

3rdly That the said Railway Company did not, nor did the said Northern Railway Company of Canada, at any time since, construct the said branch line, and that the claim of the said Corporation of the town of Barrie to have the same constructed had never been abandoned or given up at any time, but on the contrary had been always since upon all convenient occasions urged and pressed for performance.

4thly That reference being had to the agreement in the said memorandum of agreement, by which the award was to be made as though the several acts of parliament therein referred to had not been passed, he awarded "that the said claim of the corporation of the town of Barrie to have the said agreement performed was still subsisting, and if not performed their right to compensation in lieu thereof ought to be awarded:" and

5thly. As compensation for the non-performance of the said agreement, and in full satisfaction of the said claim of the said Corporation of the town of Barrie against the said Northern Railway Company of Canada in respect thereof as by the said reference he was empowered to do, he thereby awarded, ordered, adjudged and determined, that the said Northern Railway Company of Canada, and their successors, shall and do well and truly pay, or cause to be paid, to the said Corporation of the town of Barrie, or their successors, on the 10th day of March next ensuing the date of the award at the office of, &c. in Toronto, the sum of £5,000 of lawful money of Canada, and that the same be received by the said Corporation of the town of Barrie in full satisfaction and discharge of and for all the said matters in difference to him referred as aforesaid.

6thly And he further awarded that the Northern Railway Company of Canada do, when requested to do so by the said Corporation of the town of Barrie, make and execute to them a valid deed of conveyance in fee of all lands and tenements mentioned and comprised in a certain indenture of bargain and sale made by one John Boon to the said Company, dated the 18th of August, 1855; and should and do further, when so requested as aforesaid make and execute a general release of all claims in respect of the land and right of way conveyed to them, or agreed to be conveyed to them by the several parties over whose lands the said branch line from the main track into the town of Barrie was to pass.

The award then gave directions as to the costs of the reference and award.

*Eccles, Q. C.*, and *Angus Morrison*, during last term shewed cause.

*Cameron, Q. C.*, and *Galt, Q. C.*, supported the rule.

*BURNS, J.*, read the judgment prepared by the late Chief Justice of the court, in which he concurred.

As the reference was by way of compromise, and led to the withdrawing of a bill relating to the matter which was before the legislature, neither party should be countenanced by the court in refusing to abide by the award on account of any objection not really applying to the merits of the matter in dispute. There is no complaint of any improper conduct on the part of the arbitrator; no affidavits are filed; and the defendants have confined themselves to exceptions which they contend shew the award to be invalid on the face of it. If these objections are well founded the defendants can have the advantage of them in resisting performance by whatever means it may be attempted to be enforced, and as the court has always a discretion in declining to set aside an award on application, is not this a case in which the party complaining only on such grounds as he contends are apparent on the face of the award should be left to oppose any remedy for enforcing payment?

But in regard to the objections, it seems to me there is nothing in the first, though the award happens to be so expressed as to leave some appearance of ground for it. We must give a reasonable construction to the award. The arbitrator has found that the company have not yet done what they agreed to do eight years before, though they have been in no way absolved from doing it. The words "if not performed" may, when all is taken together, be understood to mean the same thing as "since it has not been performed." The arbitrator says in effect, "if the company has not made the branch line they should make compensation: they have not made the branch line and therefore I award," &c.

If the company would rather make the branch line than pay the compensation they have it in their power to contend that an option is given to them, and to move to stay proceedings on the award till a certain day, to give them an opportunity to make the branch line. The court could then determine whether they had such an option.

But the arbitrator could have never intended to give an option. "If not performed," he says, "their right" (that is the right of the town) "to compensation in lieu thereof ought to be awarded." "If not performed" may be reasonably taken to mean if they have *hitherto* not performed their undertaking, not if they shall not *hereafter* perform it, for he proceeds immediately to award "compensation for the non-performance of the agreement," thereby deciding that it had not been performed; and he awards that the compensation shall be paid at a certain fixed day little more than two months from the date of the award, and this without any reservation to the Company of a right to make the branch line instead of paying the money. What follows respecting the Company conveying back the land is all consistent with the construction that the £5,000 was positively to be paid.

The third objection seems to be immaterial. It should be assumed that the arbitrator determined that the company having refused to make the line, should not keep the land which had been conveyed to them in the confidence that they would make it. It does not appear on the face of the award why the land which Boon had conveyed to the Company should be made over by the Company to the town of Barrie instead of being re-conveyed to Boon, but all that can be said is that the facts which may have made that a just and reasonable direction are not set out in the award, as they need not be. The circumstances may be such as to account satisfactorily for the award in this respect, and we should assume that there were good grounds for it, in the absence of information to the contrary. The town may have paid Boon for the ground, and directed him to convey it to the Company, and if so they should have it back again, since the Company have declined to make use of it for the purpose for which they got it.

It should be assumed that the arbitrator made allowance in his award for the town getting back this land, and thought it just to award the £5,000 after taking that into his consideration. Besides, if the directions respecting Boon's conveying this land to the Corporation of Barrie were on any ground void, the only consequence would be that they would lose the benefit of that direction in their favour, it could interfere with their right to get the compensation awarded.

And so in respect to the fourth objection to that part of the award which directs that the Company shall execute a general release of all claims in respect of the land and right of way conveyed to them or agreed to be conveyed to them by the several parties over whose lands the branch line was to pass. So far as the town is concerned, that release was evidently intended to be something in addition to the pecuniary compensation. If from any defect in that part of the award the direction should fail of its intended effect, that is no reason why they should not be paid the pecuniary compensation awarded. But is there in truth any difficulty as regards that part of the award?

It was a matter on which the arbitrator had a right to give the direction he did, if we suppose that his intention was, that besides paying the £5,000 the Company were to give up the land which they had not applied to the purpose intended. And as to the objection that it is not stated to whom the release is to be given, could not the company release all right of action and claims against the Corporation of Barrie or any other person or persons whomsoever in respect of the land and right of way conveyed to them, or agreed to be conveyed to them by the several parties over whose lands the said branch line was to pass? Besides the release was only to be executed "upon request," which request would point out who it was that requested the release.

As to the sixth objection, it must be assumed that the arbitrator had good grounds on the evidence before him for making the estimate of damages which he did. The court has not the grounds before it and cannot go into the merits. If it were correct to assume that the arbitrator could give no damages beyond what the town had disbursed in acquiring land, then it ought to be assumed that he did so confine himself rather than that he did not.