formed the services which were to form the consideration for it; if the plaintiff succeeded in establishing the agreement, and performance, the taking of an account would necessarily follow.

The defendant had also filed a counterclaim, as to which there was no question that it would be proper to direct a reference, either to arbitration or to an official referee. Two days after the commencement of the action the defendant's solicitor wrote, suggesting that all accounts between the parties should be settled by arbitration. The plaintiff subsequently made a motion to refer to an official referee under sec. 48, and the defendant also served a notice of motion to refer to a named arbitrator, or to some other arbitrator to be named by the court. The affidavit filed in support of the defendant's motion stated the belief of the defendant that the whole matter could be settled by a reference back to the court, by reference to an arbitrator who would have authority to decide as to the validity of the alleged agreement.

Held, that the real contest between the parties was as to the individual to whom the reference should be made; for the difference between a compulsory reference of the whole action to arbitration, and a reference of all the issues of fact in the action to a referee, was in this case not important; and the discretion exercised by WILSON, C.J., in referring the action to a referee, without the consent of the defendant, should not be interfered with.

MCKENNA v. MCNAMEE.

Contract—Destruction of subject matter of contract by vis major.

Where an executory contract is entered into respecting property or goods, if the subject matter be destroyed by the act of God or *vis major* over which neither party has any control and without either party's default, the parties are relieved.

The defendants, who had had a contract with the government of B. C. for the performance of a public work, but had forfeited it after a part of the work had been done, agreed with the plaintiffs that the latter should do the remainder of the work under the contract, and should receive ninety per cent. of the amount of every estimate issued till the completion of the work. The written instrument embodying the agreement referred to the contract as an existing one, but the fact was, as was fully known by all the parties, that at the time of making the agreement the contract had been forfeited, and the government had taken possession of the works. No advantage was taken by the defendants; the plaintiffs had examined the contract with the government, and understood as well as the defendants the exact position of affairs, but all trusted in the possession of certain influence by which they hoped to get back the contract and resume work upon it.

Held, affirming the judgment of the Queen's Bench Division (not reported), that the failure to obtain a restoration of the contract destroyed the whole consideration for each party's agreement or undertaking.

WOODRUFF v. MCLENNAN.

Practice—Foreign judgment, action on—Evidence—Fraud.

In an action upon a foreign judgment the defence was that the plaintiff fraudulently misled the foreign court by swearing to what was untrue to his knowledge at the trial of the original action. The matter in dispute was a claim for extra services in hauling logs for a greater distance than required by a contract between the plaintiff and defendants, and the contest was upon the question whether the services were, or were not, within the terms of the contract. On this question the evidence of the plaintiff and of one of the defendants, and of other witnesses, was given at the trial in the foreign court, the contract and certain letters were put in, and the judge's charge to the jury shewed that the whole evidence was clearly brought to the attention of the court. The verdict in the foreign court was in favour of the plaintiff, but it was now sought to establish the falsehood of the plaintiff's evidence with respect to the extra services.

Held, affirming the judgment of the Common Pleas Division (BURTON, J.A., dissenting,) that evidence under the defence was properly rejected at the trial, for what the defendants proposed to do was to try over again the very question which was in issue in the original