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JANUARY 30TH, 1902.

DIVISIONAL COURT.

RE EMPLOYERS' LIABILITY ASSURANCE CORPORATION AND EXCELSIOR LIFE INSURANCE CO.

Arbitration and Award—Submission to Two Arbitrators—Summary Proceeding—Discretion of Court or Judge—Practice—R. S. O. 1897 ch. 62, sec. 8.

An agreement, that a sum is to be "ascertained by the arbitration of two disinterested persons, one to be chosen by each party to the agreement, and if the arbitrators are unable to agree they shall choose a third, and the award of the majority shall be sufficient," is within R. S. O. 1897 ch. 62, sec. 8, and if one party fails to appoint after notice, then the other may appoint his arbitrator to act as sole arbitrator.

Semble:—The Court or a Judge may, in the exercise of discretion, decide such a question in a summary proceeding.

Appeal by the corporation from order of STREET, J., in Chambers (2 O. L. R. 301), dismissing their application for an order setting aside the appointment by the insurance company of a sole arbitrator. A guarantee policy of insurance made by the corporation in favour of the company contained a provision that, if any difference should arise in the adjustment of a loss, an award should be made by two disinterested persons, one to be chosen by each party, and on their disagreement the two should choose a third, the award of the majority to be sufficient. Differences having arisen, the company appointed their arbitrator, and gave

notice thereof to the corporation, but they refused to appoint one. The company, therefore, acting under R. S. O. 1897 ch. 62, sec. 8, appointed their arbitrator sole arbitrator. By sec. 8, where a submission provides that the reference shall be to two arbitrators, one to be appointed by each party, then, unless the submission expresses a contrary intention, if either party fails after notice from the other to appoint his arbitrator the other may appoint a sole arbitrator. STREET, J., held that the submission was within the terms of the section, and that the insurance company were entitled to appoint their arbitrator as sole arbitrator.

A. B. Aylesworth, K.C., for appellants.

R. McKay, for respondents.

Judgment was delivered on January 30th, 1902.

MEREDITH, C.J.—The case is reported in 2 O. L. R. 301, and the facts are sufficiently set forth there. The question for decision is whether the submission is one providing for a reference "to two arbitrators, one to be appointed by each party," within the meaning of sec. 8 of the Arbitration Act, R. S. O. 1897 ch. 62. The submission provides . . . for "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." . . . The appellants relied on Gumm v. Hallett, L. R. 14 Eq. 555, deciding a question under sec. 13 of the C. L. P. Act, 1854, the same practically as sec. 8; Re Smith and Service and Nelson & Sons, 25 Q. B. D. 545; Manchester Ship Canal Co. v. Pearson, [1900] 2 Q. B. 606; and Re Sturgeon Falls E. L. & P. Co. and Town of Sturgeon Falls, 21 C. L. T. Occ. N. 595: as conclusive against the right of the respondent to appoint a sole arbitrator under the provisions of sec. 8. . . . We should have preferred not to decide this important question on a summary application, but, as appellants insist, we decide it without conceding that the matter is one, as to which the Court or a Judge may not exercise a discretion as to granting or refusing the application. . . . In the English cases, *supra*, the reference was in terms to three arbitrators, one to be appointed by each party, and the third by the two appointed, though a majority award was to be sufficient. Under such a submission, it is probably *necessary* that the third arbitrator be appointed before the reference begins: Peterson v. Ayre, 14 C. B. 665: while here the reference is to

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.

Barwick, Aylesworth, Wright, & Moss, Toronto, solicitors for appellants.

Beatty, Blackstock, Nesbitt, Fasken, & Riddell, Toronto, solicitors for respondents.

JANUARY 30TH, 1902.

DIVISIONAL COURT.

MINNS v. VILLAGE OF OMEMEE.

Divisional Court—Two Judges—Adjournment of Appeal to be Heard before a Court composed of Three Judges, on Request of a Party.

Appeal by plaintiffs from judgment of BOYD, C., (21 C. L. T. Occ. N. 561) dismissing the action.

George H. Watson, K.C., and T. Stewart, Lindsay, for plaintiffs.

F. D. Moore, Lindsay, for defendants.

The plaintiffs relied upon the judgment of a Divisional Court (MEREDITH, C.J., MACMAHON, J., LOUNT, J.), in Homewood v. City of Hamilton, 1 O. L. R. 266, which BOYD, C., distinguished. The Court, as at present constituted (MEREDITH, C.J., LOUNT, J.), now expressed the opinion that the case should not proceed before two Judges, and the defendants' counsel expressing a desire to have three Judges sitting instead of two, the case was ordered to stand over.

FEBRUARY 5TH, 1902.

DIVISIONAL COURT.

WEBB v. OTTAWA CAR CO.

Contract — Novation — Consideration — Collateral Promise — Oral Evidence to Alter Writing—Costs.

Goss v. Lord Nugent, 5 B. & Ad. 58, applied.

Action to recover the price of some brickwork done by plaintiff in setting two tubular boilers at the defendants' works in Ottawa. The defendants alleged that the work had been done for one Campbell, whom they brought in as a third party. At the trial LOUNT, J., gave judgment for plaintiff against defendants for $574.78, and also dismissed defendants' claim over against Campbell. The defendants appealed.

W. H. Blake, for defendants.

J. E. Burritt, Ottawa, for plaintiff.

J. Bishop, Ottawa, for third party.

The judgment of the Divisional Court (FALCONBRIDGE, C.J., STREET, J.), was delivered by STREET, J.:— . . . Campbell had supplied boilers to defendants under circumstances which made him practically guarantee that

the boilers would give satisfaction. . . . The defendants notified Campbell that the boilers did not give satisfaction . . . he proceeded to put in two new boilers, and the plaintiff did the brickwork, for which he claims in this action . . . he was directed to do the work by one Wylie, defendants' manager, under whose directions the plans were prepared, and who told plaintiff to keep the brick account separate from that of the work he was doing for the company, because Campbell had to pay for the former. The plaintiff says he understood Wylie to refer to the arrangement between Campbell and the defendants, and always believed that defendants, and not Campbell, were responsible to him for his work. After the work was finished an agreement was come to, on the 17th November, 1900, between Campbell and defendants in the following terms:—"I agree to accept from the Ottawa Car Co. . . . $962.84 . . . for two boilers . . . and I agree to make settlement with F. H. Webb, contractor for brickwork. The taking out of the boilers is included in this settlement. It is optional with the company to indemnify me for part of this outlay, should they so decide after taking this matter into their consideration. W. J. Campbell." The defendants then paid Campbell $962.84. At the time this agreement was signed, Wylie promised to use his influence with the directors to get defendants to recoup Campbell his loss in the matter, but he was informed and fully understood that this created no obligation on their part. On 23rd February, 1901, plaintiff signed a letter prepared by Wylie, stating that he, plaintiff, had been told from the first that he must look to Campbell for his money, and that before the company settled with their contractor, he had agreed to look to him for payment. Plaintiff said that he signed this letter, knowing that the statements in it were not strictly correct, upon Wylie assuring him that if he would sign it Campbell would pay him at once. . . . Campbell refused to pay, and this action was commenced. I think the trial Judge was right in holding that defendants had always been and remained still liable to plaintiff. In the absence of the letter there is no doubt of defendants' liability. The letter, if true, disentitled the plaintiff to recover, but it is difficult to believe it to be so, and the trial Judge has accepted plaintiff's version of it. . . . Wylie has, however, fallen short of effecting a novation of the contract; he has made Campbell promise defendants that he will pay plaintiff, and he has got the plaintiff to say that he will look to Campbell, but has not created any contract between Campbell and

the plaintiff, and therefore the plaintiff's original claim against defendants remains in force. . . . I am unable however to agree with that part of the judgment which discharges Campbell. The agreement of 17th November, 1900, is perfectly explicit, and the consideration which supports it is the receipt of the $962.84 upon the express promise on his part to pay amount of Webbs' account for the brickwork in question, and which, under his original agreement with defendants, he was bound to pay . . . Wylie's promise to use his influence with the directors was purely a private matter between him and Campbell, and is not a promise upon which defendants are liable, and is, moreover, vague in its character, and does not excuse Campbell from liability. This is one of the cases in which the rule of evidence against allowing a party to a written document to give evidence of a conversation happening just before its execution, with the object of contradicting its terms, must be applied: Goss v. Lord Nugent, 5 B. & Ad. 58; Taylor on Evidence, sec. 1132. The rights which very possibly Campbell might have made good against the company, he chose with his eyes open and for good consideration to abandon, and to rely on its mere good-will. There is no ground in law or in equity upon which he should be allowed to withdraw from his contract, and the judgment should therefore be varied by directing Campbell to pay to defendants the sum found due by defendants to plaintiff, together with the costs incurred by the defendants in bringing Campbell in as a party, and of the trial of their claim against him as a third party. The defendants are not to recover from Campbell the costs taxed against them by plaintiff, because they have failed in their contention that they were not liable to him, upon which contention these costs were principally incurred. The defendants are to pay to plaintiff his costs of appeal, which is dismissed as far as he is concerned. They are to recover against Campbell their costs of appeal, having succeeded against him.

Code & Burritt, Ottawa, solicitors for plaintiff.

McLaurin & Millar, Ottawa, solicitors for defendants.

Bishop & Smith, Ottawa, solicitors for third party.

Moss, J.A. FEBRUARY 7th, 1902.

CHAMBERS.

RE MARGARET EVANS.

Will—Construction—Legacy—Not Absolute Gift nor yet Life Interest—Discretion of Executors.

Re Sanderson's Trust, 3 K. & J. at p. 507, applied.

Application under Imperial Act 10 & 11 Vict. ch. 96, R. S. O. 1897 ch. 51, and Rules 938 and 1103, by executors and trustees under the will of Margaret Evans, deceased, for a direction as to the proper disposition of a fund of $300 mentioned in the will.

The clause in the will disposing of the fund is as follows:—

"I give and bequeath to my sons Grier Evans and William James Evans the sum of $300 each, but I direct my said executors to invest the same on good security during the lifetime of my said sons or the survivor of them, and to pay to each of them the one-half of the interest arising from such investment, and in case of sickness of my said sons or either of them, I desire my said executors to advance such portion as they may think necessary of the principal money to support my said sons, or such of them as may be sick, and in case of the death of one of my said sons his legacy, after paying his funeral and other necessary expenses, to be divided equally amongst my surviving children, with the exception of my surviving son's share, which I direct my executors to invest and pay the interest yearly during his lifetime."

Grier Evans died, intestate, on June 23rd, 1901, leaving surviving two sisters and one brother, all over 21 years of age. Action was brought on November 11th, 1901, and is pending in the County Court of Grey, by one Alexander Wright against the applicants, in respect of a claim of $200 for board and lodging furnished to Grier Evans in his lifetime, and the plaintiff in that action asked for a declaration that the sum of $300 in the executors' hands is liable for the payment of his claim. Grier Evans was indebted to other persons. The executors asked for construction of the will, an order staying proceedings in the County Court action, and other relief.

J. Bicknell, for executors.

R. U. McPherson, for brothers and sisters of Grier Evans, deceased.

H. G. Tucker, Owen Sound, for Alexander Wright.

Moss, J.A.—The testatrix did not very clearly express her intentions with regard to the exact nature of the interest to be taken by her two sons Grier Evans and William James Evans in the moneys bequeathed to them, and it is somewhat difficult to get at her precise meaning. Mr. Tucker conceded, and I think rightly, that it is not a case

of an absolute gift of the corpus. But he argued, and I think rightly, that it is more than a gift of a life interest in the income. The direction to the executors, that, in case of sickness of the sons or either of them, they are to advance out of the principal such portion as they may think necessary for the support of the one who is sick, gives an interest in the corpus It creates a trust to be exercised by the executors in case of sickness, and they have no discretion to decline to exercise it, if called upon to do so.

They are at liberty to use their discretion in determining the amount necessary to be applied for the support of the sick one, and in that respect they would not in ordinary circumstances be controlled by the Court.

I think the effect of these directions of the will is that, upon a son falling sick, a right to some portion of the principal of his legacy vests in him, the amount being that which the executors may in their discretion think necessary for his support during his sickness, and that in the event of his death before receiving that amount, his estate is entitled to receive it from the executors.

It appears to be the case that the executors had no knowledge of Grier Evans's sickness, and were not called upon to exercise their discretion as to the amount to be advanced, but if I am correct in my reading of the will, and the fact of sickness is all that is needed to vest the right to some amount, and to give rise to the duty of advancing it, the circumstance that the beneficiary died before it was actually advanced or set apart should not operate to deprive his personal representative of the right to receive it. The language of Vice-Chancellor Sir W. Page Wood in In re Sanderson's Trust, 3 K. & P. at p. 507, seems applicable, although the circumstances were not the same. He said: "The trustees have not the discretion of saying 'we will withhold any part of this income merely upon our representation of what we think discreet.' If a bill had been filed in behalf of this gentleman, during his lifetime, to have a sufficient part of the income drawn out for the purposes of his maintenance, attendance, and comfort, it would not have been competent for the trustees to say, 'we in our judgment, and in the exercise of our discretion, do not think that this is requisite, and the matter is one for our discretion and not for the judgment of the Court.' The testator might have given them such a discretion, regard being had to the circumstance that his brother had other property; but that is not the trust he has created. The trust he has created is an absolute trust for his brother to have everything necessary for his maintenance, attend-

ance, and comfort." And see Kilvington v. Gray, 10 Sim. 293.

Here, a case of sickness being made, I think the trust which was created for that specific purpose arose, and the executors may still exercise their judgment and discretion as to the amount necessary to be advanced to answer what was required for support in the sickness, or, if they are not now disposed to exercise this power, the Court may undertake it.

This does not give the creditors of Grier Evans any direct claim against the executors or the fund. In strictness the claim should be maintained by the personal representative of Grier Evans, and unless the parties can now agree (all being adults) it may be necessary to appoint a personal representative.

If the executors are prepared to declare what sum should be advanced, and the other parties are willing to dispense with a personal representative, and to agree to a proper distribution of the sum amongst the claimants against Grier Evans's estate, the clerk in Chambers may make the necessary inquiries as to the claimants, and apportion the amount payable to each, and the executors may hold the residue to be dealt with as provided by the will.

In that event they and the parties interested in the residue may receive their costs out of the fund.

I do not think I can stay the action brought by Alexander Wright in the County Court of Grey, but if he chooses to discontinue it, and to come in and take the benefit of the order in this proceeding, he may have his costs of this proceeding. On the subject of costs I observe that there is not only an originating motion, but a petition by the executors, which seems entirely unnecessary.

At present I dispose of the matter by declaring that the executors hold the sum of $300 in question subject to the right of the personal representative of Grier Evans to receive thereout such sum as may be deemed necessary as an advance for the support of Grier Evans in his sickness, and, subject thereto and to the payment of his funeral and other necessary expenses, for the persons named in the will as entitled in remainder.

In case of any question arising on settling the order, the matter may be spoken to before me at any time.

Mark & A. E. Scanlon, Bradford, solicitors for executors.

McPherson, Clark, Campbell, & Jarvis, Toronto, solicitors for beneficiaries.

H. G. Tucker, Owen Sound, solicitor for Alexander Wright.

LOUNT, J. FEBRUARY 4th, 1902.

TRIAL.

HOWARD v. QUIGLEY.

Specific Performance — Lease — Possession — Verbal Agreement for Purchase—Acts referable to Agreement.

Action to recover possession of land.

Counterclaim for specific performance of a verbal agreement to sell it.

G. Delahaye, Pembroke, for plaintiff.

W. R. Riddell, K.C., and J. H. Burritt (Pembroke), for adult defendant.

W. R. White, K.C., for infant defendant.

The facts appear in the judgment of

LOUNT, J.—George Howard, seized in fee, died in 1899, having devised to plaintiff the land in question for her life, with remainder to his son, the infant defendant by counterclaim. George Howard had, in 1887, leased to defendant for five years, 75 acres, which included the 50 acres of land in question. By a lease dated the 21st March, 1895, he leased to defendant for three years the 50 acres; and by indorsement on this lease, dated 12th May, 1898, an extension for one year from 1st May was granted.

The defendant went into possession of the 75 acres under the first lease, and remained in possession until March, 1890, when Howard took and remained in possession of 25 acres until his death on 28th August, 1899.

The defendant claims the 50 acres under an alleged verbal agreement for purchase made in 1890 with Howard. The plaintiff is entitled to judgment for possession unless defendant can shew that his possession from and after March, 1890, was that of a purchaser, and not that of a tenant; that the acts of part performance on which he relies are referable only to an agreement for purchase, and are not referable to any tenancy; and that such acts are unquestionably and in their own nature referable to the alleged agreement.

If the acts go as far as this, they are admissible as evidence of the agreement: see Fry on Specific Performance, 3rd ed., sec. 582; Magee v. Kane, 9 O. R., *per* BOYD, C., at p. 477; Humphreys v. Green, 10 Q. B. D., *per* Baggallay, L. J., at p. 155; Nunn v. Fabian, L. R. 1 Ch. 35; and as to lay-

ing out of money on the property see Fry, sec. 281, citing Wills v. Stradling, 3 Ves. 378; Howard v. Patent Ivory Co., 33 Ch. D. 156.

I find the following facts proven. The defendant entered into possession of the 75 acres under the first lease, and continued in possession to March, 1890, when Howard took possession of 25 acres and continued in possession of them until his death. The defendant remained in possession of the 50 acres until this action was commenced. In April, 1890, a line fence was built between the 25 and 50 acres, each party paying half the cost. Between March, 1890, and May, 1895, the defendant fenced in 5 acres with a post and wire fence worth $45; cleared and stumped 7 acres worth $140; stumped 2 acres and cleared off stumps worth $50; cleared off an old fence worth $50, and built 3 acres of rail fence worth $6. In 1896 he removed a stable worth $60, and in 1898 built a hen house worth $20; shingled the dwelling house, and made other improvements thereto, worth $20; and in 1899 built a frame barn 30 x 40 worth $250, and a Page wire fence worth $34. Howard had knowledge of this work as it was performed.

Having regard to the nature and character of the work; of its value, which is about one-half of the whole value of the property without these improvements; of the nature and occupancy of the land by the defendant from March, 1890; of the change which took place in such occupancy in March, 1890; and, so far as the plaintiff is concerned, the unexplained reason for such change; of the rather significant amount, $98 per annum, thereafter paid, which would be equal to interest at the rate of 7 per cent. on $1,400, the alleged purchase price; and of the payments made by defendant after March, 1890, which were, as I find, for interest and not for rent, I am of opinion that these acts or most of them were acts of part performance referable only to the agreement for purchase, and not to any tenancy, and that they or most of them are unequivocal, and in their own nature referable to such an agreement; see further Fry, sec. 611.

I find that in March, 1890, a verbal agreement was made between Howard and the defendant for the purchase of the 50 acres at $1,400 to be paid by the defendant when he was in a position to do so, and that in the meantime defendant was to pay interest at the rate of 7 per cent. per annum, and it continued in force to the death of Howard, and was not affected by the lease of 1895 or the extension of it. I find also that the evidence of the defendant is

sufficiently corroborated: Radford v. Macdonald, 18 A. R. 167; Green v. McLeod, 23 A. R. 676.

Judgment accordingly.

Delahaye & Reeves, Pembroke, solicitors for plaintiff.
J. H. Burritt, Pembroke, solicitor for adult defendant.
J. Hoskin, Official Guardian.

McDOUGALL, Co. J., York. DECEMBER 26TH, 1901.

ASSESSMENT CASE.

RE McMASTER ESTATE.

Assessment and Taxes—Exemptions—Trustees — Income—R. S. O. ch. 224, sec. 46—63 Vict. ch. 34, secs. 3, 4.

The income derived from the property vested in the trustees of the estate of the late Honourable William McMaster was held by the Court of Appeal, affirming the judgment of the senior Judge of the county of York, to be, for assessment purposes under R. S. O. ch. 224, their own income: 2 O. L. R. 474. Subsequently R. S. O. ch. 224 was amended by 63 Vict. ch. 34.

In 1901 the trustees were assessed as theretofore, and the assessment was confirmed by the Court of Revision for the City of Toronto. This appeal was then taken by the trustees, and heard before McDOUGALL, senior Judge of County Court of York.

George Bell, for the trustees.

J. S. Fullerton, K.C., for the city of Toronto.

McDOUGALL, Co.J.—In this appeal the assessment department has assessed the income of the McMaster estate in the hands of the trustees, which income, under the will of the late Hon. William McMaster, is payable to the trustees of McMaster University for the purposes of the University. In 1899 I held this income was properly assessable in the hands of the estate trustees, and, upon an appeal to the Court of Appeal, my conclusion was upheld. While that appeal was pending the Legislature amended sec. 46 of the Assessment Act by 63 Vict. ch. 34, secs. 3 and 4. The amended section now reads as follows, the amending words being in italics:

46. (1) Personal property in the sole possession, or under the sole control of any person or trustee, guardian, executor, or administrator, *and which if in the possession of the beneficiary or beneficiaries would be liable to taxation,* shall be assessed against such *person, trustee, guardian, executor, or administrator* alone.

(2) Where a person is assessed as trustee, guardian, executor or administrator, he shall be assessed as such, with the addition to his name of his representative character, and such assessment shall be carried out in a separate line from his individual assessment, and he shall be assessed for the value of the real and personal estate held by him, whether in his individual name, or in conjunction with others in such representative character, *subject to the provisions of sub-section 1 of this section*, at the full value thereof, or for the proper proportion thereof, if other residents within the same municipality are joined with him in such representative character.

What I have now to determine is as to the effect on the present appeal of this amendment. It is conceded by the city that, if the words "and which if in the possession of the beneficiary or beneficiaries would be liable to taxation" mean that this income in question is to be looked upon and treated, for the purpose of determining its liability to assessment, as actually in the hands of the McMaster University trustees at the date of the assessment, but by the taking of an account of the total income of the McMaster University of the year, including in the income the sum payable by the trustees of the McMaster estate, and deducting therefrom the legitimate outgoings properly chargeable to income of the same period, no surplus whatever would be shewn; in other words, the annual legitimate expenses of the University equal or exceed its total annual income from all sources, and therefore the *McMaster University* would not be liable to any assessment for personal property attributable to surplus income. As the beneficiary in this case is resident within the Province, and therefore directly liable in its corporate capacity to assessment for any personal property exigible under the Assessment Act, I am of opinion that the amending words of the Act of 1900 apply, and as, apparently, the sum in question in the hands of the trustees of the McMaster estate is to be regarded as actually in the hands of the trustees of the McMaster University, and the latter as the persons to be looked upon as the owners for the purpose of determining the assessability of the fund as part of their income, the admission by the city that the University has no assessable income, even with this sum included in their income receipts, disposes of the matter of this appeal. The appeal will be allowed.

Thomson, Henderson, & Bell, Toronto, solicitors for trustees.

T. Caswell, Toronto, solicitor for corporation.

MEREDITH, J. FEBRUARY 8th, 1902

WEEKLY COURT.

Re McALPINE AND LAKE ERIE AND DETROIT RIVER R. W. CO.

Arbitration and Award—Clerical Error in Award—Reference back—Arbitration Act of Ontario—Railway Act of Canada.

Motion by a land-owner for an order referring back award of compensation under the Dominion Railway Act to the arbitrators to correct a clerical error as to the date from which interest was to run, the arbitrators having put in the award "1901," instead of "1900," as they intended.

T. W. Crothers, St. Thomas, for the motion.

H. E. Rose, for the company.

MEREDITH, J.—If provincial legislation applies to this case, the motion is needless, because, by R. S. O. ch. 62, sec. 9 (*c*), the arbitrators have power to correct the mistake. If that legislation is not applicable, there is no power to remit the award, or to correct the error upon the motion. Except under power conferred by statute, or by the parties, the Courts would not correct errors in awards, either directly or through arbitrators: Ward v. Dean, 3 B. & Ad. 234; Mordue v. Palmer, L. R. 6 Ch. 22. . . . The question then is, assuming that provincial legislation is not applicable, does the Railway Act, 51 Vict. ch. 29 (D.), authorize the re-opening of the matter? . . . Under its provisions, the award is to be final and conclusive, but subject to appeal when the award exceeds $400. . . . I have been able to find one case only in which there was a reference back of a case of this character, but that was in accordance with an agreement between the parties requiring it: Demorest v. Grand Junction R. W. Co., 10 O. R. 515. The Railway Act does not, in my opinion, authorize the re-opening of the reference, and, if provincial legislation applies, there is no need for re-opening it: see R. S. O. ch. 62, secs. 47 and 9 (*c*).

Motion dismissed without costs.

Crothers & Price, St. Thomas, solicitors for the land-owner.

J. H. Coburn, Walkerville, solicitor for the company.

FEBRUARY 8TH, 1902.

DIVISIONAL COURT.

WILSON v. BOTSFORD-JENKS CO.

Master and Servant—Negligence of Master—Defective Scaffolding—Foreman of Master — Secretary of Master — Knowledge of — Admission of Evidence.

Motion by plaintiff to set aside non-suit entered by FERGUSON, J., at the trial at Owen Sound of an action at common law by servant against master to recover damages for injuries received by the former in the course of his employment, owing to the alleged negligence of the master, and for a new trial, on the ground that there was evidence of negligence to go to the jury. The injury was received in September, 1900. The work was the building of an elevator at Meaford, and the plaintiff was engaged in excavating. The alleged negligence was the unsafe and dangerous condition of a scaffolding upon which the foreman ordered the plaintiff to go, and it was said that the condition existed to the knowledge of one Jenks, the secretary of the defendants, an incorporated foreign company, and that Jenks personally interfered with the work. The trial judge held that there was no evidence to submit to the jury. The plaintiff contended that the whole case should have been left to the jury, the company being bound by the knowledge of Jenks.

W. J. Hatton, Owen Sound, for plaintiff.

W. R. Riddell, K.C., for defendants.

The judgment of the Court (FALCONBRIDGE, C.J., STREET, J.) was delivered by

FALCONBRIDGE, C.J.—It is not shown that Jenks in any way assumed to give orders to the men, or directions as to the practical work which was going on. There was some evidence that he was standing with his hands in his pockets, looking into the excavation on the morning of the accident, and that on former occasions he had been seen to call Danger (the superintendent) to one side, and say something to him which no one overheard. There was no evidence that the persons employed by defendants were not proper and competent persons, or that the materials used were faulty or inadequate: Matthews v. Hamilton Powder Co., 14 A. R. 261; Wigmore v. Jay, 2 Ex. 354; Lovegrove v. London, etc., R. W. Co., 16 C. B. N. S. 669. There was

no evidence that defendants had any better means of knowing of the danger than plaintiff. As to all the matters in respect of which plaintiff can seek here to charge defendants, the onus is on him: cases above cited and Allen v. New Gas Co., 1 Ex. D. 251. The secretary had no authority to make admissions on behalf of the company as to the defective condition of the scaffolding, and defendants' knowledge of it: Bruff v. Great Northern R. W. Co., 1 F. & F. 344; Great Western R. W. Co. v. Willis, 18 C. B. N. S. 748; Barrett v. South London Tramways Co., 18 Q. B. D. 815; Johnson v. Lindsay, 53 J. P. 599; Newlands v. National Employers' Accident Association, 53 L. T. N. S. 242.

Motion dismissed with costs.

W. J. Hatton, Owen Sound, solicitor for plaintiff.

Beatty, Blackstock, Nesbitt, Fasken, & Riddell, solicitors for defendants.