

APRIL 22ND, 1913.

McKENZIE v. ELLIOTT.

*Building Contract—Parol Modification of Written Agreement—
Evidence—Onus—Allowance for Materials—Services of
Architect—Quantum Meruit—Appeal on Questions of Fact
—Further Appeals—Judgment Disposing of Action without
Reference back—Costs.*

Appeal by the plaintiff from the order of a Divisional Court,
3 O.W.N. 1083, affirming the order of BOYD, C., 2 O.W.N. 1364,
setting aside the report of the Master in Ordinary.

The appeal was heard by GARROW, MACLAREN, MEREDITH, and
MAGEE, J.J.A., and LENNOX, J.

I. F. Hellmuth, K.C., and W. Mulock, for the plaintiff.

A. W. Anglin, K.C., and J. Shilton, for the defendant.

MEREDITH, J.A.:—There is, of course, no law against an ap-
peal in a case which has been determined upon the credibility of
witnesses; an appeal lies in such a case just as much as in any
other, and it is not only the right but the duty of an appellate
Judge to hear and duly consider such an appeal; the exception
to the general provisions giving a right of appeal in cases not
tried by a jury, is, generally speaking, only of matters in the
discretion of the trial Judge or judicial officer; as to them it is
generally provided that there shall be no appeal except by leave.

But it is quite obvious that where the findings depend alto-
gether upon the credibility of the witnesses, and there is nothing
to indicate that the parties have not had a full and fair trial,
an appeal would be hopeless, because those who hear and see
the witnesses have so much better opportunity for forming a
right judgment upon such a question.

Cases of that kind, however, are few and far between. Cir-
cumstantial evidence enters very largely into almost all cases;
and in regard to the probabilities arising from such circum-
stances a court of appeal sometimes has advantages which a
trial Judge had not.

This case is very plainly not one depending altogether, or
anything like altogether, upon the credibility of the witnesses;
the learned Master did not so treat it; and, if he had, would have
erred; his view was that he must look at the "surrounding cir-