

C. L. Cham.] SMITH V. SMITH ET AL.—GROVER & BAKER V. WEBSTER.

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executed by one partner only, in the firm name, is not valid to create a new liability on the part of the other partners, unless such liability is one which the partner could have created without seal, or unless his act was previously authorized or subsequently ratified by the other partners; and that such authority or ratification may be by parol, and may be inferred by a jury from the acts of the parties or the course of the business.—J. M. L.—*The American Law Register*.

ONTARIO REPORTS.

COMMON LAW CHAMBERS.

(Reported by HENRY O'BRIEN, Esq., Barrister-at-Law.)

SMITH V. SMITH ET AL.

Costs—Certificate—Discretion of arbitrator.

A case was referred to arbitration, the costs of the action to abide the event of the award, the costs of reference and award to be in the discretion of the arbitrator, who was to have all the powers as to amendment and otherwise of a judge at Nisi Prius. The award ordered the defendants to pay the costs of the reference and award, and the arbitrator certified "to prevent the defendants deducting costs."

Held, that the order conferred upon the arbitrator the power of certifying for costs, which implicitly took away the jurisdiction from a Judge in Chambers.

(Chambers, March 28, 1870—*Mr. Dalton*.)

This was an application made to set aside an *ex parte* order for Superior Court costs made by *Mr. Dalton*.

The action was referred to an arbitrator under the Common Law Procedure Act by the learned Chief Justice of the Common Pleas, sitting in Chambers; and by the order the costs of the action were to abide the event of the award, and the costs of the reference and award were to be in the discretion of the arbitrator, who was to direct by whom, to whom, and in what manner the same should be paid. And it was ordered that the arbitrator should have all the powers as to amendment of pleadings, and otherwise, of a judge sitting at Nisi Prius.

The award was that, after deducting the defendants' set-off, the arbitrator found them indebted upon the cause of action referred, in a balance of \$90 44; and as to costs, that the defendants should pay the plaintiff his costs of the reference and award; and the award concluded thus: "in the exercise of the power of a judge sitting at Nisi Prius, conferred upon me by the said order, I do hereby certify to prevent the defendant's deducting costs."

Mr. Reeve (Richards & Smith) for plaintiff.

J. K. Kerr for defendants.

MR. DALTON—The case is one in which from the nature of the claim and the amount recovered a certificate should be given, unless the facts take away jurisdiction.

The words of the power conferring upon the arbitrator "*all the powers*" as to amendment of pleadings and otherwise of a judge sitting at Nisi Prius, must be held to convey the power of certifying for costs. It cannot be supposed that the learned Chief Justice by these general words

of his order, did not mean to include so prominent, and beneficial a power, so frequently discussed, as that of certifying. and I think the arbitrator had that power. The arbitrator himself evidently thought so, and I agree with him. He has by his award certified under his power.

Several English cases to which I have been referred do not apply to the particular circumstances here. The cases which do apply are, *Calder v. Gilbert*, 3 P. R. 127, and the cases cited in that case.

In *Calder v. Gilbert* the arbitrator having the power did not certify, but it does not follow from that that he had not come to a decision on the point, and it was held that the power of certifying having been delegated to him, was impliedly taken away from a judge. Here the arbitrator has certified.

It would surely be an absurd conflict of authority that I should adjudicate upon a question which the arbitrator having full authority has already determined.

If these facts had been known to me I should not have made the order for Superior Court costs, and I now discharge it.

GROVER & BAKER SEWING MACHINE COMPANY V. WEBSTER.

Commission to examine witness—Evidence Act.

An order for a commission to examine a party to a cause will not be granted, notwithstanding 33 Vic. cap. 13, unless the applicant shews some great and pressing inconvenience preventing his personal attendance.

(Chambers, March 30, 1870—*Mr. Dalton*.)

The plaintiffs obtained a summons calling on the defendant to shew cause why a commission should not be ordered to issue for the examination of one of the plaintiffs on their behalf.

Alex. McDonell shewed cause.

MR. DALTON—The words of our statute authorizing the issue of a commission are permissive: the court or judge "may" order.

Our evidence act, 33 Vic. cap. 13, makes a party to a cause a good witness, either upon *vivâ voce* examination or depositions, and the cases in England are clear that a commission may, under proper circumstances, issue for the examination of a party to the cause on his own behalf.

Such a means of taking evidence is always unsatisfactory in comparison with an examination in open court at the trial, and the objection applies with far greater force to a party than to an ordinary witness. The affidavit of the plaintiff's attorney here does not disclose the fact that the witnesses are plaintiffs; that comes from the other side, and no particular reason is shown why these plaintiffs, sought to be examined, cannot personally attend.

The expense of two witnesses from Boston one would suppose not greater than that of a commission.

In the ordinary case of examining a witness unconnected with the suit, residing in a foreign country, we know that parties have no means of compelling personal attendance, and a written examination must suffice, because it is all that can be had.