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*Mar. 12, 13, 14.

*Dec. 9.

JOHN GREEN & COMPANY ..... APPELLANTS;

AND

THE CITIZENS INSURANCE CO. AND OTHERS ..... } RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

*Arbitration and award—Application to set aside an award—Time for applying*—9 & 10 *W.* 3 *c.* 15 *s.* 2—*R.S.O.* (1887) *c.* 53 *s.* 37—*Reference back to arbitrators for re-consideration and re-determination.*

In the Province of Ontario the governing statute as to the time for applying to set aside an award which has been made under a rule of court, or to remit it to the arbitrators for re-consideration and re-determination, is R.S.O. (1887) c. 53 s. 37, and it is not required that the application should be made before the last day of the term next after the making of the award as provided by 9 & 10 W. 4 c. 15 s. 2. Gwynne J. dissenting.

An award may be remitted to arbitrators for re-consideration and re-determination under the Ontario statute though the result of the re-consideration may be to have the award virtually set aside by a different, or even contrary, decision of the arbitrators.

The court is justified in remitting an award to the arbitrators if fraud or fraudulent concealment on the part of the persons in whose favor it is made is established, or if new evidence is discovered which, by the exercise of reasonable diligence, could not have been discovered before the award was made.

APPEAL from a decision of the Court of Appeal for Ontario (1) varying the order of the Divisional Court by which the proceedings were remitted to arbitrators for further reference.

The appellants, Green & Co., are assignees of policies of insurance against fire issued by the respective respondents to C. W. & J. Henderson, a firm carrying on a general business at Wingham, Ont. The property

*PRESENT: Strong, Fournier, Taschereau, Gwynne and Patterson JJ.

(1) 13 P.R. (Ont.) 70.

insured having been lost, and a dispute having arisen in respect of such loss, the matter was referred to arbitration under a clause in the policy, the arbitrators chosen being Judge Chadwick, of Guelph, and Judge Davis, of London. The submission contained in the policy provided that in case they could not agree upon an award the arbitrators chosen should appoint an umpire and such umpire should make an award upon the evidence taken before the two arbitrators without calling the witnesses before him or hearing the parties. Evidence was taken by the arbitrators and they being unable to agree Judge Woods, of Stratford, was chosen as the umpire, and an award was published adjudging that appellants were entitled to receive from the several companies the aggregate sum of $4,000 with interest. The submission to arbitration was then made a rule of court according to a provision therein contained.

The several companies afterwards commenced actions to set aside the award as being fraudulent. These actions were discontinued and other actions instituted for the same purpose. Then, ten months after the award was made, the respondents moved the Divisional Court to set the award aside and to remit the matter to the arbitrators for re-consideration and re-determination. The grounds of such motion were that the umpire had not decided the matter on the statements of the arbitrators as required by the submission; that the owners of the property insured did not make a full statement of the property saved but fraudulently concealed a portion thereof and claimed that it was burnt, and gave false testimony in respect to it; and that new evidence had been discovered as to such fraudulent dealing and perjury. This motion was heard by Mr. Justice Rose, who made the following order:—

"It is ordered that the matter of the said submis-

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sion be referred back to the said arbitrators and umpire to take evidence and inquire and report as to whether any of the goods insured, and if any to what extent, were not destroyed by fire, either by reason of salvage, fraud or concealment on the part of the assured or by reason of any other cause, and that in respect of the question so remitted the reference and proceedings thereon be governed by the terms of the original submission herein."

The respondents appealed from this order with a view of having the matters sent back to the arbitrators without any restriction as to the evidence to be taken, and the appellants, by way of cross-appeal, sought to have the application to set aside or remit the award dismissed. The Court of Appeal varied the order of Mr. Justice Rose by ordering the case to be sent back on the terms of the original submission. From that decision this appeal was brought.

*Aylesworth* and *Hellmuth* for the appellants.

The application to set aside the award was made too late and the court had no jurisdiction to entertain it. By 9 & 10 Will. 3 ch. 15 sec. 2 such an application had to be made before the last day of the term next after the making of the award. Terms were abolished in Ontario by 44 Vic. ch. 5 sec. 18 (1) but the statute expressly provides that in cases where they were previously used for determining the measure of time in which any act should be done they are still to be referred to for the same purpose. This is also the case in England under the Judicature Act, 1873. *College of Christ's Hospital* v. *Martin* (2). In *Kean* v. *Edwards* (3) Armour C.J. held that an award must be moved against within the time corresponding to the term after it was made.

Between July, 1887, when the award was made, and

(1) R.S.O. (1887), ch. 44, sec. 56. (2) 3 Q.B.D. 16.
(3) 12 P.R. (Ont.) 625.

May, 1888, the time of moving to set it aside, some three terms would have elapsed under the old system.

It will be urged that the award is not set aside but only remitted to the arbitrators, and therefore it is not within the statute. As to that the motion is to set aside, and the effect of the order is, practically, to set it aside. The arbitrators may refuse, and cannot be compelled, to act further, and the time for bringing an action on the policy has elapsed. The case of *Leicester* v. *Grazebrook* (1) is relied upon by the respondents. That case is opposed to a long line of decisions and has not been considered of sufficient importance to appear in the regular reports. Moreover, the case has no application as matters were presented to the court which are wanting in the present case. See also *Zachary* v. *Shepherd* (2).

Respondent's counsel was called upon to argue the question of juridiction.

*Bain* Q.C. for the respondents.

By R.S.O. (1887) ch. 53 sec. 37, the court may, from time to time, or at any time, remit matters referred, or any part of them, to the arbitrators for re-consideration.

The authorities show that it is within the discretion of the court to deal with an award of arbitrators and the question is whether or not the discretion will be exercised in each case as it comes up.

The following authorities were cited. Russell on Awards (3); *Burnand* v. *Wainwright* (4); *In re Dare Valley Ry. Co.* (5); *Warburton* v. *Haslingden Local Board* (6); *Caswell* v. *Groucutt* (7); *Gartside* v. *Gartside* (8).

*Aylesworth* and *Hellmuth* on the merits.

The evidence charged to be false is that of Henderson

(1) 40 L.T.N.S. 883.
(2) 2 T.R. 781.
(3) 6 ed. p. 483.
(4) 1 L. M. & P. 455.
(5) 4 Ch. App. 554.
(6) 48 L. J. C. L. 451.
(7) 31 L. J. Ex. 361.
(8) 3 Anst. 735.

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who had no interest in the proceedings but to set an award aside on such ground the false testimony must be that of the party seeking to enforce it. *Scales* v. *East London Waterworks Co.* (1); *Pilmore* v. *Hood* (2).

The respondents having chosen their remedy by bringing an action cannot afterwards ask for a summary order.

The fraud should be established in a proceeding where the appellants could have means of protecting themselves; it cannot be tried out in this way. *Mills* v. *Society of Bowyers* (3).

*Bain* Q. C. for the respondents cited Redmond on Awards (4); *Abouloff* v. *Oppenheimer* (5).

STRONG J.—This matter was originally a reference to arbitration of a claim for loss under a policy of insurance against fire on a stock of dry goods granted by the respondents in favor of Messrs. C. W. & J. Henderson, which claim had been assigned by the Hendersons to the present appellants, Green & Co.

The technical objection insisted upon by the appellants, and which at the hearing of the appeal seemed to make it very difficult to support the decision appealed against, has not, on further consideration, appeared to me to be insurmountable.

The enactment of 9 & 10 Wm. 3 c. 15, which enabled a party to a submission made a rule of court to apply to set aside an award upon the ground that the same was procured by "corruption or undue means," provided the application was made before the last day of the term following the making of the award, would have become, as regards the limitation of the time for moving, literally inapplicable when, by the Judicature Act, terms were abolished, if

(1) 1 Hodges 91.
(2) 8 Scott 180.
(3) 3 K. & J. 66.
(4) P. 261.
(5) 10 Q. B. D. 295.

it had not been for the 56th sec. of the act, which provided that the division of the year into terms might still be referred to for the purpose of determining the time within which any act was required to be done. *College of Christ* v. *Martin* (1); *Giles* v. *Morrow* (2); *Kean* v. *Edwards* (3).

By section 37 of the act respecting arbitrations and references (Revised Statutes Ontario 1887, cap. 53) it is enacted that when the submission has been made a rule of court

> the court or a judge may at any time and from time to time remit the matters referred, or any or either of them, to the reconsideration of the arbitrator or arbitrators or umpire, as the case may require, upon such terms as to costs and otherwise as to the court or judge seem proper.

This section is almost a verbal reproduction of sec. 8 of the English C.L.P. Act of 1854.

In exercise of the jurisdiction thus conferred an application was made to Mr. Justice Rose in May, 1888, more than three terms after the publication of the award,

> for an order to declare that the award in this matter is void and invalid and should be set aside and to remit the matters referred to the re-consideration and re-determination of the original arbitrators mentioned in the said submission.

This motion was supported by voluminous affidavits to the effect that since the publication of the award new evidence had been discovered showing that valuable goods, which were claimed to have been destroyed by the fire, had not, in fact, been so destroyed, but had been concealed and not accounted for by the insured.

I do not propose to enter into any consideration of the evidence upon the merits of the application, but I may say at once that I entirely agree with the court

(1) 3 Q.B.D. 16. (2) 4 O.R. 649.
(3) 12 P.R. Ont. 625.

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below that these affidavits and the cross-examination had upon them, as well as the cross-examination of the appellants' witnesses, make out a *primâ facie* case of fraud amply sufficient to warrant a re-consideration of the case referred, if the rules of procedure will admit of such a disposition of the matter; and further, that it sufficiently established that this evidence has been discovered since the award, and could not, by reasonable diligence, have been discovered before.

Mr. Justice Rose disposed of the motion by making an order referring it back to the arbitrators and umpire:

> To take evidence and inquire and report as to whether any of the goods insured, and if any to what extent, were not destroyed by fire either by reason of salvage, fraud or concealment on the part of the assured, or by reason of any other cause.

This order was varied by the Court of Appeal by directing a general reference back to the arbitrators for re-determination and re-consideration upon the terms of the original submission to be substituted for the limited reference back directed by Mr. Justice Rose. From this order of the Court of Appeal the present appeal has been taken to this court.

There can be no doubt that if it was not for section 37 of the Ontario Arbitration Act already extracted there would, in consequence of the lapse of time, have been no jurisdiction to interfere with the award by simply setting it aside.

The validity of the order under appeal must, therefore, depend altogether upon the extent of jurisdiction conferred upon the court below by the 37th section.

It was argued with great force and ability by Mr. Aylesworth for the appellants that inasmuch as the order under appeal would, in the event of the arbitrators upon a re-consideration of the matters referred coming to a different determination from that contained in the original award, have the effect of setting it aside

altogether the application to refer back involved a proceeding which the statute of William the 3rd expressly required to be made not later than the term following the publication of the award. I cannot accede to this argument. In every case in which the matter of the submission under the statute is sent back to the arbitrator for re-consideration the consequence may follow that the award will eventually be superseded and thus, virtually, set aside by a different, possibly a directly contrary, decision of the arbitrator. If, therefore, the objection put forward were to prevail the result would be to strike the words "at any time" contained in section 37 out of the statute altogether. This would be a virtual repeal of the enactment, and no authority has suggested that it can be done. Upon the only admissible construction sec. 37 must, following the plain words in which it is expressed, be taken as authorising an order remitting the reference to the arbitrator, although the application is not made within the limit of time prescribed by the statute of William.

It is obvious that there is a wide difference between the jurisdiction conferred by the statute of William and that arising under the 37th section of the Arbitration and Awards Act. Under the former the award could only be absolutely set aside, with the effect of annulling the submission altogether and remitting the parties to their strictly legal rights and remedies before the ordinary tribunals, but under the reference back authorized by the latter act the arbitrator chosen by the parties (in the case of a voluntary submission) would be still left to deal with the case, the submission would be kept alive and the ultimate decision would thus remain with the conventional tribunal selected by the parties. These considerations may well have induced the legislature to impose less strictness as regards time in cases coming under the modern enact-

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ment than that which was applied by the express limitation contained in the former act. The conclusion is, therefore, that both upon authority and principle, when a proper case is made for a reference back under the 37th section the application is not restricted as to time by the limitation prescribed by the statute of Wm. 3 for moving to set aside an award. This was decided by the case of *Leicester* v. *Grazebrook* (1) referred to in the judgment of the Chief Justice of the Court of Appeal, and I see no reason to doubt the correctness of the report of that case. All that is required is that the application must be made with reasonable promptitude, and it is, in my opinion, shown that that condition was complied with in the case before us.

The question is then reduced to this: What is to be considered a proper case for exercising the jurisdiction given to the courts by the 37th section?

Upon this head the authorities undoubtedly show that, for some reason, the English courts have by their decisions very much restricted the operation of the 8th section of the C.L.P. Act of 1854, corresponding to the 37th section of the Ontario Act. The reason of this seems to have been a repugnance to entertaining applications which might, in any way, involve a review of the arbitrators' decision in the nature of an appeal.

In the case of *Hodgkinson* v. *Fernie* (2), decided in 1857 by a court composed of judges of the highest authority, it was said that the jurisdiction to refer back under the statute was intended to be limited to cases in which that power would, before the statute, have been exercised under a clause to that effect contained in the submission, and was, therefore, to be restricted to cases of fraud and to cases of mistake of fact or law either apparent on the face of the award or on some paper referentially incorporated with it or volun-

(1) 40 L.T.N.S. 883. (2) 3 C. B. N. S. 189.

tarily acknowledged by the arbitrator ; and this statement of the law was expressly approved by the same court in the late case of *Dinn* v. *Blake* (1). As these decisions do not seem to have been called in question in any later reported case I am of opinion that we must accept them as establishing the construction of the statute in this respect, and, therefore, as authorities which we must follow in deciding this appeal.

Then, to apply the law thus propounded, I am of opinion that the present case does come within the rule which is laid down in the cases cited as to what constitutes a proper case for a reference back to the arbitrator for reconsideration.

In *Hodgkinson* v. *Fernie* (2). Williams J. says :—

> The law has for many years been settled, and remains so at this day, that when a cause or matters in difference are referred to an arbitrator, whether a lawyer or layman, he is constituted the sole and final judge of all questions both of law and of fact. Many cases have fully established that position where awards have been attempted to be set aside on the ground of the admission of an incompetent witness, or the rejection of a competent one. The court has invariably met these applications by saying : 'you have constituted your own tribunal, you are bound by its decision.' The only exceptions to that rule are cases where the award is the result of corruption or fraud, and one other which, though it is to be regretted, is now I think firmly established, viz., where the question of law necessarily arises on the face of the award or upon some paper accompanying and forming part of the award.

And at the conclusion of his judgment the same judge says :

> This provision of the statute was intended merely to introduce into every order of reference the clause familiarly known as Mr. Richard's clause. Nobody ever dreamt that the introduction of that clause into the order had the effect of altering the law as to the decision of the arbitrator being conclusive.

In the same case Willes J. says (3) :

(1) L. R. 10 C. P. 388. (2) 3 C. B. N. S. 202.
(3) P. 205.

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It seems to me that the 8th section was simply intended to enable a court to send back a case to the arbitrator in all cases where otherwise, by reason of the want of a clause for that purpose, they would have been precluded from so doing.

The judgment of Williams J. has been generally received as a correct statement of the law and was expressly approved in the case of *Dinn* v. *Blake* (1). Although it is not so said directly, yet I understand Mr. Justice Williams to imply, that in a case of fraud, meaning thereby, of course, fraud or fraudulent concealment by one of the parties, or by some one identified with a party, a reference back under the 8th section would be proper; and it is apparent from the following passage in the judgment of Brett J. in *Dinn* v. *Blake* (1), that the last named judge also understood it in that sense.

In *Dinn* v. *Blake* (1), Mr. Justice Brett, says:—

> This is a reference under the C.L.P. Act. Before that act there was some fluctuation of opinion as to the question in what cases an award might be referred back; and after the act it was asserted that the powers of the court were larger than they were before. In the case of *Hodgkinson* v. *Fernie* (2), both questions, viz., as to when there was power to refer back and as to the effect of the statute, were considered, and the law was clearly declared in the judgment of Williams J. He lays it down that the award cannot be sent back and the arbitrator forced to review it merely on the ground that there has been a mistake of fact or of law. The exceptions he mentions to the rule are where there has been corruption or fraud, and where it appears on the face of the award that there has been a mistake of law or fact.

Then, taking these authorities as furnishing the criterion by which we are to ascertain in the present case if there was jurisdiction to send back the award for re-consideration by the arbitrators, I am of opinion that the evidence is amply sufficient to make out a *primâ facie* case of fraud and fraudulent concealment on the part of the Hendersons under whom the present appellants claim. It is shown that goods of consider-

(1) L.R. 10 C.P. 388. (2) 3 C.B.N.S. 189.

able value were concealed in such an unusual way as to indicate a deliberate intention to defraud, some of these goods having been actually packed away in the coffins in an undertaker's shop. But, as I said before, I do not intend to discuss the evidence, and I content myself with the observations on it already made, and with saying that I entirely agree in the view of it taken by the Court of Appeal. I think there would be a great failure of justice and a great defect in the law, if a case like the present could not be ordered back for review by the arbitrators.

There is, in addition to the ground of fraudulent concealment of the goods, another distinct ground upon which the order appealed against can be supported. In the extracts already made from the judgments delivered in *Hodgkinson* v. *Fernie* (1) it is, as already mentioned, said that the measure of jurisdiction under the 8th section was the extent of the power to refer back under the clause which it was the practice to introduce into submissions and orders of reference before the statute was passed. In the case of *Burnand* v. *Wainwright* (2) Wightman J., under a clause of the kind just mentioned, referred the case back to the arbitrator on the ground of the discovery of new evidence material to the inquiry, although there were no circumstances of fraud or concealment shown. In the case of *Davenport* v. *Vickery* (3) a similar order was made under like circumstances. These cases have never, so far as I can discover, been overruled or dissented from, though it is true that Willes J., in his judgment in *Hodgkinson* v. *Fernie* (1) mentions the case of *Burnand* v. *Wainwright* (2) and says he expresses neither "assent nor dissent" from the doctrine there laid down. I think we may, therefore, assume these cases to be still law. Then, if the

(1) 3 C.B. N. S. 189. (2) 1 L. M. & P. 455.
(3) 9 W.R. 701.

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standard by which we are to measure the jurisdiction in the present case depends on what could have been done under the conventional clause irrespective of the statute, these cases show that apart from the question of fraud, and on the distinct ground of the discovery of new material evidence, no want of diligence or promptitude in discovering it being imputable to the respondents, the case ought to be referred back, and *a fortiori* ought it to be so dealt with when these newly discovered facts go to show that a fraud was practised by the parties under whom the appellants claim.

The appeal should be dismissed with costs.

FOURNIER J. concurred.

TASCHEREAU J.—I am of opinion that this appeal should be dismissed for the reasons given by my brother Strong.

GWYNNE J.—(After stating the facts of the case His Lordship proceeded as follows) :—

It was enacted by 9 & 10 Wm. 3 c. 15 sec. 2 that

any arbitration or umpirage procured by corruption or undue means shall be adjudged and esteemed void and of none effect, and accordingly be set aside by any court of law or equity, so as complaint of such corruption or undue practice be made in the court where the rule is made for submission to such arbitration or umpirage before the last day of the next term after such arbitration or umpirage made and published to the parties.

By the Ontario Judicature Act of 1881, 44 Vic. ch. 5 sec. 18, it was enacted that :

The division of the legal year into terms shall be abolished so far as relates to the administration of justice, and there shall not be terms applicable to any sitting or business of the high court of justice, or of any commissioners to whom any jurisdiction may be assigned under this Act, or of any commissioners of assize, but in all cases in which, under the law now existing, the terms into which the legal year is divided are used as a measure for determining the time at or within

which any act is required to be done the same may continue to be referred to for the same or the like purpose, unless and until provision is otherwise made by any lawful authority.

This enactment is taken verbatim from the Imperial Statute, 36 & 37 Vic. c. 66 sec. 26. Now, if the statute of William III is to apply to the motion made in the present case by the insurance companies, the last day for making complaint of the corruption or undue practice charged was Friday, the ninth day of September, 1887.

But it is contended that it is not the statute of William III that governs the present case, but the 164th section of the Upper Canada Common Law Procedure Act, ch. 22, C.S.U.C., which was taken from section 8 of the Imperial Common Law Procedure Act, 17 & 18 Vic. ch. 125, and which is now the 37th sec. of ch. 53 of the Revised Statutes of Ontario, 1887, and is as follows :—

In case, in a reference to arbitration, whether under this Act or otherwise, the submission is made a rule of the high court or a county court, the court or a judge may, at any time, and from time to time, remit the matters referred, or any or either of them, to the re-consideration of the arbitrator, or arbitrators, or umpire, as the case may require, upon such terms as to costs, or otherwise, as to the court or judge seem proper.

We must be governed in a case like the present by the decisions of the English courts upon the Imperial statute *in pari materiâ*.

It is to be borne in mind that the sole grounds of the motion as stated in the notice of motion are: 1st, misconduct in the umpire in deciding without hearing the statements of the arbitrators as required by the submission; and

2nd, which is the main ground and the one upon which the Court of Appeal for Ontario has proceeded, on fraudulent concealment by C. W. and J. Henderson, the insured through whom Green & Co. claim, of a

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portion of the property saved from the fire, and fraud and perjury committed by them in the evidence given by them on the hearing before the arbitrators. Now in the English courts it has never been adjuged or contended that the above section of the common law procedure act had either the effect of extending the time for moving to set aside an award as having been procured by fraudulent and corrupt means within the statute of William, or of authorising the reference back of an award procured, as the award in the present case is alleged to have been, by corrupt means including fraud and perjury, and which if so procured the statute of William declared should be adjudged to be void and of none effect and should be set aside by the court in which the submission was made a rule, so as complaint should be made within the time prescribed by the statute. No case has been found in the English courts, where the reference back of an award alleged to have been procured by corruption and undue means was ever granted or asked for as being within the provisions of the above cited section of the common law procedure act; but on the contrary the intent of the legislature in enacting that section, as declared in the cases which have been adjudged upon it, is clearly, I think, established to be that a reference back in a case like the present is not a thing which is authorised by the section. In *Hodgkinson* v. *Fernie* (1) Cockburn C. J. was of opinion that the section of the C.L.P. act in question was only intended to apply to cases where the court sees grounds for setting aside the award, but where the mistake might be set right by sending the matter back to the arbitrator :

It is true, he says, the section gives the court authority in any case where reference shall be made to arbitration at any time, and from time to time, to remit the matters referred, or any or either of them,

(1) 3 C.B. N.S. 199.

to the re-consideration and re-determination of the said arbitrator upon such terms as to costs or otherwise as to the said court or judge may seem proper.

I am, however, clearly of opinion that it was not intended by that enactment to alter the general law as to the principles upon which the courts had been in the habit of acting in determining whether they would or would not set aside awards, but merely to give the court power to remit the matter to the arbitrator for re-consideration in all cases, though the submission should not contain that extremely useful clause giving them that power where it turned out that there was a fatal defect in the award, but of such a nature as not to render it expedient to set aside the award, and thus render nugatory all the expense that had been incurred under the reference. I see nothing "on the face of the award" that would have justified the court in interfering to set it aside, and therefore, I think it is not a case in which jurisdiction to send it back is conferred upon us by sec. 8 of 17 & 18 Vic. ch. 125.

And in that case Williams J. says:

This provision of the statute was intended merely to introduce into every order of reference the clause familiarly known as "Mr. Richards' clause."

Crowder J. says:—

The intention of the 8th section evidently was to give the court the same power in all cases to send back an award for re-consideration, as they before had only in those cases where the submission or order contained a special provision to that effect.

And Willes J. declares his opinion to be precisely to the same effect. So in *Holland* v. *Judd* (1), in 1858, the same court as had decided *Hodgkinson* v. *Fernie* (2) sent back an award which was, upon the face of it, defective in the arbitrator,—a county court judge,—not having certified how he disposed of the several issues in the cause. In *Hogge* v. *Burgess* (3) the Court of Exchequer refused to remit the matter of an award to have a correction made in a matter in which it was contended the arbitrator was mistaken both in law and in fact *because no defect appeared on the face of the award*, and Martin B. giving judgment referring to *Phillips* v. *Evans* (4), says:

(1) 3 C. B. N. S. 826.
(2) 3 C. B. N. S. 189.
(3) 3 H. & N. 293.
(4) 12 M. & W. 309.

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Alderson B. says it is safer to abide by the general rule of not allowing awards to be set aside for mistakes. That was clearly the old rule, and we have now to deal with an act of parliament operating upon these proceedings by compulsory reference. It is well known that up to a certain period there was no power to send back an award to an arbitrator; the clause for that purpose was first introduced by the late Mr. Vaughan Richards, and it enabled the court to remit the matters referred to the arbitrator instead of setting aside the award.

The legislature, he then says, acting on that state of things enacted the 3rd, 7th and 8th sections of the common law procedure act, and after setting out these sections he says as to the 8th:

It seems to me that is nothing more than enacting that the clause introduced by Mr. Richards shall apply to all orders of reference made under the 3rd section.

And Channel B. there says:

The 8th section gives the court or a judge no more power than they would have had under an ordinary reference, that is, they may remit in compulsory references, where in references made by consent they might have sent back the matters to the arbitrator.

In *Lord* v. *Hawkins* (1) the award was bad upon its face, and the order was made in 1857 to remit the matters in difference under a special agreement in the submission to that effect. In *Mills* v. *Bowyers' Society* (2) the object of the 8th sec. of 17 & 18 Vic. ch. 125, was declared to be:

To enable the court, where any error formal or otherwise had occurred which would vitiate an award, to send it back if they thought fit to the arbitrators "to correct such error," instead of setting the award wholly aside.

And it was further held that:

If a mistake had been made in the award not apparent on the face of it, and such mistake is admitted in an affidavit by the arbitrators, such an admission is sufficient to authorize the court to refer it back under the statute, as it was to set aside the award under the former practice.

And so also that:

(1) 2 H. & N. 55. (2) 3 K. & J. 66.

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Although the arbitrators insist that they have made no mistake, but state the principle upon which they made the award, and the court is of opinion that such principle is not consistent with the reference, the court may remit the matter.

In *Morris* v. *Morris* (1), in 1856, the award was remitted to the arbitrator to enable him to correct a defect appearing on the face of the award. In *Aitken's Arbitration* (2), in 1857, the award was remitted to enable the arbitrator in like manner to correct a defect appearing on the face of the award.

In *Flynn* v. *Robertson* (3) in 1869, the arbitrator had, by mistake, made an award in favor of the defendant instead of the plaintiff; the mistake was admitted by both parties and by the arbitrator who explained the circumstances under which it had occurred, and the award was remitted to him to enable him to correct the mistake. In *Re Dare Valley Railway Company* (4) in 1868, the court remitted an award back to an arbitrator, it having appeared from a paper produced by the arbitrator, in explanation of his award, that there had been a mistake made by him as to the subject matter referred to him, and in point of legal principle affecting the basis on which the award was made. But in *Dinn* v. *Blake* (5), in 1875, the Court of Common Pleas held that the court will not, in case of a mistake, send back an award without an assurance from the arbitrator himself that he is conscious of the mistake and desires the assistance of the court to rectify it. It is there expressly laid down that an award, good upon its face, is final, and cannot be interfered with by the court except only in cases where there is corruption on the part of the arbitrator or excess of jurisdiction, or where the arbitrator himself admits that there is a mistake and,

(1) 6 E. & B. 383.
(2) 3 Jur. N.S. 1296.
(3) L.R. 4 C.P. 324.
(4) L. R. 6 Eq. 429.
(5) L.R. 10 C.P. 388.

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as it were, craves the assistance of the court in setting it right.

By the above cases it appears, I think, to be well established that the jurisdiction conferred by the C. L. P. Act upon the courts to refer back awards and the matters in difference to the re-consideration and re-determination of arbitrators was a remedial jurisdiction conferred by way of substitution for the jurisdiction formerly exercised by the courts to set aside awards for defects appearing on the face of the award, excess of jurisdiction or acknowledged mistakes in the award, and the jurisdiction so conferred is limited to the like cases as before the passing of the C. L. P. Act it had been exercised in by agreement contained in the submission to arbitration, namely:

1. Where some defect appears on the face of the award which, in order to make the award unobjectionable, should be rectified;

2. Where, although no defect appears on the face of the award, a mistake has been made by the arbitrator, which he admits having made in such a manner as to display, as it were, a desire to be enabled by the court to rectify;

3. Where the arbitrator has exceeded his jurisdiction; or—

4. Where the arbitrator states the principle upon which he has proceeded and the court is of opinion that such principle is not consistent with the reference.

Now, whether or not the above heads cover all the cases in which the courts can exercise jurisdiction to refer back an award, there can be no doubt that the motion to refer back authorized by the Common Law Procedure Act is in substitution for the motion to set aside the award for certain particular grounds

of objection under the old practice, and there has been no case found of a reference back, or of an application for that purpose where, the objection to the award was that it had been procured by the corruption, fraud and perjury of one of the parties to the arbitration, or of a witness. Indeed, such a motion could not, in my judgment, be entertained for a moment, because, as the jurisdiction to refer back is a remedial jurisdiction, substitutional for the jurisdiction formerly exercised to set aside the award for certain grounds of complaint not going to the merits of the matters in difference, it would be destructive of the principle upon which the jurisdiction to refer back is founded if it should be absolutely necessary to adjudge the award to be fraudulent and void as a preliminary step to referring it back, as it would be, and as has been done in the present case, where the objection to the award is founded upon the allegation that it had been procured by the fraud, corruption and perjury of one of the parties thereto, or of a witness, and so irremediable. The notice of motion is not for an order to refer back the award for its amendment in some particular in which it appeared upon its face to be defective, or for anything done by the arbitrators in excess of jurisdiction, or for any mistake which needed correction, but for an order whereby it should be "declared," that is adjudicated, that the award is void and invalid as having been procured by the fraud, corruption and perjury of the assured, and for that reason should be set aside, and to remit the matters referred to the re-consideration and re-determination, &c., so that unless the award should be declared to be void for the reasons stated in the notice of motion and should therefore be set aside there was nothing asked to be, nor in point of fact was there anything to be, referred back. And if

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the award should be set aside, as that could be ordered only as a consequence of the court pronouncing the award to be void as having been procured by the fraud, corruption and perjury of the assured, who were, and in the nature of things could be, the only witnesses upon the points in respect of which the fraud and perjury was charged to have been committed, it would be a mere delusion to refer back the matters in difference for re-consideration by the arbitrators accompanied by a judgment that the testimony upon which the award was founded was false and perjured, and therefore not to be received or entertained. The object of the insurance companies in making the motion would, therefore, seem to have been, as its effect undoubtedly was, to operate, not as a motion to refer back within the meaning and under the provision of the C. L. P. Act in that behalf, but simply as a motion to have the award adjudged to be void and invalid as having been procured by the fraud, corruption and perjury of the Hendersons, the parties insured. The learned Chief Justice of Ontario, in his judgment in the Court of Appeal, says that the evidence before the learned judge before whom the motion was made either amounted to nothing or "was a case of actual, personal, wilful fraud," and he might have added "perjury on the part of the assured."

If, then, the award was open to objection upon this ground it was quite unnecessary to move to set it aside, for if void for the reasons stated it never could be enforced, and if, notwithstanding that the award was void, a motion to set it aside should be made the court had no jurisdiction to entertain it as not having been made within the time prescribed by 9 & 10 Wm. 3 c. 15. Upon this point there does not seem to be any contradiction in the cases.

In *North British Railway Company* v. *Trowsdale* (1), it was held, in 1866, that a motion to set aside an award could not be made even with consent of the parties after one term after the publication of the award.

In *Re Corporation of Huddersfield and Jacomb* (2), it was held, in 1874, by Malins V.C., and affirmed by the Court of Appeal (3), that a motion to set aside an award must be made within the time prescribed by the statute 9 & 10 Wm. 13, c. 15, but that the service of notice of motion was a sufficient commencement of complaint to satisfy the provisions of the statute.

In *College of Christ* v. *Martin* (4) it was held, in 1877, by the Court of Appeal, consisting of Cockburn C.J., and Bramwell and Brett, Lords Justices, affirming the judgment of the Q. B. Division, that notwithstanding that terms were done away with by 36 & 37 Vic. c. 66 s. 26. they are used still as a means of determining the time within which proceedings to set aside an award must be taken, and that in the particular case, as the 8th of May was the last day upon which, under 9 & 10 Wm. 3 c. 15, the proceeding must have been instituted, the court had no jurisdiction to entertain a motion made after that day. And in *Smith* v. *Parkside Mining Company* (5), it was held in 1880 by the Exchequer Division following *in re Corporation of Huddersfield and Jacomb* (2), that the service of a notice of motion was a complaint made in the court before the last day of the term after the publication of the award and that therefore the statute of William 3 had been complied with and the court had jurisdiction to entertain the motion to set aside the award.

(1) L.R. 1 C.P. 401.
(2) L.R. 17 Eq. 476.
(3) 10 Ch. App. 92.
(4) 3 Q.B.D. 16.
(5) 6 Q.B.D. 67.

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This is an instructive case because the objection to the award was of a technical character, viz., want of finality appearing on the face of the award, and the case was, therefore, one in which an application to refer back the award for amendment under the provision of the C. L. P. Act in that behalf might have been made ; and the court, after determining that the proceedings to set aside the award had been taken within the time prescribed by the statute of William, and after having heard the motion, refused to set aside the award but themselves made an order referring it back for amendment, thus showing that where a motion is made to set aside an award the statute of William must be complied with, and that where an order is made under the provisions of the C. L. P. Act to refer back the award is not set aside and the reference back is substitutional and wholly remedial.

In the present case the judgment appealed from appears to have proceeded wholly upon the assumption that all of the above cases, showing a concurrence of all the courts as to the law where the application is to set aside an award, are overruled by the judgment of the Queen's Bench Division in *Leicester* v. *Grazebrook* (1), decided in 1879. It is obvious from *Smith* v. *The Parkside Mining Co.* (2) that the Exchequer Division were not of that opinion in 1880, when the judgment in *Leicester* v. *Grazebrook* (1) was recent ; but apart from the difficulty of conceiving that Cockburn C.J., Lush and Manisty JJ. sitting in the Queen's Bench Division could have contemplated that they were making a decision in the slightest degree at variance with the judgment of Cockburn C. J. himself, sitting with Lords Justices Bramwell and Brett in the Court of Appeal in *Christ College* v. *Martin*, (3) or with the judgment of Malins V. C. in L. R. 17 Eq. affirmed in ap-

(1) 40 L.T.N.S. 883. (2) 6 Q. B. D. 67.
(3) 3 Q. B. D. 16.

peal by Lords Justices James and Mellish, in 10 Ch. App. 92, a reference to the meagre report of *Leicester* v. *Grazebrook* (1) shows that the motion was not at all to set aside an award but the ordinary case of a motion, under the C. L. P. Act, to refer back the award for the correction of some technical defect in the award, the nature of which is not even stated in the very meagre report of the case ; but that it was the ordinary case of a reference back for the correction of some technical defect is apparent from the fact that there does not appear to have been any objection to the reference back as soon as it was decided that the application was not too late. The case was evidently one of an application by the party in whose favor the award was made for the purpose of having rectified some technical defect appearing on th face of the award and not an application by the party against whom the award was made, as in the present case, to have the award declared void as having been procured, as alleged, by fraud, corruption and perjury, and it can have no application in the present case.

But, even if the application had not been too late, and if, therefore, the court had had jurisdiction to entertain a motion to set aside the award, I am of opinion that the grounds upon which the application was rested, and has been maintained, were of such a nature as to have required a trial of the complaint with the intervention of a jury in an ordinary action raising the precise issue whether or not the award had been procured by the fraud, corruption and perjury charged. If the award, which, it must be borne in mind, was in favor of Green & Co., is to be avoided by the evidence of John Henderson, taken eight months after the making of the award, in which he now asserts that both he himself and C. W. Henderson were guilty of

(1) 40 L.T. N.S. 882.

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wilful and corrupt perjury in the evidence given by them upon the arbitration, the parties to be affected by such evidence, and who are not even suggested to have been privy to the perjury whereof Mr. John Henderson now accuses himself and C. W. Henderson, should surely have the opportunity given them of questioning the truth and *bona fides* of Mr. John Henderson's later evidence, and of taking the opinion of a jury upon the question whether the perjury was committed in the evidence given on the arbitration or in that given eight months after by Mr. John Henderson and used by the insurance companies on their application to have the award declared to be void. The language of Lords Justices James and Thesiger in *Flower* v. *Lloyd* (1), although disapproved of by the Court of Appeal in *Abouloff* v. *Oppenheimer* (2), as applied to the case of an action instituted to avoid a judgment upon the allegation of its having been obtained by fraud and perjury of the party in whose favor it was rendered, seems to me, when applied to the present case, to be singularly appropriate, and so applied, it would read much as follows:

Assuming the alleged fraud and perjury to have been committed by C. W. and J. Henderson, as is now alleged by the latter, can such fraud and perjury be established in such a manner as to be acted upon judicially to the prejudice of Green & Co., in whose favor the award was made, upon a motion made to the court to declare the award to be void for such fraud and perjury? Has the court on motion jurisdiction to declare, or which is the same thing to adjudicate, that an award had been procured by fraud and perjury, and was, therefore, void to the prejudice of the person in whose favor the award was made and who was a stranger to the fraud and perjury charged? These

(1) 10 Ch. App. 333. (2) 10 Q. B. D. 307.

questions would require very grave consideration before they are answered in the affirmative. Where is litigation to end if judgment obtained in an action or an award obtained on an arbitration fought out adversely upon the very question of fraud, the charge of which is now repeated, could be declared to be void upon the ground of fraud and perjury, on the inquiry in relation to it, on a mere motion before a judge? Perjuries, falsehoods, frauds, when detected, must be punished and punished severely, but can such grave charges, after having been once tried, be re-opened even upon the confession of one of several parties accusing himself and others of fraud and perjury, and be substantiated (to the prejudice of a party who is a stranger to the fraud and perjury), otherwise than in an action instituted in the ordinary manner, wherein an issue as to the existence of the fraud and perjury charged shall be joined between the parties sought to be prejudiced by their being substantiated, who, in the present case, are Green & Co., and the parties seeking to be benefited thereby, who are the insurance companies?

In my opinion these questions can only be effectually answered either in an action brought by the insurance companies, or one of them, of the nature of the actions commenced by writs of summons in November, 1887, and discontinued, or in an action by Green & Co. upon the award, if the court below should think fit, upon their motion to enforce the award, to decline doing so, and should leave them to their action upon the award. But for the reasons already given I am of opinion that this appeal should be allowed with costs, and that the motion made in the court below by the insurance companies should be ordered to be refused with costs.

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PATTERSON J.—The facts on which the questions in dispute mainly turn may be briefly stated.

A firm of C. W. & J. Henderson insured their stock of merchandise with several insurance companies. A fire occurred. After the fire, and before the loss was adjusted, the Hendersons assigned their claims upon the policies to John Green & Co. Disputes arising respecting the loss, a submission to arbitration was entered into between the several insurance companies, C. W. & J. Henderson and John Green & Co. The arbitrators were Judge Chadwick of Guelph and Judge Davis of London, who, if they disagreed, but not unless they disagreed, were to appoint an umpire who was to decide the matters in difference upon the statements of the arbitrators and such reference to the evidence as he should think proper, and make his award without hearing the parties or examination of witnesses before him.

The arbitrators disagreed and appointed Judge Woods of Chatham as umpire.

The umpire made his award on the 28th of July, 1887.

The submission was made a rule of the High Court of Justice, Queen's Bench Division, at the instance of John Green & Co., and in June, 1888, over ten months after the making of the award, the insurance companies moved for an order to declare that the award was void and invalid, and that it should be set aside, and to remit the matters referred to the re-consideration and re-determination of the original arbitrators mentioned in the submission.

The principal ground of the motion was the alleged recent discovery that the Hendersons had by deliberate fraud concealed a part of their goods which they had saved from the fire, and that their proofs of loss and

also their evidence before the arbitrators were fraudulently false in relation to the amount of their loss.

The motion was heard before Mr. Justice Rose, who made an order:

That the matter of the said submission be referred back to the said arbitrators and umpire to take evidence and inquire and report as to whether any of the goods insured, and if any to what extent, were not destroyed by fire, either by reason of salvage, fraud or concealment on the part of the assured or by reason of any other cause, and that in respect of the question so remitted the reference and proceedings thereon be governed by the terms of the original submission herein.

From that order the companies appealed to the Court of Appeal, contending that the award ought to be set aside and the whole matter remitted back to the arbitrators.

The appeal was allowed and an order made that

the matter of the submission between the parties above-named be referred back to the arbitrators for re-consideration and re-determination upon the terms of the said original submission; and that all questions of costs, in respect of such reference back, shall be reserved till after the determination of the said matters so referred back.

Before the Court of Appeal the respondents (who are appellants in this court) were not content to support the order of Mr. Justice Rose. They insisted, by way of cross-appeal, and they now insist, that the motion ought to have been altogether dismissed because of the lapse of time since the making of the award, and because the case presented was one for simply setting aside the award and not for referring the matter back to the arbitrators. Their answer to a motion to simply set aside the award would have been the conclusive one that, under the statute 9 & 10 Wm. III, ch. 15 the motion could not be later than the term following the making of the award.

A good many of the numerous cases which touch, more or less directly, the subjects of the contest have

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been brought to our attention in the course of the learned and thorough discussion at our bar. I shall not find it necessary to refer to many of them. I do not think the solution of the questions in dispute requires much more than a careful attention to the statutes on the subject of arbitrations, and I think that the questions are correctly solved by the judgment now in review.

It is familiar law that when parties submitted a dispute to arbitration, choosing their own tribunal, a court of common law could not set aside the award until the act of 9 & 10 Wm. III ch. 15 gave power to do so when an award was procured by corruption or undue means, provided it was complained of before the last day of the term following the making of the award.

It is also familiar law that in all cases but exceptional ones the courts met applications to set aside an award by saying "You have constituted your own tribunal; you are bound by its decision." The only exceptions to that rule, as stated by Williams J. in *Hodgkinson* v. *Fernie* (1), were cases where the award was the result of corruption or fraud, and one other, viz., where the question of law necessarily arose on the face of the award or upon some paper accompanying and forming part of the award.

I shall have to refer again by-and-bye to this statement of the law.

*Hodgkinson* v. *Fernie* (1) is relied on principally as a leading decision that an award will not be referred back to the arbitrator for any cause for which it could not properly be set aside. It is not my purpose to inquire whether that rule is universal and not subject to exceptions. Cases such as *Flynn* v. *Robertson* (2) and others, some of which are there cited, suggest a

(1) 3 C. B. N. S. 189, 202. (2) L. R. 4 C. P. 324.

contrary opinion, but the inquiry is not, in my judgment, at present called for, as I shall presently show.

The 8th section of the English C.L.P. Act, 1854, which first gave power to refer back an award, was represented in Ontario by R. S. O. (1877), ch. 50 sec. 213 or R. S. O., (1887), ch. 53 sec. 37, which gave power to the court of which the submission was made a rule, or a judge, to

> at any time and from time to time, remit the matters referred, or any or either of them, to the re-consideration and re-determination, [these last two words are omitted in R. S. O., 1887] of the arbitrator or arbitrators or umpire as the case may require, upon such terms, &c.

There is here no indication of any limit to the discretion of the court on deciding for what reason an award shall be sent back. On the contrary the expressed purpose of sending it back, viz., for re-consideration and re-determination by the arbitrator, is opposed to the idea that the determination evidenced by the document, however erroneous it may be demonstrated to be, must be sacredly respected, as it also is to the idea that the only purpose in sending back an award must be for the performance of the *quasi* ministerial duty of correcting some apparent error by correctly expressing the determination previously arrived at. It is for re-consideration and re-determination.

In the present case the charge is that the award was procured by fraud. Whether or not that charge is substantiated by the evidence adduced on the motion is a matter that we can scarcely be expected to discuss very critically. It was for the court below to deal with on the evidence, and it cannot be held that the evidence did not fully justify the view taken by the court. There was no reason why the re-consideration should not be by the originally appointed arbitrators. No suggestion of unfairness or other personal objection to them was made.

Now, taking *Hodgkinson* v. *Fernie* (1) to be a leading

(1) 3 C. B. N. S. 189

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case on the subject, how does it apply to the immediate question ? We have good authority for applying to the referring back of an award the law there laid down with more direct reference to setting aside an award. I find the remarks of Williams J., to which I have adverted, quoted by Brett J. in *Dinn* v. *Blake* (1) as if immediately addressed to the question of referring back an award. This is his language :

> In the case of *Hodgkinson* v *Fernie* (2) both questions, viz., as to when there was power to refer back, and as to the effect of the statute, were considered, and the law was clearly declared in the judgment of Williams J. He lays it down that the award cannot be sent back and the arbitrator forced to review it merely on the ground that there has been a mistake of fact or of law. The exceptions he mentions to the rule are where there has been corruption or fraud, and where it appears on the face of the award that there has been a mistake of law.

A third exception is spoken of by Brett J. and the learned judges who sat with him, as established by the later cases of *Mills* v. *Bowyers' Company* (3) and *Flynn* v. *Robertson* (4), viz., when the arbitrator admits his mistake. In *Dinn* v. *Blake* (1) the application to refer back an award on the ground of the arbitrator being mistaken in his law was refused because the mistake was not admitted by the arbitrator and did not appear on the face of the award.

The case is a distinct authority for the proposition that, under the rule stated in *Hodgkinson* v. *Fernie* (2) as interpreted and applied in *Dinn* v. *Blake* (1), an award may be referred back to the arbitrator for the same causes, including fraud in procuring the award, for which it may be set aside.

We have then to consider if the motion in this case was in time.

It appears to have followed the discovery of the fraud with reasonable promptness.

(1) L. R. 10 C. P. 388.
(2) 3 C. B. N. S. 189.
(3) 3 K. & J. 66
(4) L. R. 4 C. P. 324.

The statute leaves the question of time at large. The expression is "at any time and from time to time," giving to the courts a discretion unfettered by any statutory limit but necessarily governed, as in every case of judicial discretion, by what is under the circumstances reasonable.

That is the understanding evidenced by the case of *Leicester* v. *Grazebrook* (1), in which a divisional court consisting of Cockburn C. J. and of Lush and Manisty JJ. made an order to refer back an award after the time limited by the statute of William had elapsed, affirming the discretion of the court to do so when the delay was reasonably accounted for.

We have no report of the decision except a short note in the Law Times. It does not seem to have found its way into the Weekly Notes. It was probably one of the many cases which are merely the application to particular facts of rules that are already familiar in practice. It is useful, however, as a reported instance in which the phrase "at any time and from time to time," was construed by its own force, and without qualifying it by any limitation borrowed from the statute of William.

It has long been my opinion that for some cause, possibly the inertia arising from the intimate association in the legal mind of the statute of William III and its limitations with the subject of arbitration, the provisions of the Common Law Procedure Acts have not always been administered with as much liberality as the statutes would have justified. One notable example of this is the application to compulsory references of some of the stricter doctrines appropriate to voluntary references where the parties really appoint their own tribunal. These stricter rules of practice, adopted or continued under the C. L. P. Acts in England, were, as a matter of course, followed in Upper Canada under the C. L. P. Act of 1856, and the old



(1) 40 L. T. N.S. 883.

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measure of sanctity continued to be ascribed to awards, whether made on compulsory or voluntary references, until the important relaxation provided by the provincial legislature by giving an appeal from awards in some form, and in most cases of arbitration. The order now in appeal is in the spirit of the day, which tends to bring the subject of arbitration more under the supervision and control of the courts than formerly, and to place it more fully on a footing with other forms of litigation.

I take the English Arbitration Act, 1889, to be also an advance in the same direction, and to remove whatever necessity may have seemed to exist for construing one enactment by reference to another. The act embodies the provisions of the C. L. P. Act and those of the act of Wm. III now in discussion. It provides in the 10th section, in the most general terms, that in all cases of reference to arbitration the court or a judge may from time to time remit the matters referred or any of them to the re-consideration of the arbitrators or umpire. Note in passing the omission of the redundant words "and re-determination," which, as already pointed out, were dropped in Ontario two years earlier (1). One provision of section 11 is that where an arbitrator or umpire has misconducted himself, or an arbitration or award has been improperly procured, the court may set aside the award. No time for this proceeding is limited by the statute, the limitation being left to the more flexible machinery of the general orders of the court (2).

In my opinion the judgment of the Court of Appeal should be affirmed and the appeal dismissed with costs.

*Appeal dismissed with costs.*

Solicitors for Appellants: *Hellmuth & Ivey.*

Solicitors for Respondents: *Bain, Laidlaw & Co.*

(1) R. S. O. (1887,) ch. 53 s. 37. (2) G. O. LXIV rule 14.