A Novel and Important Decision.

RECONSIDERATION AWARDS D. & W. ACT. NO RIGHT OF APPEAL.

A short time ago His Honor Judge Merrill, of the County Court of the County of Prince Edward, handed down a decision on two appeals to him against a certain award made pursuant to the provisions of the Ditches and Water-Courses Act. This decision embodies an exhaustive discussion, of a point raised by the counsdl for the respondents, which had not theretofore been judicially considered. The circumstances of the case were as follows :

In June 1894, proceedings were taken under the Ditches and Watercourses Act, on the requisition of Albert G. Robin and Theodore B. Roblin, owners in severalty of lands making up lot number 73, in the 1st concession of the township of Ameliasburg, in the County of Prince Edward, for the purpose of having a ditch made to convey water from that and other lands.

Thereupon an award was made by Daniel A. Howe, the township engineer for that township, and filed with the Township Clerk on the 20th of June, 1894. On the 22nd of June the clerk sent notices to the various parties interested.

The appellants, J. B. and A. E. Phillips, on the 6th day of July served upon the clerk a notice of appeal, but being as it was thought by the clerk, one day too late, no further proceedings in appeal were then taken. During that year the ditch or most of it was put through as directed by the award, except that the appellants, having refused to perform that portion of the work alloted to them, others were engaged to do it, under the direction of Mr. Hermon, who was appointed engineer on the 15th of October, 1894, upon the resignation of Mr. Howe.

In August, 1898, proceedings were taken by the appellants, under section 36 of this act, for the reconsideration of the award. This resulted in an award by Mr. Hermon on the 20th of September, 1898. On the 3rd of October notices of appeal against this award, as well as against that of Mr. Howe, were served on the township clerk.

The following is the full text of His Honor's judgment :

I appointed the 29th of October, at the town hall, Ameliasburg, to hear the appeals. At the time and place appointed I was attended by the parties interested and their respective counsels.

The appeals were taken together, the evidence in the one case to be available for the other, so far as applicable.

The 29th of October, and the 2nd, 3rd, 4th, 5th, 8th and 28th days of November were occupied in taking evidence, and the latter also in inspecting the premises. And at my chambers in Picton on the 26th of January the taking of evidence was concluded, and final argument heard.

At the opening of the matter on the 29th of October some preliminary objections were taken by Mr. Morden, to the hearing of the appeals. After argument as to these I decided to proceed with the investigation and to hear the evidence, reserving the points raised. Among the objections urged by Mr. Morden, it seems necessary now to consider the following :

(1) There can be no appeal now from Mr. Howe's award of June, 1894.

(2) There is no appeal, in any case, from the results of a reconsideration.

On the final argument these objections, with others, were again raised and discussed. No authority directly in point was cited by the counsel on either side. I have found one case dealing with the question of appeal under the former act respecting line fences and water courses : In Re McDonald et al, v. Cattanach et al, 5 P. R. 288. But this is, I think, easily distinguishable from the present case. It was there held that the right of appeal against an award of fence viewers, given by section 7 of 32 Vict. ch. 46, was not restricted to an award under section 6, sub-section 2, but extended to an award by three fence viewers under C. S., U. C., ch. 57, of which it was made a part. Section 7 reads as follows : "It shall be competent for any party affected by any decision of such fenceviewers to appeal, &c."

There is a material difference between thi wording "any decision" and the language of section 22 of the present act. "Any owner dissatisfied with the award of the engineer," &c. Here the particular award from which appeal may be taken is pointed out. Even in that case (Re McDonald and Cattanach) Gwyne J., in giving judgment (at p. 289 says) : "After much doubt and hesitation, I have arrived at the conclusion that the appeal does lie" &c. The learned judge further says (p. 291) : "I think the 7th section, which contains the right of appeal, must be read as applying to all the preceding parts of the two acts, reading them as one" Here it is sought to make section 22 applicable to succeeding as well as to preceding parts of the act, notwithstanding its reference only to the latter.

Under section 22 the person dissatisfied, &c., "may within fifteen clear days from the filing thereof appeal therefrom," &c.

Under section 24, if no appeal be taken within the time limited therefor the award becomes "valid and binding to all intents and purposes, notwithstanding any defect in form or substance, either in the award or in any of the proceedings relating to the work to be done thereunder, taken under the "provisions of this act." It seems certain, then, that in this case (not only 15 days, but 4 years having been allowed to elapse) there can be no appeal from Mr. Howe's award.

But the appeal from Mr. Hermon's award on the reconsideration, remains to be considered. Under cover of this appeal, can the former award be attacked ? Unless this can be done, and thus the award be set aside or amended, there would not seem to be any object in the appeal, and if permissible then the provision of section 24, making the former award "valid and binding to all intents and purposes," would be rendered nugatory. A construction of the statute favoring such a result should not, it is confidently submitted, be adopted, unless the intention of the legislature to so provide is clear, either by "express enactment or necessary intendment." It is not suggested that the act contains any such express provision. But the wording of the latter clause of section 36 : "And in every such case he shall take the same proceedings, and in the same form and manner as are hereinbefore provided in the construction of a ditch," is relied on as implying a right of appeal. The argument is that because the person desiring a reconsideration of the award is directed to take the same proceedings, &c., to obtain it, as he would have had to take for the construction of a ditch, therefore he must also be entitled to the same right of appeal.

This seems, clearly, a *non-sequitur*. The section merely provides the procedure by which he is to obtain the re-consideration, nothing further. This will, perhaps, be more apparent, when we consider that a re-consideration may be of an agreement (under S. S. 8 and 9), as well as of an award. And "this agreement is in effect an award," (see Mr. Henderson's work on this Act, pg. 12). Now, there is no appeal from the agreement. If then, following the appellant's line of argument, it is correct to say that because there is an appeal from the original award, therefore there is an appeal from the re-consideration, it must as legitimately follow, that because there is no appeal from the agreement, there can be none from the re-consideration. Upon what ground should I adopt the former, in preference to the latter deduction ?

Perhaps it will be suggested that, although no appeal will lie from a re-consideration of an agreement, it will form a re-consideration of an award. But section 36 makes no distinction. The same proceedings are to be taken whether the re-consideration is from an agreement or from an award.

It seems, therefore, clear that the argument in favor of an appeal by implication is untenable.

On the other hand indications are not wholly wanting in other portions of the Act, that it was not intended to provide for an appeal from a re-consideration. I will refer to one instance only. By sub. s. 10, of s. 22, it is provided that "the award as so altered or affirmed, shall be certified, etc, and the time for the performance of its requirements shall be computed from the date of such judgment in appeal." As to this sub. s. Mr. Henderson in his work before referred to (at p. 36) says : "This is not very clear. It may be contended that under this provision the time for performance fixed by the award must necessarily be extended by so much time as may have been taken up by the appeal proceedings." However, this may be, it is evident that no appeal after the work of construction has been completed, was contemplated. It was suggested by counsel for the respondents that in analogy to s. 72, of R. S. O., ch. 226, (the Municipal Drainage Act), a re-consideration should be restricted to questions of future maintenance, etc.

(It may not be inappropriate to notice that in that act, it was apparently thought necessary to provide specifically for appeals. See sub-sections 3 and 4.)

See also as to maintenance, the case of Logan vs. McKillop, (25 Ap. R.) At p. 512, Maclennan, J. A. says :—"S. 36 is for the reconsideration of the agreement or award, but says nothing about new work. It deals with a completed work and all that would be left for reconsideration after two years from completion would be its maintenance, as to which, upon re-consideration, a new agreement or a new award might then be made."

But, having come to the conclusion that no appeal lies from the result of a re-consideration, which, in itself, is in the nature of an appeal, I need not further attempt to determine what matters do legitimately come within the scope of re-consideration proceedings.

And I dismiss the appeals.

McKinnon vs. East Hawkesbury.

Dr. McKinnon, of Vankleek Hill, has brought an action against the Township of East Hawkesbury, for the recovery of a sum of $430, for professional services rendered during the small-pox sickness in that township last winter. The township has already paid Dr. McKinnon a sum of $429, and thinks that they have paid the doctor most liberally, while the latter is of the opinion that he was only half paid. The case will be tried at the fall assizes, and will prove most interesting. On the result of this trial depends a similar case between the doctor and the town of Vankleek Hill.

York Township is considering a proposal to grant a perpetual street railway franchise. Every municipality should be protected from such dangers. There is no warrant for councillors elected for a year giving away the public streets forever. If the council for a year gives away the streets for a generation, it is certainly exercising sufficient authority.—*The Toronto Globe.*

The city of Hamilton has purchased Dundurn, the beautiful park site in the heart of the city, for $50,000, the expenditure being strongly endorsed by a vote of the people.