

performed, but should, nevertheless, remain liable for all loss and damage which might be suffered by the owner, and that all materials and plant should remain the property of the owner for the purposes mentioned in cl. 10.

After work to the value of \$24,290.88 had been done, the owner took possession of the works, the materials on the ground, and the plant and machinery of the contractors, and no work had since been done by them under the contract.

An action by the contractors against the owner for damages for improperly taking the works out of their hands and to recover the value of the materials, machinery and plant, and some supplies taken by the owner, and also to recover a large sum on account of work done, had been dismissed.

Held, that the 15 per cent. which, under s. 11 of the Act, R.S.O. c. 153, the owner was required to deduct from any payments made in respect of the contract and to retain as a fund for the discharge of liens, was to be computed on the value of the work and materials, but not upon the value of the plant as well, notwithstanding that for the security of the owner the plant was declared to be for the purposes of the contract his property.

It was contended for the plaintiffs that, although there might be nothing justly due by the owner to the contractors, the lien of the plaintiffs attached upon what might ultimately become due, and that the trial should have been postponed until the final completion of the works.

Held, that, if the judgment dismissing the action brought by the contractors was binding on the plaintiffs, they would not be benefited by the postponement, for the effect of that judgment was that the contractors had forfeited all right to payment for any work which they had performed and for which they had not been paid; and, even if the judgment were not binding on the plaintiffs the case should not be sent back for a new trial.

Shepley, K.C., for plaintiffs. *Aylesworth*, K.C., for defendants.

Meredith, C.J., MacMahon, J., Lount, J.]

[Jan. 30.

EXCELSIOR LIFE INS. CO. v. EMPLOYERS' LIABILITY ASSURANCE
CORPORATION.

*Arbitrators and award—Submission—Appointment of sole arbitrator—
Arbitration Act, R.S.O. 1897, c. 62, s. 8.*

A submission contained in a policy of insurance provided "that, if any difference shall arise in the adjustment of a loss, the amount to be paid . . . shall be ascertained by the arbitration of two disinterested persons, one to be chosen by each party, and, if the arbitrators are unable to agree, they shall choose a third, and the award of the majority shall be sufficient."

Held, MACMAHON, J., dissenting, that the submission was one providing for a reference "to two arbitrators, one be appointed by each party,"