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THE CANADIAN NORTHERN WESTERN RAILWAY COMPANY } APPELLANTS;

*May 8.
*June 24.

AND

JOHN T. MOORE ..... RESPONDENT.

ON APPEAL FROM THE APPELLATE DIVISION OF THE SUPREME COURT OF ALBERTA.

Railways—Expropriation of lands—Arbitration—Appeal—Jurisdiction of court on appeal—Reference back to arbitrators—Proceedings by arbitrators—Receiving opinion testimony—Number of witnesses examined—"Alberta Evidence Act," 1910—Alberta "Arbitration Act," 1909—Alberta "Railway Act," 1907—Setting aside award—Evidence—Admission in prior affidavit—Ascertaining value of lands.

The provisions of the Alberta "Arbitration Act" of 1909, in relation to references to arbitration, apply to proceedings on arbitrations under the Alberta "Railway Act" of 1907, and give power to the court or a judge, on an appeal from the award made, to remit the matters referred to the arbitrators for reconsideration. Anglin J. inclined to the contrary opinion.

Per Davies, Idington and Anglin JJ. (Fitzpatrick C.J. *contra*).—When arbitrators have violated the provisions of section 10 of the "Alberta Evidence Act" of 1910 by receiving the testimony of a greater number of expert witnesses than three, as thereby limited, upon either side of the controversy, their award should be set aside by the court upon an appeal.

Per Fitzpatrick C.J. and Idington J. (Davies J. *contra*).—An affidavit of the party whose property has been expropriated, made for different purposes several years prior to the expropriation proceedings, cannot properly be taken into consideration by arbitrators as evidence establishing the value of the property at the time of its expropriation.

Per Idington and Brodeur JJ.—In the circumstances of the case the arbitrators were not *functi officiis*, as their award had been invalidly made.

The appeal from the judgment of the Appellate Division of the Supreme Court of Alberta (8 Alta. L. R. 379) and the cross-appeal therefrom were dismissed with costs.

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

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APPEAL AND CROSS-APPEAL from the judgment of the Appellate Division of the Supreme Court of Alberta(1), setting aside an award made by arbitrators and referring the matter back to the arbitrators for reconsideration and determination anew of the compensation to be awarded for lands expropriated for railway purposes.

On proceedings taken for the expropriation of the respondent's lands for railway purposes under the Alberta "Railway Act" of 1907, arbitrators were appointed, on 25th June, 1913, and they proceeded with the arbitration on 16th December, 1913, rendering their award on the 21st February, 1914. During the proceedings the arbitrators allowed evidence to be adduced by the opinion testimony of a greater number of witnesses than that limited in regard to expert testimony by the "Alberta Evidence Act", ch. 3, sec. 10, of the statutes of 1910, (2nd sess.) on behalf of the party expropriated, and also refused to receive in evidence an affidavit respecting the value of the lands in question, made by the respondent in the year 1911, when applying for probate of the will of his deceased wife, for the purposes of fixing the succession duty payable in regard to her estate. Upon the opening of the arbitration proceedings, it was determined, with the assent of the parties, that the compensation to be awarded should be upon the basis of the value of the lands at that time, and this appeared to be the date adopted by the arbitrators in the estimation of the value of the lands expropriated.

On an appeal by the railway company, the Appellate Division of the Supreme Court of Alberta set aside the award of the arbitrators, on the ground that they had

(1) 8 Alta. L. R. 379.

improperly heard opinion evidence as to the value of the lands contrary to the provisions of the "Evidence Act," and, being of opinion that on the evidence the court was unable itself to make an award, referred the matter back to the arbitrators to determine anew the compensation to be paid without regard to the evidence theretofore taken.

The railway company now appealed against that portion of the judgment of the court below which referred the matter back to the arbitrators for reconsideration and the respondent, by cross-appeal, contended that the award ought not to have been set aside for the reason stated by the court and that the award of the arbitrators should have been confirmed.

Chrysler K.C. for the appellants. The points in respect of which we allege error are (1) that the court had no power to direct a reference back to the arbitrators to determine anew the compensation, (2) that the arbitrators had no power to proceed further, they being *functi officiis*, and (3) that, in any case, this matter does not fall within the class of cases in which the court has jurisdiction to refer an award back to the arbitrators.

The Alberta "Railway Act," ch. 8, of 1907, contains a complete code in respect of compensation by arbitration for lands taken by railway companies, and the sections, 99 to 114, referring to arbitrations make very complete provision for all contingencies but give no authority to remit any award to the arbitrators. For the jurisdiction of the Supreme Court of Alberta, see the "Judicature Ordinance," ch. 21 of 1898, secs. 3, 8 and 10.

The Alberta "Arbitration Act," ch. 6 of 1909, has no application to proceedings under the "Railway Act," of 1907, and the provisions as to arbitration, in

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the "Railway Act," are self-contained, and constitute a complete code of provisions for the expropriation of lands under that Act. The "Arbitration Act" applies only to the classes of arbitrations—(1) which depend upon a written agreement for submission of present or future differences to arbitration (sec. 2, sub-sec. 1), (2) which originate by order of reference (sec. 11), and (3) statutory arbitrations under section 17. Proceedings under the "Arbitration Act," differ from and are inconsistent with the provisions of the "Railway Act," which is silent as to remitting awards but makes express provision for setting aside awards and appealing therefrom. It was clearly the intention of the legislature to exclude any provision as to remitting awards. See *Simpson Commissioners of Inland Revenue*(1); *In re Keighley, Maxsted & Co. and Durant & Co.*(2); *North Riding of Yorkshire County Council* v. *Middlesborough County Borough Council*(3); *Re British Columbia Railway Act and Canadian Northern Pac. Rway. Co.*(4); *London and Blackwall Rway. Co.* v. *Board of Works for Limehouse District*(5); *Canadian Northern Ontario Rway. Co.* v. *Holditch*(6); *In re Davies and James Bay Rway. Co.*(7); *In re McAlpine and Lake Erie and Detroit River Rway. Co.*(8).

Even under the "Arbitration Act" there would be no right to remit any such case as the present. This right arises in four cases only: (1) when the award is bad on the face of it;(2) when there has been misconduct on the part of the arbitrator; (3) when there has been admitted mistake and the arbitrator himself asks that the matter be remitted; and (4) when addi-

(1) [1914] 2 K.B. 842.
(2) [1893] 1 Q.B. 405.
(3) [1914] 2 K.B. 847.
(4) 20 D.L.R. 633.
(5) 3 K. & J. 123.
(6) 50 Can. S.C.R. 265.
(7) 28 Ont. L.R. 544.
(8) 3 Ont. L.R. 230.

tional evidence has been discovered after the making of the award. *Green* v. *Citizens' Insurance Co.*(1); *In re Keighley, Maxsted & Co., and Durant & Co.*(2); *Re Montgomery Jones & Co., and Liebenthal & Co.*(3); *Re Grand Trunk Railway Co., and Petrie*(4).

In any case the arbitrators are *functi officiis*. *Snetsinger* v. *Peterson* (5).

The award was properly set aside but it was impossible for the court itself to make an award, not only because improper evidence had been heard, but also because of the exclusion by the arbitrators of the affidavit of the owner, which made a valuation of the lands in question, and which might have materially affected the award in determining the value of the lands taken. This affidavit was made by the owner in 1911, before the question of expropriation by the railway was considered. Two witnesses for the owner gave evidence that from 1911 to 1913 the land had increased in value fifty per cent. By this method of ascertainment, the value of the land, in 1913, would have been only a small fraction of the sum awarded. While the arbitrators were not bound to accept this method of ascertaining the compensation, the appellants were at least entitled to use the affidavit as an admission.

The proceedings proved abortive, and the proper course would have been to allow the parties to proceed *de novo* to have the compensation determined by arbitration.

Frank Ford K.C. for the respondent The reasoning of their Lordships Justices Duff and Anglin in the case of the *Canadian Northern Ontario Rway.*

(1) 18 Can. S.C.R. 338.
(2) (1893) 1 Q.B. 405.
(3) 78 L.T.N.S. 406.
(4) 2 Ont. L.R. 284.
(5) Covt. Dig. 146.

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Co. v. *Holditch*(1), relied upon by the appellants, and of Meredith J. in *Re McAlpine and Lake Erie and Detroit River Rway. Co.*(2), cannot now prevail in view of the decision of the Judicial Committee of the Privy Council in *Cedars Rapids Manufacturing and Power Co.* v. *Lacoste* (3). It is not necessary to consider the position as it might arise under the Dominion "Railway Act" if the Alberta "Arbitration Act" has application to the proceedings of the arbitrators in the present case. The sections to be referred to are secs. 2, 11 and 17 and, in view of the general scope of that Act, as well as of the sections referred to, their terms cannot be taken in the restricted sense in which similar provisions of the Dominion "Railway Act" were treated in the cases above cited.

On the cross-appeal, we contend that the appellants are estopped, by the agreement entered into at the commencement of the arbitration proceedings, from taking the ground now that the arbitrators were wrong in fixing the value of the lands on the basis of their value at the time of the arbitration. On this point we adopt the reasoning of Mr. Justice Stuart in the court below. In the alternative we submit that the agreement amounted to a submission to arbitration outside of and apart from the "Railway Act," or, in further alternative, that it estops the appellants from setting up that a mistake was made by the arbitrators.

As to the infringement, as alleged, of the "Evidence Act" in regard to the hearing of opinion evidence, the provisions of section 10 of that statute are uncertain: *Re Scamen and Canadian Northern Rway. Co.*(4) and it

(1) 50 Can. S.C.R. 265.
(2) 3 Ont. L.R. 230.
(3) (1914) A.C. 569.
(4) 22 West. L.R. 105.

makes it highly dangerous to apply them literally, if indeed any literal meaning can be taken from them. Section 106 of the Alberta "Railway Act" authorizes arbitrators to proceed to ascertain the amount of compensation to be awarded "in such way as they or he or a majority of them deem best", and the legislature could not have intended absolutely to restrict that power. See Phipson on Evidence, ch. 35. As appellants' counsel cross-examined the expert witnesses objection to the admissibility of their testimony cannot be taken on appeal.

The affidavit tendered in evidence was entirely irrelevant as to the value of the lands in question either as of the date of the proceedings before the arbitrators or as of the date of the judge's order appointing them; the valuation therein made had relation merely to the time of the death of the respondent's deceased wife in the year 1911.

It is submitted that the appeal should be dismissed with costs and that the cross-appeal should be allowed and the award of the arbitrators restored with costs.

THE CHIEF JUSTICE.—This appeal and the cross-appeal should be dismissed with costs.

Without expressing any opinion as to whether in expropriation proceedings under the Dominion "Railway Act" the arbitrators having once made an award are *functi officio* (compare *Cedars Rapids Manufacturing and Power Co.* v. *Lacoste*(1) with *Holditch* v. *Canadian Northern Ontario Rway. Co.*(2) at page 541), I am satisfied that the provincial "Arbitration Act" (ch. 6, Statutes of Alberta, 1909, sec. 11) gives to the Alberta court, on appeal, in all cases of arbitration the power to remit

(1) [1914] A.C. 569.

(2) [1916] 1 A.C. 536.

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or set aside an award. The sections of the Alberta "Arbitration Act" are quoted at length by Sir Louis Davies in his judgment.

I agree in the conclusions reached by my brother Idington with respect to the admissibility in these proceedings of the affidavit made by the respondent Moore at another time for an entirely different purpose. One can easily imagine conditions under which such a document might be properly introduced, but although a statement made by a party to a proceeding may be used against him as an admission, whenever it is made, I am satisfied that no fault can be found with the arbitrators for having refused to receive the affidavit in the circumstances under which it was offered here.

I am not quite satisfied that section 10 of the "Evidence Act" limiting the number of expert witnesses is applicable to proceedings in which such wide powers are given to the arbitrators. Section 106 of the "Railway Act" directs the arbitrators to proceed to ascertain the compensation due

in such way as they, or he, or a majority of them deem best.

That statute creates for expropriation purposes a tribunal with wide and exceptional powers which it cannot fully exercise if hampered by the special limitations of the "Evidence Act," and I would be disposed to hold that the arbitrators were at liberty to examine or permit the examination of as many witnesses as they thought desirable. In other words, the arbitrators are, in this regard, limited solely by the bounds of a sound and honest discretion, but I defer on this point to the views of the majority.

DAVIES J.—The appeal by the railway company in this case is from the judgment of the Supreme Court

of Alberta, only in so far as that judgment purports to refer the award back to the board of arbitrators.

There is also a cross-appeal by the respondent claiming the judgment appealed from to be *erroneous* in holding that the arbitrators erred in admitting the testimony of more than three witnesses giving their opinion as to the value of the lands compensation for the taking of which under the provincial "Railway Act" the arbitrators were assessing.

On the main appeal as to the power of the court to refer the award back to the arbitrators, I am of opinion that the court possessed such power.

The Alberta "Railway Act," 1907, ch. 8, in its 114th section, provides for an appeal to the court in cases where the award exceeds $600 and declares that upon the hearing of the appeal the court shall, if the question is one of fact, decide the same upon the evidence taken and in sub-section 2 declares that, upon such appeal, the practice and proceedings shall be as nearly as may be the same as upon an appeal from the decision of an inferior court.

Sub-section 3 says:

> The right of appeal hereby given shall not affect the existing law or practice in the province as to setting aside awards.

Then the "Arbitration Act" has the following provisions (Alberta statutes, 1909, ch. 6, defining the law with respect to references to arbitration):—

> Section 2:—In this Act, unless the contrary intention appears:—
> 1. "Submission" means a written agreement to submit present or future differences to arbitration whether an arbitrator is named therein or not.
> Section 11.—In all cases of reference to arbitration the court or a judge may from time to time remit the matters referred, or any of them, to the reconsideration of the arbitrators or umpire.
> Section 17.—Whenever it is directed by any Act or Ordinance that any party or parties shall proceed to the appointment of arbitrators

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or appoint arbitrators as provided by this Act or that any party or parties shall proceed to arbitration under this Act or any similar direction shall be made with respect to arbitration under this Act such direction shall be deemed a submission.

While sub-section 3 of section 114 of the "Railway Act," above quoted by me, is not as clear as it might be and does not in so many words speak of remitting the award back, I cannot doubt that in its true construction it covers such a power of remitting back the matter referred for reconsideration.

In my judgment sub-section 3 of section 114 of the "Railway Act" should be held to cover and incorporate these sections of the "Arbitration Act" above cited and, when read together with the 17th section, vest in the court the power of remitting awards back made under the "Railway Act" for reconsideration, which they have exercised in this case.

This conclusion renders it unnecessary on my part to consider the question of the power of the court to remit back an award where no statutory authority to do so exists.

Then as to the cross-appeal of the respondent, who contends that the award should be upheld and not remitted back, I am also of opinion that this cross-appeal must be dismissed.

Two contentions were advanced against the validity of the award—one was that the arbitrators valued the lands as of the wrong date, taking the time when the arbitration was held, 16th December, 1913, instead of the date when the judge's order was made appointing the arbitrators, namely, the 25th June, 1913.

It is not necessary under the circumstances of this case to determine the exact date with reference to which "compensation or damages are to be ascertained." Sub-section 2 of section 100 mentions three different dates. The first is where there is an

agreement made between the parties respecting the lands taken or the compensation to be paid as provided in section 99 and, in such case, the date of the agreement is to be the date for fixing compensation. The other dates where there is no agreement are the service of the notice to treat or the order of the judge made for the appointment of an arbitrator or arbitrators. As between these two latter dates cases may arise in which it would be important to determine which should govern.

In the present case, I concur with the judgment of the appellate court that the parties having agreed at the opening of the arbitration proceedings to adopt the "time of the arbitration" as the date for fixing the compensation, and as the evidence shewed clearly there was no difference in the values of the lands during the year 1913, the date agreed upon, 16th December, 1913, was for all practical purposes the same as that of judge's order, 25th June of the same year, so that no error prejudicing either party was under the circumstances committed. No question was raised as between the date of the judge's order and that of the notice to treat given in the latter part of 1912 and it must be taken that all parties agreed at the arbitration to take the time of the arbitration as the proper time to fix the valuation.

The other objection to the validity of the award and the one sustained by the appellate court was that the provisions of section 10 of the "Evidence Act" limiting the number of expert witnesses to three upon either side had been violated by the admission against the objection of the railway company of more than the statutory number.

The facts respecting the number of witnesses called and examined on the part of the owner are set out

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fully in the reasons for the judgment of the court given by Mr. Justice Stuart. It is unnecessary for me to repeat them here. I agree with the conclusion reached by him that the statute had been clearly violated and that

> the arbitrators admitted very important evidence as to value which was inadmissible and that it was impossible to say what weight they attached to that evidence

or whether it was not "the controlling evidence in their minds."

Under these circumstances, I think the court was right, having the power to do so, to remit the award back to the arbitrators and not to attempt under the circumstances the almost impossible task of making an award themselves.

I am also of opinion that the court was right in holding that the affidavit of the respondent as to the value of the land made by him on his application for probate was improperly rejected. The weight to be given to such an affidavit was a matter entirely for the arbitrators under all the facts and circumstances existing when the affidavit was made. But it should not have been excluded from their consideration.

For the foregoing reasons, I would dismiss both the appeal and the cross-appeal with costs.

IDINGTON J.—The appellant claims that the court of appeal for Alberta had no power, upon setting aside the award, made by the arbitrators appointed under the "Railway Act" of Alberta, to determine the compensation to be made respondent for lands taken and injuriously affected by the exercise of some of the powers of the appellant in the way of expropriation, to remit the matter so in question to the arbitrators.

It argues that the same result should follow as formerly followed upon the setting aside of an award

under a submission at common law. It overlooks, in making such a contention in this appeal, the wide difference in many respects between a submission by parties, relative to the disposition of a matter in dispute between them, and this statutory method of determining the amount of compensation to be made for what must be surrendered and endured by him whose rights have been invaded by virtue of the statutory powers given the expropriating company.

The common law award being set aside the parties still had their full right to resort to the courts to enforce their respective claims and recover or have therein determined what they might be entitled to.

In expropriation cases the party whose property is taken has no remedy except that furnished by the statute authorizing the taking.

That remedy is the constitution of a board appointed by the parties, or, default their agreeing, by the court, and that board has not discharged its duty until it has made an award reached by due process of law within the contemplation of the statute. If it produces an award which in law is null, then on what legal principle can it be said to be discharged of or relieved from the performance of that duty it has undertaken?

That, however, is not the only thing the appellant has overlooked, for there has been much legislation in the several jurisdictions, where the common law prevails, to supplement the powers of the court relative to awards and enable much to be done which could not formerly have been done in the way of relieving unfortunate litigants.

It does not appear to me herein necessary to follow the argument relative to the legislation of that kind in Alberta, or forming part of the law introduced into Alberta, and determine whether or not it is applicable

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to the arbitration here in question, further than to point out that the Alberta "Arbitration Act" expressly provides, by section 2, as follows:—

Section 2.—In this Act, unless the contrary intention appears:—

1. "Submission" means a written agreement to submit present or future differences to arbitration whether an arbitrator is named therein or not;

and by section 11, as follows:—

11.—In all cases of reference to arbitration the court or a judge may from time to time remit the matters referred or any of them to the reconsideration of the arbitrators or umpire.

and by section 17, as follows:—

Section 17.—Whenever it is directed by any Act or Ordinance that any party or parties shall proceed to the appointment of arbitrators or appoint arbitrators as provided by this Act or that any party or parties shall proceed to arbitration under this Act or any similar direction shall be made with respect to arbitration under this Act such direction shall be deemed a submission.

The enactments seem clearly designed to provide for the very contingency in question herein.

It is to be observed that the appellant railway company is the creation of the Alberta Legislature and the proceedings were taken under its "Railway Act."

And in any event, as already suggested, the award having been set aside because of the non-performance according to law of the duty assumed by or cast by law upon the board of arbitrators they must in law proceed to the discharge of that duty in a proper manner, whether specially directed or not, does not seem to matter very much.

The judgment in the case of *Cedars Rapids Manufacturing and Power Co.* v. *Lacoste*(1), seems to assume as a matter of course the power and duty of the appellate court to remit the matters to the arbitrators, who had erred, as here, to hear evidence and make an

(1) (1914) A.C. 569.

award in accordance with the principle expressed in the opinion judgment of the Judicial Committee. The powers of expropriation and method of fixing compensation in question therein were those of the Dominion "Railway Act" as it stood revised in 1903. Surely if that set of provisions enabled a remitting of the case those under the Acts I have referred to which are still more comprehensive and elastic can enable the court below to do so.

The court of appeal for Alberta has decided it cannot under the circumstances of the appeal there determine the matter pursuant to section 114 of the "Railway Act" and it has not been contended by the cross-appeal herein that such conclusion is erroneous if the questions of law or either of them passed upon by it has been properly maintained.

The cross-appeal however claims that court erred therein and seeks a reversal of the decision.

I see no reason to quarrel with the judgment so far as it relates to the question of opinion evidence and therefore the judgment remitting the matter to the board of arbitrators should stand.

I am, however, not able to agree with the holding of that court relative to the admissibility of the respondent's affidavit made as an administrator in the course of settling the question of succession duties when valuing the entire property of which only a fractional part is in question.

The question to be tried is the value of the property taken or injuriously affected at another and later time and, hence ,as evidence of that it certainly cannot be treated as an admission against an administrator of the fact to be tried or anything clearly and directly bearing thereon.

I can conceive of such an affidavit being used in

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cross-examination, had respondent been a witness, or in the like event in contradiction; and as a most efficient weapon in the hands of the counsel for appellant if he saw fit to put respondent in the witness box.

But in principle I cannot think the affidavit apart from some such contingencies can be properly admitted.

I do not think the part of the formal judgment directing a trial anew necessary or even expedient, if respondent is willing to strike out the excessive expert testimony and rest the case there.

In such event there should be no such order touching costs as the judgment directs.

I think the appeal should be dismissed and the form of order adopted by the court above in the *Cedars Rapids Case*(1) in regard to costs throughout, and otherwise should be adopted.

ANGLIN J.—I agree with the view of the Appellate Division of the Supreme Court of Alberta, stated by Mr. Justice Scott, that the provisions of section 10 of the Alberta "Evidence Act" were violated on the arbitration under review. It may be that section 106 of the Alberta "Railway Act" authorizes arbitrators themselves to call expert witnesses in addition to the number allowed by the "Evidence Act" to be "called upon either side." That case is not before us and I express no opinion upon it.

Likewise it may be open to the parties themselves to give in evidence the opinions of three witnesses on each issue in an action or arbitration which admits of such testimony being adduced. That question also is not before us and I express no opinion upon it.

While the meaning of section 100 (2) of the Alberta "Railway Act" is quite uncertain, and clarifying

(1) [1914] A.C. 569.

legislation would seem to be greatly needed, I think that under the circumstances of this case there was no error in fixing the date as of which compensation should be ascertained.

The arbitration here in question was held under the provincial "Railway Act." Section 17 of the provincial "Arbitration Act" is invoked by the respondent as a provision making the various sections of that statute applicable to any arbitration directed by any Act or ordinance of the province. But the limitative words "as provided by this Act," found in section 17, indicate that its effect is much more restricted. One of the provisions of the "Arbitration Act" is that

> In all cases of reference to arbitration the court or a judge may from time to time remit the matters referred or any of them to the reconsideration of the arbitrators or umpire (sec. 11).

If this section were applicable, this case would be clearly distinguishable from *Canadian Northern Ontario Railway Co.* v. *Holditch*(1), in which the arbitration dealt with took place under the Dominion "Railway Act."

I understand a majority of the court is of the opinion that the order referring the award back to the arbitrators was properly made. I incline to the contrary opinion.

BRODEUR J.—The question on the main appeal is whether the Appellate Division of Supreme Court of Alberta had the power, under the provisions of the "Railway Act" of that province, to direct a reference back to the board of arbitrators to determine anew the compensation.

By section 114 of the "Railway Act" of 1907, of Alberta, chapter 8, it is stated that

(1) 50 Can. S.C.R. 265.

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Whenever the award exceeds $600.00, any party to the arbitration may within one month * * of the making of the award appeal therefrom upon any question of law or fact to the court.

Sub-section 3.—The right of appeal hereby given shall not affect the existing law or practice in the province as to setting aside awards.

It is submitted on the part of the respondent that the provisions of the "Arbitration Act" of that province (ch. 6, of 1909) apply to arbitration proceedings under the "Railway Act," so long as they are not absolutely inconsistent with its provisions, and he relies on section 2 and section 17 of the "Arbitration Act."

Section 2 defines a submission as meaning a written agreement to submit differences to arbitration.

Then section 17 declares that

Whenever it is directed by any Act or Ordinance that any party or parties shall proceed to the appointment of arbitrators or appoint arbitrators as provided by this Act or that any party or parties shall proceed to arbitration under this Act or any similar direction shall be made with respect to arbitration under this Act, such direction shall be deemed a submission.

The "Railway Act" determines how the arbitrators are to be appointed and regulates to a certain extent their proceedings. But I cannot agree with the appellants when they claim that the provisions as to arbitration in the "Railway Act" are self-contained and constitute a complete code of provisions for the expropriation of land. Of course, in cases where the provisions of the "Railway Act" and of the "Arbitration Act" are inconsistent the "Railway Act" should prevail; but in virtue of section 17 of the "Arbitration Act," which I have quoted above, it seems to me that where there are no provisions in the "Railway Act" as to procedure or as to the power of the court then that procedure and those powers should be determined by the "Arbitration Act."

Now, by the "Arbitration Act," it is stated that in all cases of reference to arbitration the court may remit the matter referred to the reconsideration of the arbitrators (sec. 11). In the case of *Cedars Rapids Manufacturing and Power Co.* v. *Lacoste*(1), the Privy Council, in setting aside an award, ordered that the matter should be remitted to the arbitrators.

In the latter case the proceedings were instituted under the Dominion "Railway Act" in which we find provisions which might lead us to conclude that the arbitrators were *functi officio*. Those restrictions are not to be found in the "Railway Act" of Alberta.

It seems to me in these circumstances that the court below had the power to send back the matter referred to be determined anew by the arbitrators.

The respondent has made a cross-appeal and claims that the reasons given by the court below for setting aside the award should not be accepted.

The grounds upon which the court below set aside the award are that evidence was admitted which should have been rejected and that proper evidence was not admitted.

There is no doubt, in my opinion, that the Alberta "Evidence Act" applies to proceedings before arbitrators; sec. 2, sub-sec. 1. By the provisions of section 10 of that Act it is declared that the number of expert witnesses should not exceed three. The arbitrators in this case, however, have allowed a larger number of expert witnesses than the law permits to be examined. It was one of the grounds on which the court below found that the award should be set aside. I do not see any valid reason why this opinion should not stand.

(1) [1914] A.C. 569.

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It is not necessary for me then to examine the other question which was raised as to whether some evidence had been improperly excluded.

For these reasons the appeal and the cross-appeal should both be dismissed with costs.

Appeal and cross-appeal dismissed with costs.

Solicitors for the appellants: *Short & Cross.*

Solicitors for the respondent: *Emery, Newell, Ford, Bolton & Mount.*