

From Divisional Court.]

[April 14.

EXCELSIOR LIFE INS. CO. v. EMPLOYERS' LIABILITY ASSURANCE CORPORATION.

IN RE FAULKNER.

Arbitration and award—Submission—Appointment of sole arbitrator—Appeal—Order of Judge in Chambers.

A submission contained in a policy of insurance provided "that, if any difference shall arise in the adjustment of a loss, the amount to be paid . . . shall be ascertained by the arbitration of two disinterested persons, one to be chosen by each party, and if the arbitrators are unable to agree, they shall choose a third, and the award of the majority shall be sufficient."

Held, reversing the decisions of a Divisional Court, 3 O.L.R. 93, and of STREET, J., 2 O.L.R. 301, that the submission was not one providing for a reference "to two arbitrators, one to be appointed by each party," within the meaning of the Arbitration Act, R.S.O. 1897, c. 62, s. 8; and, therefore, one party having failed, after notice from the other, to appoint an arbitrator, the other could not appoint a sole arbitrator.

Re Sturgeon Falls Electric Light Co. and Town of Sturgeon Falls, 2 O.L.R. 585, approved.

Held, also, that the order of STREET, J., dismissing an application to set aside the appointment of a sole arbitrator, was not made by him as persona designata, but was a judicial order from which an appeal lay.

J. H. Moss, for appellants. *R. McKay*, and *J. H. Fisher*, for respondents.

From Moss, J. A.]

UFFNER v. LEWIS (No. 2).

[May 8.

BOYS' HOME v. LEWIS (No. 2).

Will—Construction.

A testator by his will gave to two trustees his estate, real and personal, and directed the trustees to pay (1) to a sister a legacy of \$500, and in case of her death to her daughter, and in case of the death of her daughter to the daughter's children in equal shares; (2) to a niece a legacy of \$500; (3) to the children of another niece a legacy of \$500; and (4) to a charitable institution a legacy of \$500; with a direction that should there not be sufficient to pay all the legacies there should be a proportionate abatement; and then directed that should there be any residue after payment of the legacies it should be divided and paid "to and among my legatees hereinbefore named and referred to, and my said trustees or the survivor of them in even or equal shares and proportions:

Held, that the children of the niece, who were five in number, were entitled between them to one-fifth of the residue and not to one-ninth each.

Judgment of Moss, J. A., affirmed.