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THE CAMPBELLFORD, LAKE ONTARIO AND WESTERN RAILWAY COMPANY (DEFENDANTS). } APPELLANTS; *Nov.23, 24. *Nov. 30.

AND

ROBERT F. MASSIE AND OTHERS (PLAINTIFFS) ..... } RESPONDENTS.

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

Expropriation—Agreement to fix compensation—Arbitration or valuation—Powers of referees—Majority decision.

Where the land was expropriated for railway purposes the railway company and the owner agreed to have the compensation determined by reference to three named persons called "valuers" in the submission; their decision was to be binding and conclusive on both parties and not subject to appeal; they could view the property and call such witnesses and take such evidence, on oath or otherwise, as they, or a majority of them, might think proper; and either party could have a representative present at the view or taking of evidence, but his failure to attend for any reason would not affect the validity of the decision.

Held, Fitzpatrick C.J. and Duff J. dissenting, that this agreement did not provide for a judicial arbitration, but for a valuation merely, by the parties to whom the matter was referred, of the land expropriated.

The agreement provided that a valuator should be appointed by each party and a County Court judge should be the third; if one of those appointed would or could not act the party who appointed him could name a substitute; if it was the third the parties could agree on a substitute, in which case the decision of any two would be binding and conclusive without appeal; if they could not so agree a High Court judge could appoint. There was no necessity for substitution.

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

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Held, that the decision of any two of the valuators was valid and binding on the parties.

APPEAL from a decision of an Appellate Division of the Supreme Court of Ontario maintaining an award in a matter of expropriation of land for railway purposes.

The material facts are indicated by the above headnote. The agreement for submission on which the questions to be decided turn is set out in full in the opinion of Mr. Justice Duff.

W. N. Tilley for the appellants. The agreement provided for an arbitration not a mere valuation. Compensation was to be determined not only for the land taken, but for the consequential injury to the remaining lands to determine which called for decision on questions of law. See Russell on Awards (9 ed.), page 45; *Thomson* v. *Anderson*(1), at pages 530-1; *In re Carus-Wilson and Greene*(2); *In re Brien and Brien*(3); *Taylor* v. *Yielding*(4).

The award of the original arbitrators was to be unanimous. The provision prohibiting an appeal from the award of the valuers "or any two of them" only makes for finality and there was already a provision as to who should make the award. See *United Kingdom Mutual S.S. Assurance Association* v. *Houston & Co.*(5); *In re O'Connor and Fielder*(6).

Hamilton Cassels K.C. for the respondents, referred, on the question of arbitration or valuation to

(1) L.R. 9 Eq. 523.
(2) 18 Q.B.D. 7.
(3) [1910] 2 Ir. R. 84.
(4) 56 Sol. Jour. 253.
(5) [1896] 1 Q.B. 567.
(6) 25 O.R. 568.

the American cases of *Hobson* v. *McArthur*(1); *Quay* v. *Westcott*(2); *Republic of Columbia* v. *Cauca Co.* (3), and on the other question to *Whiteley* v. *Delaney* (4), contending that the evident intention of the parties that a majority could make the award in any case should not be defeated by a narrow and technical reading of the phraseology.

THE CHIEF JUSTICE.—I agree with Mr. Justice Duff.

DAVIES J.—I agree that this appeal should be dismissed and concur with the judgment of the Appellate Division that the case should go back for trial with a declaration "that the agreement between the parties provides for a valuation by the valuers named therein or a majority of them and expresses the true agreement between the parties."

The question argued before us is whether the agreement of reference in question provides for an arbitration or for a valuation and whether it can be fairly construed as providing for a decision by any two of the valuators named or must be unanimous.

I think this case is one of those intermediate cases referred to by Lord Esher in *In re Carus-Wilson and Greene*(5), where though a dispute has actually arisen it is not intended that the persons appointed to decide it shall be bound to hear evidence and that it must be decided not on any general principle, but on its own particular circumstances.

(1) 16 Pet. 182.
(2) 60 Pa. St. 163.
(3) 106 Fed. R. 337.
(4) [1914] A.C. 132.
(5) 18 Q.B.D. 7.

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Davies J.

Reading the agreement as a whole and with reference to the subject-matter of the reference and the circumstances under which it was entered into, I have reached the conclusion above stated.

The question to be determined by the valuators was the

> amount of compensation for land and damages which the respondents were entitled to as owners of lands taken by the appellate railway company.

The agreement named three "valuers" to whom that question was referred. It provided that if the valuer appointed by either party died he might substitute a new valuer, and if the "third valuer" died the other valuers might agree upon a third valuer in his stead,

> and in that case the decision of any two of the valuers should be conclusive and binding without appeal.

Then follows a covenant that the decision of the valuers should be observed and should be binding and conclusive upon the parties and

> should not be subject to appeal from the decision of the said valuers or any two of them.

The agreement further provided that

> the valuers may view the property and may at their discretion call such witnesses and take such evidence or statements on oath or otherwise as they or *a majority of them* may think proper and shall give such weight, if any, to such evidence or statements as they in their discretion think proper.

Considering the one thing referred to them, namely, the fixing of the compensation to be given the land-owner for his land taken and damages sustained, the fact not without significance that the parties are called "valuers" all through the instrument and not arbitrators, and the special provision that the valuers

might view the premises and decide the question submitted to them without the aid of witnesses, or if they determined to do so might hear statements from witnesses not under oath, I reach the conclusion that the submission was a valuation only and not an ordinary judicial arbitration.

Then as to the power of two of them to make a binding decision, I revert again to the provision that in case of the death or incapacity of the third named valuer, Judge Morgan, and the inability of the two remaining valuers to agree upon an amount, it was provided that they might agree upon a third valuer, and in that case, that is where a third valuer was appointed by the other two, the decision of *any two of the valuers* should be conclusive and binding without appeal.

I think that the appellant attaches more weight to this change of language than it deserves. It seems absurd and without reason to hold that in the case of the *named* valuers unanimity should be required, while in the other case of the death or incapacity of one of the named valuers and the appointment in his place of a third by the other two, such unanimity was dispensed with. It is clear that in the latter case any two of the valuers could make a final and conclusive decision and if it was intended to change that important fact with respect to the decision of any two of the named valuers, very clear and explicit language would be required to shew such change.

As I have said while the language used is inapt I think it fairly bears the construction placed upon it by Mr. Justice Hodgins speaking for the Appellate Division and that it may fairly be paraphrased thus,

shall be final and conclusive and shall not be subject to appeal.

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Idington J.

For these reasons I would dismiss the appeal with costs.

IDINGTON J.—The construction of such an instrument as now in question cannot be properly reached by the mere microscopical examination and analysis of one or more clauses or sentences therein.

Reading and construing this instrument as a whole and finding it possibly ambiguous, we should consider the nature of the business the parties had in hand, attribute to them some common sense and knowledge of the world, and keep in view their probable purpose and see if having due regard thereto and such like surrounding circumstances some sensible operative meaning can be given it.

Of course if in face of all that it were still found that some clauses were of such an imperative nature that they must be read literally and left no room for being thus properly interpreted and modified by and harmonized with other parts or clauses, we should have to give effect thereto even if by doing so we rendered the document practically worthless as being unworkable.

I find myself under no such necessity in the interpretation or construction of this document.

Its meaning is very plain if we approach it in the way I suggest and then look at the clause by which the parties covenanted and bound themselves to abide by the results which might be reached by a majority of those named.

Then it seems to me the other clauses expressly speaking of a majority acting are also each in harmony with such a purpose and need not be so read as

to bear the construction thereof pressed upon us. One of these might by a little straining be so construed, but that is not its necessary or only meaning.

And the clause as to exercising a discretion relative to the hearing of witnesses seems expressly designed for the purpose of enabling a majority of those voting to determine the basic facts upon which the estimate for compensation has to be made. Would it not be rather absurd that two could control the kind of facts which must necessarily guide them and yet could not execute the purpose so clearly involved ? It seems to me they might, if so disposed, have thus step by step reduced the remaining problem to a pure arithmetical question and yet if the contention set up be correct they could not carry out such result by signing the certificate thereof.

I have not had much trouble in coming to the conclusion that a majority of those named were intended to finally determine the result.

But when I have to say whether this is a submission to arbitration or a mere agreement for determining a valuation, I find some difficulty.

I have, therefore, purposely put forward just now what seems to be its import and the only difficult part of the document bearing upon that question, and need not repeat same here.

Assuming evidence by witnesses used for such a purpose, does the existence of such a power enabling it to be done involve the whole proceeding being held to be one of judicial inquiry within the meaning of that term as defined by Cockburn, C.J., in *Re Hopper* (1), at p. 372 and top of p. 373, or by Lord Esher in *Re Dawdy* (2), at p. 429 and top of p. 430, or by Mr.

(1) L.R. 2 Q.B. 367. (2) 15 Q.B.D. 426.

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Idington J.

Justice Williams in the case of *Re Hammond and Waterton*(1), at p. 809.

We find therein no very clear-cut test of what is to be held as constituting a judicial investigation, but if I understand those cases and many others the mere permission to a majority of the valuers to examine witnesses does not of itself constitute the submission one of arbitration.

If they had been herein bound to hear such witnesses as either party desired, and to determine judicially according to such evidence, then it certainly might have been urged with great force that it was a submission to arbitration.

The purpose of the parties hereto seems to me to have been so evidently that of constituting those named mere valuers that I should feel much regret if forced to say they had failed of their purpose.

And that such was their purpose surely is self-evident when regard is had to the departure from the usual method of arbitration under the "Railway Act."

Seeing this was not dealt with by the learned trial judge I doubted our right to deal with it, but appellant's counsel did not seem disposed to raise such question, but preferred getting the opinion of this court thereon as the Court of Appeal had passed upon it.

I think the appeal should be dismissed with costs.

DUFF J.—I think the agreement of 2nd July, 1913, constituted a submission to arbitration.

The appellant company gave to the respondents notice of expropriation of part of their property pur-

(1) 62 L.T. 808.

suant to the provisions of the Dominion "Railway Act" (section 193) and offering $900

as compensation for the said lands and premises and for all damages caused to you by the exercise of its corporate powers thereon.

The respondents refused to accept this sum and the appellant company obtained a warrant for (and went into) possession of the lands under the authority of section 217 of the "Railway Act." Instead of applying to a judge for the appointment of arbitrators (under section 196) to determine the amount payable as compensation and damages which either party was entitled to do (see chapter 37, 6 & 7 Edw. VII.), the parties entered into the agreement already mentioned, making provision for the ascertainment of that amount, which agreement is in the following terms:—

MEMORANDUM OF AGREEMENT made on the second day of July, 1913.

Between

THE CAMPBELLFORD, LAKE ONTARIO AND WESTERN RAILWAY COMPANY, hereinafter called the Railway Co.,

Of the one part;

and

ROBERT F. MASSIE, ISABEL E. MASSIE and THE TORONTO GENERAL TRUSTS CORPORATION, hereinafter called the Owner,

Of the other part.

WHEREAS the owner now owns the lands, being part of lot number six (6), Concession B, in the Township of Hamilton, containing three acres and ninety-two hundredths of an acre (3.92), more or less, and the Railway Company is proceeding with the construction of its line of railway across the said lands, as shewn on and according to the plan thereof, a copy of which plan so far as above lands are concerned, is attached hereto.

AND WHEREAS the Railway Company and the owner have agreed to *settle the question* of compensation for land and damages to which the owners of said lands are entitled under the "Railway Act" as hereinafter set forth.

NOW THIS AGREEMENT WITNESSETH that the Railway Company and the owner do hereby covenant and agree that the *question* of the amount of compensation payable under the "Railway Act" by the

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Railway Company for the taking of the said lands for its said railway and for damages sustained by the owner by the taking of said lands and the construction and maintenance of the said railway is hereby referred to the *determination* of Joseph Hickson, as valuer, appointed by the Railway Company, and Nicholas Garland, as valuer, appointed on behalf of the said Owner, and His Honour Edward Morgan, as third valuer.

AND in case either of such valuers appointed by the parties respectively shall die, refuse or become incapable to act as valuer before such question is fully determined by the said valuers as to all the lands and damages herein referred to, then the party who appointed such valuer, or the heirs, executors, or administrators of such party, shall forthwith thereafter appoint some other fit person to be valuer in the place of the valuer dying, refusing or becoming incapable to act.

In case the third valuer shall die, refuse or become incapable to act and the other two valuers are unable to agree upon the amount to be paid as compensation as aforesaid, they may agree upon a third valuer in his stead and in that case the decision of any two of the valuers shall be conclusive and binding without appeal; if they cannot agree upon such third valuer, a judge of the High Court Division may appoint him on the application of either party on six days' notice to the opposite party of application to the judge to make such appointment.

No costs in respect of proceedings in pursuance hereof shall be payable by either of the parties hereto to the other; but the Railway Company shall pay the fees of all the valuers and the costs heretofore incurred of application for warrant of possession and of motion for appointment of arbitrators if any, shall be paid as between party and party by the Railway Company to the owner. Before valuation proceeds the parties are to agree upon the crossings, if any, to be provided.

And the parties hereto mutually covenant and agree that the decision of the said valuers shall be faithfully kept and observed and shall be binding and conclusive upon the said Railway Company and owner, and shall not be subject to appeal from the decision of said valuers or any two of them.

AND the undersigned owner for themselves, their heirs, executors, administrators, successors and assigns, doth hereby covenant and agree with the Railway Company, its successors and assigns, that he or they will upon tender of the amount payable to him or them as such compensation by the said valuers, with interest as hereinafter mentioned, execute and deliver to the Railway Company good and sufficient deed in fee simple free from dower and all other claims and encumbrances, vesting in the Railway Company the lands required as aforesaid, such deed to be prepared by and at the expense of the Railway Company, and the said Railway Company agrees to pay the sum of money found payable as aforesaid, with interest forthwith

after the making of the said decision, execution of deed, and completion of title as aforesaid.

The Railway Company meanwhile to retain possession of the lands required, and to be permitted to proceed forthwith with the construction and operation of its railway and works thereon.

The valuers may view the property and may at their discretion call such witnesses and take such evidence or statements on oath or otherwise as they or a majority of them may think proper, and shall give such weight, if any, to such evidence or statements as they in their discretion think proper.

Either party shall have the right to have one representative present, if desired, at any meeting of the valuers held to view the property or to take statements or evidence, but failure of such representative to attend, whether through lack of notice, or otherwise, shall not affect the validity of the decision.

The Company to pay interest at five per cent. per annum on the amount found from date of possession till date of payment.

IN WITNESS whereof the Railway Company has hereunto caused its corporate seal to be affixed under the hands of its proper officers and the owners have hereunto set their hands and seals and corporate seal respectively.

IN THE PRESENCE OF

C.L.O. and W.
[SEAL]

CAMPBELLFORD, LAKE ONTARIO AND WESTERN RAILWAY COMPANY.
D. MCNICOLL,
President.

As to signature of
Robt. F. Massie.
Ronna E. Large.

ROBT. F. MASSIE. [SEAL]

As to signature of
Isabel E. Massie.
E. Ross.

ISABEL E. MASSIE. [SEAL]

THE TORONTO GENERAL TRUSTS CORPORATION.
[SEAL]
F. OSLER, *President.*
J. W. LANGMUIR,
Gen'l. Manager.

In passing on the question whether this agreement is a submission to arbitration in the legal sense we are to be guided, I think, by the principles laid down by

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Lord Esher in *In re Carus-Wilson and Greene*(1), in these words:—

> If it appears from the terms of the agreement by which a matter is submitted to a person's decision, that the intention of the parties was that he should hold an inquiry in the nature of a judicial inquiry, and hear the respective cases of the parties, and decide upon evidence laid before him, then the case is one of an arbitration. The intention in such cases is that there shall be a judicial inquiry worked out in a judicial manner. On the other hand, there are cases in which a person is appointed to ascertain some matter for the purpose of preventing differences from arising, not of settling them when they have arisen, and where the case is not one of arbitration, but of a mere valuation. There may be cases of an intermediate kind, where, though a person is appointed to settle disputes that have arisen, still it is not intended that he shall be bound to hear evidence or arguments. In such cases it may be often difficult to say whether he is intended to be an arbitrator or to exercise some function other than that of an arbitrator. Such cases must be determined each according to its particular circumstances.

It is not denied that differences had arisen. Were these differences to be settled by means of a "judicial inquiry worked out in a judicial manner?" The respondents rely upon the use of the term "value" as shewing that the parties contemplated a conclusion reached as a result of the application of the personal knowledge and skill of the valuators. But the language of the instrument as a whole seems to negative that suggestion.

The question is "referred to the determination" of the gentlemen selected. In certain eventualities,

> the decision of any two of the valuers shall be final and binding and without appeal.
>
> The valuers may view the property and take such evidence on oath or otherwise as they or a majority of them may think proper.
>
> Either party shall have the right to have one representative present, if desired, at any meeting of the arbitrators to view the property or take statements of evidence.

(1) 18 Q.B.D. 7.

These stipulations seem to contemplate a decision after "hearing the respective cases of the parties"; and indeed the fact that the amount of compensation properly awardable for "damages" caused by the exercise of the powers of the railway company was one of the subjects of the reference (and not merely the value of the land taken) in itself creates a presumption that such was in fact the intention of the parties. I think the instrument rightly construed does provide for an inquiry, in its nature judicial.

On the other point I am, with a good deal of doubt, of the opinion that a majority of the arbitrators was competent to act.

In the result I think the appellants are entitled to have their motion to set aside the award heard and disposed of; but as a majority of the court are for dismissing the appeal, it is not necessary to consider what would be the most convenient form of order for giving effect to the view above expressed.

ANGLIN J.—Not, I confess, without some hesitation, I concur in the dismissal of this appeal. Taking the document of submission as a whole it is, perhaps, made sufficiently clear that it was the intention of the parties that a binding valuation might be made by any two of the valuators whether the three originally named should act or there should be a substitution in the case of the third arbitrator. The clause providing that any two of the arbitrators might determine what evidence should be received certainly points in this direction. At all events I am not convinced that this construction of the agreement, which prevailed in the Appellate Division, is so clearly wrong that we

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would be justified in reversing the judgment of that court.

Neither am I satisfied that the view of the Appellate Division that the document taken as a whole provides for a valuation and not for an arbitration is erroneous. There are, no doubt, one or two clauses in it which are not usual in agreements providing for a mere valuation. But their presence does not, I think, suffice to change the character, which it seems otherwise sufficiently manifest from the tenor of the whole instrument it was meant that it should have.

BRODEUR J.—I would dismiss this appeal with costs.

*Appeal dismissed with costs.**

Solicitors for the appellants: *MacMurchy & Spence.*

Solicitors for the respondents: *Cassels, Brock, Kelley & Falconbridge.*

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*On the same day judgment was given in *Campbellford, etc., Railway Co.* v. *Laidlaw*, in which the court held that a similar agreement was a submission for valuation only, affirming the judgment of an Appellate Division (31 Ont. L.R. 209).