

land in question was conveyed by the owners of the legal estate to D., through whom the plaintiff claimed. One of the terms of the conveyance and a part of the consideration was that D. should, and he did thereby, release a debt which he held against the defendant and others. The defendant did not execute the conveyance, but he was an assenting party to the whole transaction, and was aware that the conveyance was being executed, and that D. was releasing his liability.

*Held*, that he was estopped from setting up a prior adverse possession in himself as effectually as if he had been a conveying party.

Per ARMOUR, C.J. At all events, upon the evidence, the possession of the defendant at the date of the conveyance, if any, was a tenant at will to the owners of the legal estate; and there was also evidence of an entry by D. sufficient to prevent the setting up by the defendant of any possession prior thereto.

W. H. Walker, for the plaintiff.

Aylesworth and Wyld, for the defendant.

ROSE, J.]

[Dec. 31, 1888.

CONMEE v. CANADIAN PACIFIC R.W. Co.

(FOUR ACTIONS.)

*Arbitrator—Disqualification—Offer by party of solicitorship pending reference—Subsequent acceptance—Order of reference, construction of—Judicature Act, 1881, s. 48—C.L.P. Act, ss. 189, 209—9 & 10 Wm. III c. 15—Interim finding of facts—Time for moving against—Waiver of objections to.*

By an order made at *nisi prius* on the 4th November, 1886, upon the application of the defendants, and without the consent of the plaintiffs, the actions and all matters in question therein were referred to the award of the persons named, who were given all the powers therein of a Judge of the High Court of Justice sitting for the trial of an action. By clause 2 of the order the referees were directed to make and publish their award in writing, on or before the 3rd January, 1887, or such other day as they should appoint. By clause 6 it was provided that there should

be the right of appeal in the same way as if the order was made under s. 189 of the C.L.P. Act; and by clause 8, that the reference should be considered as made in pursuance of s. 48 of the Judicature Act, 1881, and also, in so far as the same is applicable, as under the provisions of s. 189 of the C.L.P. Act.

*Held*, that the reference was a compulsory one, so far as the plaintiffs were concerned, and that it was not a reference under 9 & 10 Wm. III, c. 15, but under s. 48 of the Judicature Act and s. 189 of the C.L.P. Act.

During the reference it was agreed between the parties that the arbitrators should proceed to the ground and ascertain by their own examination the quantities of material moved (as to which the dispute was), and certify their findings, and all other questions in the actions and reference were to remain open; and pursuant to this agreement the arbitrators proceeded to the ground, and ascertained certain facts, and on 23rd August, 1887, reported: "We do hereby find and certify that the plaintiffs moved the respective quantities hereinafter mentioned," etc.

*Held*, that this finding and certificate was not the award which clause 2 of the order of reference directed the referees to publish; nor was it an award within the meaning of s. 209 of the C.L.P. Act; but was merely a finding of facts pending the reference, to enable the arbitrators to make their award; and apart from the question of waiver, the parties were not bound to make any motion as to the finding until the making of the award; and therefore the objection that a motion against the finding made on the 29th May, 1888, was too late, failed.

*Held*, also, upon the evidence, that there was no waiver of the objections to the finding; and that, although the finding was not an award, the motion made against it by the plaintiffs was a convenient and proper one.

The finding and certificate was set aside, because, pending the reference and before the finding, one of the arbitrators had received an offer of the solicitorship of the defendant's Company, and had after the finding accepted it, and was thus disqualified from acting.

McCarthy, Q.C., and Wallace Nesbitt, for the plaintiffs.

Robinson, Q.C., and S. H. Blake, Q.C., for the defendants.