The amount in dispute here is large; and the affidavits on either side are not at all of that precise or satisfactory nature that would enable the court to decide so grave a matter on materials so very loose.

I therefore direct that the parties do proceed to the trial of a feigned issue in each case (unless it be agreed that one shall decide both); that Brown and McKenzie be the plaintiffs, and Magdalena Klein be defendant: that the question to be tried shall be, whether the judgment obtained by her against Andrew Klein, in the one cause, and the judgment obtained by her as administratrix of Michael Klein against Andrew Klein, in the other cause, was founded upon a valid and *bona fide* consideration, or whether the same was fraudulent and void, as against Brown and McKenzie, creditors of said Andrew Klein: that such issue or issues be tried at the next assizes for the county of Waterloo: that the rules granted last term be enlarged till the determination of such issues: and that all questions of costs be reserved; the issue to be delivered within 20 days from 23rd September, 1861, and to be returned in eight days from delivery.

I also refer to *Bell* v *Todd*, 6 Jurist 59; *Bainbridge* v. *Wildman*, 1 Dowl., N. S., 774; *Cooke* v. *Edwards*, 2 Dowl. N. S 55; *McMartin* v. *Cline*, 7 Grant 550.

Per cur.—Rule absolute for an issue in the terms directed.

McDonald v. McDonald et al.

Setting aside award on compulsory reference—Sufficiency of materials—Practice.

On an application to set aside an award on the ground that the arbitrator was mistaken in point of law and fact, the court will not interfere unless the alleged mistake appear on the face of the award or is disclosed by some contemporaneous writing.

In this respect there is no difference between awards made on compulsory references under the Common Law Procedure Act and other awards.

(Practice Court, Trinity Term, 1861.)

In Easter Term last *Mr. McKelcan* obtained a rule calling on the defendants to shew cause the following term why the award made on the 30th April last, by A Logie, Esq., should not be set aside on the ground that the arbitrator had acted improperly in allowing to defendants credit for the amount of a note for £250, made by defendants McDonald and Ross in favor of plaintiff, dated 18th January, 1856.

In support of this motion were filed the rule of reference, award and an affidavit of plaintiff.

It appeared that all matters in difference in the cause were by order of Mr. Justice Richards on 17th October last referred to the award of A. Logie, Esq., Judge of the County Court for Wentworth.

Mr. Logie made his award in favour of plaintiff, directing defendants to pay plaintiff $103.84, the amount he found to be due from them to him.

The plaintiff filed an affidavit in which he swore that he duly proved his account, and the arbitrator gave defendants credit for the amount of the £250 note, of which a copy was produced; that the evidence shewed that the plaintiff received the proceeds of that note from a bill broker who discounted it, and that he applied the proceeds in the works carried on in partnership between him and defendants A. P. McDonald and Ross, for the Great Western Railway Company at Hamilton, under an agreement, of which a copy was produced; that by the terms of partnership they were bound to find funds but did not, and he, plaintiff, was obliged to raise money by getting notes discounted which they should have retired; that in Chancery suit is pending between him and his late copartners A. P. McDonald and Ross, concerning their business; that he endorsed many notes for them; that he should not be charged with any portion of said note; that his claim in this suit was for moneys expended for defendants in connexion with the works at the Chats Canal on the Ottawa and services connected therewith; that the note was not in any way connected with said works or the claim in this suit, and the books of the works on the Chats Canal and in which plaintiff's account is entered were produced to the arbitrator and contain no charge of any such sum; that evidence was given that he, plaintiff, had stated to a person after the note became due he wished A. P. McDonald and Ross would take up the note as it was standing against him, the plaintiff, and was detrimental to his credit; that he proved before the arbitrator the agreement, of which a copy was produced, signed by A. P. McDonald, Ross being then his partner, and plaintiff also a partner in the Great Western Railway works, of which he, plaintiff, had the superintendence.

This document was dated 30th January, 1856, (after the date of the note,) and stated that plaintiff had signed and endorsed several notes, cheques, &c. for him and for A. P. McDonald & Co., at different places, and agreeing to indemnify plaintiff from any payments, &c. on said notes, &c., except what had been used for the work in which he was interested at the Great Western Railway depot, as he received none of the value or products of the above in any other way.

J. B Read shewed cause, filing an affidavit of defendant McDonald positively swearing that if all just credits were allowed, defendants owed plaintiff nothing, and that plaintiff was in their debt; that plaintiff discounted the £250 note, received the proceeds, and (to deponent's certain knowledge,) used the money for his private purposes, and so informed deponent; that it was never entered in the Company's book nor credit given therefor, or account rendered of it, and it has been paid by deponent and defendant Ross; that his note was not made for partnership purposes but was endorsed by plaintiff for his special benefit, and was understood when given to be a private transaction unconnected with any work in progress or the letter of indemnity.

For defendant were cited *Burns* v. *Hillabee*, 1 H. & N. 729; *Fuller* v. *Fenwick*, 3 C. B. 705; *Hutchison* v. *Shepardton*, 13 Q. B. 955; *Lalta* v. *Walbridge*, 7 U. C. Law Journal.

For plaintiff it was urged that this being a compulsory reference the Court should enquire more readily into the merits than under the old system, citing *In re. Hall* v. *Hynes*, 2 M. & Gr. 847; *Kent* v. *Enstoff*, 3 East. 18; *Jones* v. *Corry*, 5 Bing N. C. 187; *Bernard* v. *Wainwright*, 7 Dowl. 299, S. C. 1 L. M. & P. 455; *Hodgkinson* v. *Ferine*, 3 C. B. N. S. 189.

Hagarty, J. Assuming the law to be as Mr. McKelcan urges in some of the earliest cases, it would still be impossible to set aside an award like this on such materials as the plaintiff has laid before the Court.

The plaintiff has merely his own affidavit as to the evidence adduced and his own version of the facts, and on this he is flatly contradicted by the defendant's affidavit. No evidence whatever is before me as to how the arbitrator, a Judge of the County Court, proceeded, or on what view of the law or facts he has based his decision.

There are certainly authorities to shew that when the award or some contemporaneous statement in writing of the arbitrator shews a clearly mistaken view of law, or a clear mistake in fact, or possibly where the arbitrator communicated to the Court or the parties for their use, a statement of his conclusions or admission of his error, the Court may have interfered.

The case in East. where the award or a paper taken as part of it in a collision case stated that both ships were equally to blame and in the wrong, but nevertheless awarded large damages against one of them may illustrate this practice.

But the law seems clearly stated in a late case by a very high authority, the late Baron Watson. In *Hodge* v. *Burgess*, 3 H. & N. 298, "This is a motion to set aside the certificate of an arbi-"trator on the ground that he was mistaken in point of law and "fact. The law as regards awards not under this Act is clear, "where an arbitrator professes to decide according to law but "does not do so. If this mistake appears on the face of the "award or is disclosed by some contemporaneous writing, the "Court will set aside the award. So also with respect to a mis-"take in fact. To that extent the law has gone but no further. "That being the general law, the only question is whether there "is any difference with respect to awards under the compulsory "clauses of the C. L. P. Act." The Act provides, "the proceed-"ings upon any such arbitration shall be subject to the same rules "and enactments as to the power of the Court for enforcing or "setting aside the award as upon a reference by consent under a "rule of Court of Judges' order," therefore he continues, "the Le-"gislature has not left the matter in doubt, but has clearly ex-"pressed its intention that these compulsory references should be "governed by the rules of law applicable to ordinary references." Martin and Channel, B. B. concurred.