

DIVISIONAL COURT.

NOVEMBER 20TH, 1911.

RE MYLES AND GRAND TRUNK R.W. CO.

Evidence—Appeal from Award under Railway Act—Examination of Arbitrator—Reasons for Award—Scope of Examination—Appellate Forum—Divisional Court—Agreement of Parties—Judicature Act, sec. 67 (1) (f).

Motion by the railway company for an order allowing them to take evidence by viva voce examination of one of the arbitrators for use upon the hearing of an appeal from the arbitrators' award. See ante 176.

The motion was heard by FALCONBRIDGE, C.J.K.B., RIDDELL and LATCHFORD, JJ.

Frank McCarthy, for the company.

W. G. Thurston, K.C., for the land-owner.

RIDDELL, J.:—A motion is pending to the Divisional Court by way of appeal from the award of arbitrators under the Railway Act. No objection is taken to the jurisdiction of the Court, notwithstanding *Re Montreal and Ottawa R.W. Co.* and *Ogilvie*, 18 P.R. 120; and I assume that the "parties agree to the same being heard by a Divisional Court;" Ontario Judicature Act, sec. 67 (1) (f). The proceedings originated in an order, consented to by all parties, that upon the arbitration, which was under the Railway Act, there should be only one appeal, and that should be to a Divisional Court.

Upon the appeal, the railway company desire to have evidence of one of the arbitrators taken; and the present is an application for an order for such evidence. No objection is taken to the jurisdiction of the Court.

Any such application must be made to the Divisional Court, as we have decided in *Trethewey v. Trethewey*, 10 O.W.R. 893, following *Kendry v. Stratton*, 10th June, 1893, not reported.

What the applicants desire is to examine one of the arbitrators "for the purpose of explaining the basis of the arbitrators' findings." The objection is taken that such evidence, even if taken, would not be admissible, and consequently should not be taken. And, if the non-admissibility were made out, the conclusion contended for must follow. This is concluded by the case of *Rushton v. Grand Trunk R.W. Co.*, 6 O.L.R. 425.