

(3) That the answer given by MIDDLETON, J., in his judgment of the 20th March, 1918 (Re McConkey Arbitration (1918), 42 O.L.R. 380), to the third question in the special case submitted by the arbitrators, was wrong in law and constituted a misdirection to the arbitrators.

The motion was heard in the Weekly Court, Toronto.

E. G. Long, for the Toronto General Trusts Corporation.

M. H. Ludwig, K.C., for the other parties to the arbitration.

SUTHERLAND, J., in a written judgment, said that the arbitration was for the purpose of fixing the value of certain buildings on lands demised under a lease bearing date the 1st November, 1896. The arbitrators, having taken upon themselves the burden of the arbitration, were met with difficulties arising out of the construction of the lease and the basis on which they were to proceed to determine the value of the buildings. Thereupon a case was stated for the opinion of the Court and the clauses of the lease with reference to which the doubts arose were construed by Middleton, J., in the judgment above referred to. The arbitration thereafter proceeded and the said award was made.

Upon the present motion it appeared from the outset plain to the learned Judge that the main contention on the part of the applicants was based on the view that the construction placed by Middleton, J., on the clauses of the lease in question, was an erroneous one; and that, the arbitrators having proceeded upon the basis that it should determine their course of procedure, the award was also erroneous and should therefore be set aside, or remitted back. If this were so, the application was in effect an appeal from one Judge to another.

British Westinghouse Electric and Manufacturing Co. Limited v. Underground Electric Railways Co. of London Limited, [1912] A.C. 673, was referred to. It was there held that, "although the opinion of the High Court upon a special case stated by an arbitrator under the Arbitration Act, 1889, with regard to a question of law arising in the course of the reference, cannot be the subject of an appeal, yet, if that opinion is erroneous, an award expressed to be founded on that opinion can be set aside as containing an error of law apparent on the face of the award."

The learned Judge said that he was unable to see that that case was an authority which would make it appropriate for him to hear and determine this application, though it might be quite appropriate that it should be heard and disposed of by a higher tribunal: see p. 686.

He therefore refused to entertain the application, and dismissed it with costs.