims founded on the use of the works can ever found a claim for compensation.

And with these claims failing there is no need to consider the question of the power to refer back to arbitrators.

And the right given by recent legislation amending the "Railway Act" so as to modify the injustice often done heretofore to owners of properties abutting upon

(1) L.R. 4 H.L. 171. (2) L.R. 2 H.L. 175.

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streets over which railways ran without touching such lands must be pursued before the tribunal empowered by such remedial legislation to deal therewith.

This appeal should be allowed with costs.

Duff J.

DUFF J. (dissenting).—I concur with Mr. Justice Anglin.

ANGLIN J. (dissenting).—Two questions are presented on this appeal: the first, whether some 49 building lots owned by the respondent were so "held with" certain other lots in the same building subdivision which have been taken from him by the appellant railway company as to entitle him to compensation in respect of them as lands which, though not physically injured, will be injuriously affected by the construction of the proposed railway and its future operation; the second, whether it is within the power of a court hearing an appeal from arbitrators under section 209 of the Dominion "Railway Act" to refer the whole subject of the arbitration, or any part of it back to the arbitrators for further consideration.

The respondent and his predecessor in title had laid out the property in question as a building subdivision some years before the advent of the railway. It contained upwards of 500 lots fronting on thirteen streets. The plan had been registered and more than 200 lots had been sold to purchasers, some of them fronting on each of the streets laid down on the plan. The railway took the whole of every lot which its projected right of way touched and against the award in respect of lots so taken no appeal has been launched. The concluding paragraphs of the award of the majority of the arbitrators are as follows:—

And further, we find that as to the following lands, on account of their being severed from the other lands of the said William Ernest Holditch in the said subdivision, and on account of their being rendered more difficult of access by reason of the construction of the railway, and the grade thereof, and their being impaired in value as appears by the evidence of witnesses for both parties, the said witnesses agreeing upon the proportions in which the said lands hereinafter mentioned were so lessened in value, though differing in the values given by them in evidence, the said lands being as follows:—

Lots 96, 97, 100, 102, 103, 109, 111, 115, 117, 119, 122, 124, 125, 127, 129, 131, 132, 184, 185, 186, 187, 353, 355, 356, 379, 378, 370, 372, 373, 507, 510, 516, 517, 519, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 193, 194, 196, 197, and 198, are injuriously affected to the extent of four thousand eight hundred dollars ($4,800), but we make no award as to the same, as we consider that we are not warranted under the "Railway Act" or by law to make any such award.

And further, we find that we cannot and we make no award as to damages claimed by the said William Ernest Holditch on account of lands injuriously affected on account of vibration that would be caused by trains and by noise and smoke.

The Appellate Division held the plaintiff entitled to the $4,800 damages assessed by the arbitrators in respect of the 49 enumerated lots. The court, being also of the opinion that the claimant is entitled to damages in respect of other lots, inserted the following paragraph in their order:—

3. And this court doth further order that it be referred back to the arbitrators, John James Kehoe, Robert Spence Mitchell, and David Marr Brodie to ascertain and state the amount of damage sustained by the said Ernest Holditch on account of the lands situate on the north and south sides of Hickory Street and the north side of Poplar Street, consisting of lots numbers 145, 144, 140, 139, 136, 364, 362, 380, 381, and 384, on the north side of Hickory Street, and lots numbers 148, 149, 151, 152, 154, 155, 333, 336, 337, 334, 340, 395, 396, 397, 385, and 386 on the south side of Hickory Street and lots numbers 163, 162, 160, 158, 157, 331, 330, 347, 348, 343, 341, 392, 391, and 390 on the north side of Poplar Street, according to plan of subdivision of lots of the said Ernest Holditch, filed as an exhibit upon the said arbitration, by reason of the construction of the railway of the Canadian Northern Railway Company, this court declaring that the said Ernest Holditch is entitled to recover all damages sustained by him to the said property by reason of the construction of the said railway.

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The case was disposed of in the Appellate Division at the conclusion of the hearing and we are without the advantage of having before us the reasons on which the court proceeded.

Dealing with the first branch of the appeal, the appellant insists that by the sale of lots fronting upon each of the streets of the registered plan that plan has become binding on the claimant in its entirety; that the streets have become fixed and are not subject to deviation and may not be closed without the consent of the purchasers of such lots; that the claimants' lots have been so separated one from another that there cannot be in respect of them a claim for severance because some of them have been taken from him; and that the only interference with access to the lots which he retains is what will be due to the construction of the railway across the streets, which does not afford a ground for compensation under the statute. As a matter of fact only one of the 49 lots in respect of which damages have been awarded is contiguous to an expropriated lot. Lot 519 lies next to lot 520. Each of the remaining 48 lots is separated from the expropriated lots either by a street or by an intervening lot sold by the claimant.

This branch of the case must, however, in my opinion, be dealt with on the rule formulated by the House of Lords in *Cowper-Essex* v. *Local Board for Acton* (1). As stated in the head-note that rule is as follows:—

> The lands taken and the lands injuriously affected being held by the same owner so that the unity of ownership conduced to the advantage of the property as one holding, the lands injuriously

(1) 14 App. Cas. 153.

affected were "held with" the lands taken within the meaning of section 49 of the "Lands Clauses Consolidation Act, 1845."

The following passages occur in the judgments: Halsbury, L.C., says at p. 163:—

It is in each case a question of fact dependent upon its own circumstances whether what I have called the unity of the estate is interfered with.

Lord Watson at p. 167:—

Where several pieces of land owned by the same person are so near to each other and so situated that the possession and control of each gives an enhanced value to all of them, they are lands held together within the meaning of the Act; so that if one piece is compulsorily taken and converted to uses which depreciate the value of the rest the owner has a right to compensation (for the depreciation).

Lord Bramwell, p. 168:—

The lands have one owner. I cannot think it matters that they are separated by a railway; I suppose it would hardly be said that one part of a park separated from another part by a railway was not land held with that other part. Here the lands are close; what is done on one part must or might affect what would be done on the other. For example, what I mean is this: Houses of a particular class or character built on one part would influence the class or character of what would or might be built on the other. The class of occupants of one part would in like way influence the character of that on the other. On these considerations I am of opinion that the land in respect of which the claim is made here was land held with the piece taken.

Lord Macnaghten at p. 175:—

Lands in respect of which a claim for compensation may arise are referred to in the Act, in contradistinction to the lands taken or purchased from the owner thereof, as lands "held therewith" or as "the other lands" of such owner. The Act says nothing about their being held along with the lands taken or purchased for one and the same purpose, nor does it require that they should be in contact with those lands. Apparently it is enough if both parcels of land are held by one and the same owner, and if the unity of ownership conduces to the advantage or protection of the property as one holding.

Lord Fitzgerald concurred in these views.

I have no doubt that the possession and control of

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the lots which have been expropriated gave an enhanced value to the claimant's other lots in the building subdivision. The taking of the expropriated lots and putting them to the use proposed will depreciate the value of the rest. Inasmuch as it gave him power to control the use to be made of his expropriated lots the claimants' ownership of them

> conduced to the advantage or protection of the property as one holding.

Had he retained the ownership of the lots taken, it would have enabled him to prevent such a use being made of them as would tend to depreciate the value of his remaining property.

The finding of the arbitrators that the 49 lots would in fact be "injuriously affected" and the quantum of their assessment are unchallenged. Upon this branch the appeal, in my opinion, fails.

On the other question I am, with great respect, of the opinion that the Appellate Division had no jurisdiction to make the order for a reference back. Meredith, J., so held in *Re MacAlpine and Lake Erie and Detroit River Railway Co.*(1), and his decision was approved by the Court of Appeal in *Re Davies and James Bay Railway Co.*(2), at page 568. It is true that in the recent case of *Cedars Rapids Manufacturing and Power Co.* v. *Lacoste*(3), the Judicial Committee ordered a reference back as to part of the subject of an arbitration to which the provisions of the Dominion "Railway Act" applied. But, so far as can be ascertained from the report of that case, the question of jurisdiction does not appear to have been raised

(1) 3 Ont. L.R. 230. (2) 28 Ont. L.R. 544.
(3) [1914] A.C. 569.

before their Lordships and their attention was not directed to the grounds on which the Ontario decisions above referred to are based or to the difficulties presented by the provisions of the statute to which they call attention. Apparently in the present case the decision of the Ontario Court of Appeal in *Re Davies and the James Bay Railway Co.*(1) was not brought to the attention of the Appellate Division.

Although counsel for the respondent asserts in his factum that when before the Appellate Division counsel for both parties agreed that a reference back in respect of the lots mentioned in the third paragraph of the order of that court would be more desirable than to have the court deal with the matter on the evidence, this is denied on behalf of the appellants. At all events nothing appears to have occurred which would be tantamount to a new submission, as an agreement of counsel was deemed to be in *Demorest* v. *Grand Junction Railway Co.*(2). With respect, I am of the opinion that the part of the judgment in appeal which directs a reference back cannot be supported.

On the evidence, giving due weight to the views of the Appellate Division, so far as they can be gathered from an order such as they have made, I find no sufficient reason for interfering with the unanimous conclusion of the arbitrators that the lots owned by the claimant other than those enumerated in the award of the majority would not be injuriously affected by the construction and operation of the railway.

But the arbitrators have expressly excluded from their award any allowance for damage which would

(1) 28 Ont. L.R. 544.

(2) 10 O.R. 515.

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be caused by vibration of trains and by noise and smoke. The $4,800 assessed by them as damages were confined to injury to the lands from other causes. I agree with the declaration in the order of the Appellate Division that the claimant

> is entitled to recover all damages sustained by him to the said property by reason of the construction of the said railway,

which, I assume, was intended to include damages to arise from the operation of the railway as well.

So far as the lands of the claimant were "held with" the lands expropriated he is entitled to damages arising from "operation" as well as from "construction." These would include damages for injury caused by vibration, noise and smoke which the arbitrators excluded. For further depreciation in the value of the lots enumerated in the arbitrators' report due to smoke, noise and vibration, a further sum should therefore be awarded. It is, however, unnecessary to determine the amount of this allowance, since the majority of the court is of the opinion that none should be made.

BRODEUR J.—This is a question of compensation under the "Railway Act."

The respondent has divided a piece of land a few years ago in town lots at Sudbury. The line of railway of the company appellant is passing through that piece of land and has taken over for its right of way some of those lots. Some others have not been touched at all, though they may have been injuriously affected.

There is no dispute as to the value of the land which has been taken by the company; but we have to decide whether the Appellate Division of the Supreme

Court of Ontario was right in awarding damages for the lots which were not touched or severed by the railway.

It is a jurisprudence very well established that in order to be entitled to compensation the claimant must shew that some of the land injured has been taken. *In re Devlin and Hamilton and Lake Erie Railway Co.*(1).

If the property on which the railway passes has not been divided in town lots, the respondent could be entitled to damages because then his land would have been severed.

But as it is divided in town lots, as the severance has taken place through the action of the respondent himself, those lots cannot be treated any more as one parcel of land; but they must be considered as separate and independent lots and it is only in case where part of one of those lots has been taken that the balance of the lot could give rise to a claim for compensation.

Hammersmith Railway Co. v. *Brand*(2).

Now the respondent claims that he is deprived of the easy access he had to the street and that upon that ground he should be compensated.

The crossing or blocking of a street is not a ground, on the part of abutting owners, for claiming damages. That question came up in the case of *Grand Trunk Pacific Railway Co.* v. *Fort William*(3), and it was held that a provision for compensation to those owners embodied in the Board of Railway Commissioners' order was illegal and should be set aside.

(1) 40 U.C.Q.B. 160. (2) L.R. 4 H.L. 171.
(3) [1912] A.C. 224.

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Brodeur J.

As a result of the judgment in the *Fort William Case*(1), the "Railway Act" was amended so as to enable the adjacent abutting land-owners to receive compensation when the railway passes along or across a street. This amendment is section 6, 1 & 2 George V., ch. 22, which reads as follows:—

> Subject to the company making such compensation to adjacent or abutting landowners as the Board deems proper, the railway of the company may be carried upon, along or across an existing highway upon leave therefor having been first obtained from the Board.

Supposing that in this case the respondent would be entitled to compensation as to the use of the street in question, it would be for the Board to determine and that question of compensation then was not within the powers of the arbitrators.

The judgment of the Appellate Division of the Supreme Court of Ontario awarding damages for those lots which had not been taken, but which were injuriously affected and ordering a reference as to some of the lots about which the arbitrators did not grant any damages is not well founded.

The appeal then should be allowed with costs of this court and of the court below and the award of the majority of the arbitrators should be confirmed.

Appeal allowed with costs.

Solicitors for the appellants: *Armour & Mickle.*

Solicitor for the respondent: *Joseph Fowler.*

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(1) [1912] A.C. 224.