

two arbitrators, and the intervention of a third is to take place if the two cannot agree, and then the reference is to be to three, and the majority award sufficient.

Why then should not the submission be held to come within sec. 8? If, as must be and was conceded in *Re Smith, supra*, a reference to two arbitrators, one to be appointed by each party, is within sec. 8, although the submission further provides that the two arbitrators may appoint an umpire, and that in certain events the umpire may make the award in lieu of the arbitrators—and such a provision is, since the Act, to be deemed included in a submission, unless a contrary intention is expressed in it—I am unable to understand why a submission to two arbitrators, one to be appointed by each party, with a provision that if the two are unable to agree, they are to choose a third, and the award of the majority is to be sufficient, is not also within sec. 8. In *Bates v. Cook*, 9 B. & C. 407, the question arose on the appointment of an umpire, not a third arbitrator, . . . and I am unable to find a case in which such question has arisen as to the appointment of a third arbitrator.

MACMAHON, J.—I entirely concur with the judgment in the *Sturgeon Falls* case. There, the reference was in case of dispute to be “by each party choosing an arbitrator, and they two a third, in case of dispute; the majority award to be binding.” Here the third arbitrator is to be appointed if the two are “unable to agree.” A distinction therefore cannot be drawn between the two cases. See *Redman’s Law of Awards*, 3rd ed., at p. 2, as to the effect of sec. 6 of the English Act, the equivalent of sec. 8 of our Act.

Where a submission makes provision for the appointment of a third arbitrator, although he is not to be chosen unless the two appointed by the parties are unable to agree, it thereby provides for a contingency which may happen, viz., a reference to three arbitrators. I therefore think the submission is not within the Act.

LOUNT, J., agreed with MEREDITH, C.J.

Appeal dismissed with costs.

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