THE CALGARY AND EDMONTON RAILWAY COMPANY ..... } APPELLANTS;

AND

DANIEL H. MACKINNON..... RESPONDENT.

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*May 6, 12.
*June 15.

ON APPEAL FROM THE SUPREME COURT OF ALBERTA.

Arbitration and award—Expropriation—Form of award—Evidence—View of property—Proceeding on wrong principle—Disregarding evidence.

In expropriation proceedings, under the "Railway Act," the arbitrators in making their award stated that they had not found the expert evidence a valuable factor in assisting them in their conclusions and that, after viewing the property in question, they had reached their conclusions by "reasoning from their own judgment and a few actual facts submitted in evidence." On appeal from the judgment of the Supreme Court of Alberta setting aside the award and increasing the damages,

Held, that it did not appear from the language used that the arbitrators had proceeded without proper consideration of the evidence adduced or upon what was not properly evidence and, therefore, the award should not have been interfered with.

APPEAL from the judgment of the Supreme Court of Alberta setting aside an award of arbitrators with costs.

In proceedings under the "Railway Act" for the expropriation of lands required for the use of the railway the evidence adduced was contradictory and the arbitrators made a personal inspection of the property in question. In making their award, the majority of the arbitrators said:

"We regret very much that the evidence submitted

*PRESENT:—Girouard, Davies, Idington, Duff and Anglin JJ.

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consisted so largely of personal opinions of values and produced so little of authentic fact in confirmation. The expert evidence submitted varied so widely in difference of opinion as to land values that we have not found it a valuable factor in assisting our conclusions, and we have been thrown very considerably upon our own judgment in arriving at this decision.

"Reasoning from our own judgment and a very few actual facts submitted in evidence we are convinced that the sum of two thousand nine hundred dollars ($2,900.00) is a fair and just valuation of the land under dispute."

The third arbitrator gave his opinion as follows:

"In view of the testimony of three of the witnesses who swore that they were prepared to pay five thousand dollars ($5,000.00) for this property I dissent from the above finding, and consider the award should be five thousand dollars for the property less three hundred dollars for the fraction remaining, making a net total of four thousand seven hundred dollars ($4,700.00)."

By the judgment appealed from, the Supreme Court of Alberta took the view that the arbitrators could not substitute their personal inspection of the property for the other evidence adduced and that it appeared that the majority of them had reached their conclusions from their own opinions as to the value of the lands and not from those of the witnesses.

Hellmuth K.C. and *Curle* for the appellants.

Chrysler K.C. and *Travers Lewis K.C.* for the respondent.

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Girouard J.

GIROUARD J.—This is an appeal from the Supreme Court of Alberta *en banc* setting aside an award of arbitrators fixing the compensation to be paid to the respondent for land expropriated under the "Railway Act." The reason given by the court below was that the majority of the arbitrators, who awarded a smaller amount, substituted their own opinion for the testimony of the witnesses. As usual in these cases, the evidence is contradictory. Personal opinions as to the value of the land are also given. The arbitrators decided to view the premises and judge for themselves. After having done so, they came to the conclusion

from their own judgment and a few actual facts submitted in evidence,

as they observe, that $2,900 was a fair and just valuation. One of the arbitrators dissented

in view of the testimony of three witnesses who swore that they were prepared to pay $5,000 for the property.

I do not think that this evidence is of much value. The Supreme Court of Alberta thinks otherwise and goes so far as to hold that the opinion of the arbitrators based upon their personal examination of the premises cannot control or override the opinions and the statements of these witnesses. I entirely disagree from this view. The arbitrators are bound to give proper weight to the evidence adduced and accept only that which seems to them to be correct; and, to help them to reach this result, they are empowered by law to view the locality. Are all the judges in appeal in as good a position as they were to consider properly all the circumstances of the case? I would long hesitate to set

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aside an award so rendered by arbitrators selected with the consent of the proprietor, as they were in this case, he approving in writing their appointment by the judge, especially as no irregularity, or informality, or illegality, or partiality is alleged.

I would, therefore, allow the appeal with costs.

DAVIES J.—I concur in the opinion of Mr. Justice Anglin.

IDINGTON J.—The expressions in the award of the majority are certainly unfortunate.

They seem almost to exclude the expert evidence and then say:

> We have been thrown very considerably upon our own judgments in arriving at this decision. Reasoning from our own judgment and a few actual facts submitted in evidence, etc.

The presumption must, I think, be in favour of the arbitrators having acted properly.

There is nothing else in this case to lead one to the conclusion they did otherwise unless it is implied from these ambiguous expressions.

Being ambiguous, how can I affix to them the definite meaning needed to prove their authors had proceeded upon a wrong principle?

After much consideration and hesitation I rather think them capable of being construed, and to have been intended to be used, in such a way as to exclude the implication of impropriety found by the court below.

It is quite right for arbitrators to use their own judgment in determining the value or want of value of evidence put before them by experts or others. If it

shocks their common sense or common knowledge of affairs, for possessing which they may have been chosen as arbitrators, they are not bound to accept it simply because sworn to.

They are often by reason of extreme conflict of evidence driven to exercise that same common sense and knowledge of affairs, in sifting and estimating, so as to get out of the conflict some sufficient grain of truth upon which to proceed properly in the business they have been chosen for.

Can I fairly say these gentlemen meant any more ? Can I impute to them by virtue of these expressions the substitution of their own personal opinions (apart from such as derivable from the view they had) for the evidence ? I think not.

I would allow the appeal with costs.

DUFF J.—With great respect I cannot agree with the view of the court below as to the grounds upon which the arbitrators proceeded. I think it is rather a forced construction of the language used to say that they must have discarded the evidence entirely. After examining the record carefully I am disposed to think there was some reason for regarding the specific opinions as to value put forward by the so-called expert witnesses as of very little weight. There was some evidence, not very much it is true, of sales in the neighbourhood; but sufficient, I think, taken together with the knowledge of the locality gained by the actual examination made by the arbitrators and such general evidence touching the elements of value and the circumstances affecting it as was given by the witnesses to enable them to pass upon the question before them without resorting to the opinions mentioned. It is,

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Duff J.

I think, to these specific opinions given by the expert witnesses rather than to their evidence as a whole that the arbitrators refer in the passage which appears mainly to have led the court below to the view that the arbitrators had constituted themselves valuers, and had proceeded upon their own personal views without regard to the evidence adduced.

The appeal should, I think, be allowed.

ANGLIN J.—The ground on which the Supreme Court of Alberta allowed the appeal to them from the award herein was that, the arbitrators having made an inspection of the property in question, the majority wholly discarded the evidence which they had taken and proceeded solely upon their own opinions of the value of the property based on such skill and knowledge as they had independently of the evidence adduced and upon such information as their own inspection gave them. If the award made it apparent that the majority of the arbitrators had in fact pursued this course in reaching their conclusion, I should not have been prepared to disturb a judgment setting aside their award, although it by no means follows that I would have upheld the increase in the amount of the award made by the Supreme Court of Alberta.

But while the award of the majority may not be happily worded and might, on cursory perusal, give the impression that, in reaching their conclusion, they had wholly disregarded the evidence, a careful consideration of the award makes it reasonably clear that what they intended to state was that the inspection of the property had satisfied them that certain parts of the evidence adduced could not be relied upon while

other parts might safely be made the basis of their adjudication. A proper appreciation of the value of the evidence is always a legitimate object of a view and, if it leads to the discrediting and the consequent rejection of certain portions of the testimony, I am not prepared to say that undue weight or effect has therefore been given to the result of the view. The impeached award states that, while the majority of the arbitrators "have not found" the expert evidence "a valuable factor in assisting (their) conclusions," they have reached those conclusions by

> reasoning from their own judgment and a few actual facts submitted in evidence.

This language does not, in my opinion, shew that the arbitrators gave no weight or consideration to the evidence before them. On the contrary, it rather establishes that they acted upon such of it as they deemed credible and trustworthy. I am therefore unable to agree with the opinion of the Supreme Court of Alberta that the majority of the arbitrators proceeded on a wrong principle and made an award "on what was not properly evidence."

Weighing the evidence itself and giving due effect to the fact that the arbitrators had the advantage of a view, it is, I think, impossible for an appellate court to say that the award is clearly erroneous—still less that it should be increased to the amount allowed by the Supreme Court of Alberta.

I am, therefore, with respect, of the opinion that the Alberta Court erred in interfering with the award, that the appeal from their judgment should be allowed with costs here and below and that the award should be reinstated.

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Appeal allowed with costs.

Solicitors for the appellants: *Dawson, Hyndman & Hyndman.*

Solicitors for the respondent: *MacKinnon & Cogswell.*