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April 15.

[CIVIL JURISDICTION.]

[ACTION NO. 89, 1922.]

FREDERICK BENJAMIN SPAETH *v.* ARTHUR HERBERT HALLEN.

Award after reference to arbitation—motion to set aside—principal grounds of objection—

(i) a mistake;

(ii) evidence wrongly admitted.

General principles governing the setting aside of an award reviewed—motion dismissed.

Sir ALFRED YOUNG, C.J. This is a Motion by the defendant Hallen for an order setting aside the award made herein on the 11th day of March, 1924, after reference to Arbitration pursuant to an Order of His Majesty the King in council dated the 7th day of July, 1923. Mr. Mann of counsel appeared in support of the Motion and Mr. Crompton and Mr. Ellis of counsel contra.

Eighteen heads of objections are set forth in the Motion Paper upon which the defendant relies to have the award set aside or remitted back for reconsideration, but with few exceptions the objections are not specifically stated, and I find considerable difficulty reading the heads of objections, even together with the affidavit filed in support of the Motion Paper, in ascertaining the nature of some of the objections, in fact the learned counsel, who appeared in support of the Motion, seemed to me at the hearing to have the same difficulty, and in argument abandoned many of the objections set out. I think on the authority of the cases of *Boodle* v. *Davis* 3 A. & E. p. 200 and *Mercier* v. *Pepperwell* 19 C.D. p. 58, that the objections in each case should have been specifically stated so as to draw attention to that particular part of the award on which it is sought to have it set aside; otherwise there is a risk of confusing one ground with another and so lead to useless prolixity in argument, as well as running the risk of having the objection struck out.

In argument the objections taken practically resolved themselves into two outstanding and important heads, namely:—

(1) Mistake as to the scope of the authority conferred by the submission in that certain correspondence between the plaintiff and the defendant put in at the original trial of the case and marked as exhibits E, F, G, H, I, J, K, L, M, N, O, P, was admitted in evidence at the arbitration although objection was taken at the time that the correspondence was inadmissable (see head A); and

(2) That the award was based on evidence wrongly received and was a valuation of the buildings, stock and implements on " a take over " and not their value as ascertained by sale at auction, and further that the value of the " growing crops " was wrongly decided (see Heads of Objections H, I, J, K). Further, the learned counsel took several other minor objections which I shall deal with later on; but the two I have mentioned specifically are in my opinion the two important and far reaching objections, and even if I have not set them out exactly as they appear on the Motion Paper I think I have done so with sufficient clearness, so as to indicate them for the purpose of the learned counsels' arguments.

In reference to arbitration, the general rule is that as the parties choose their own arbitrators to be the judges in the dispute between them, they cannot when the award is good on the face object to the decision, either upon the law or the facts (see *Hodgkinson* v. *Fernie* C.B.R., N.S. vol. 3 p. 189) or, to go further and use the words of Lord Esher in re *Keighley* v. *Maxsted & Co,*, 1893, Q.B.D. p. 409:—

> It has been held that one effect of the Act (i.e., C.L.P.A. 1854) was that it continued the ordinary law as to decisions by arbitrators, that is to say, that they are final and conclusive, both of the law and of the facts, and that whether there has been a mistake either of law or fact the parties cannot by themselves set it up. When, however, the submission contains a power to refer back to the arbitrator, if the party alleges that there has been a mistake on the arbitrator's part either of law or fact, the Court gives this effect to the power: that upon such a state of facts alone the decision cannot be questioned whether on the law or the facts, the parties having chosen their arbitrator for better or worse; but that if the arbitrator himself informs the Court that he thinks he has made a mistake either of law or fact, and both he and the party approach the Court, the Court would send the matter back to him for reconsideration, although such a course will not be taken on the mere allegation of one of the parties.

And again in *Dinn* v. *Blake*, 10 C.P. p. 388, Archibald, J., lays it down that as a general principle an award is final; and assuming that it is good on the face of it, there can be no appeal from it. The learned Judge then proceeds to specify the cases in which the Court will interfere with an award. He confines them to:—

(1) Corruption on the part of the arbitrator.
(2) Excess of jurisdiction.
(3) When the arbitrator himself admits that he has made a mistake, and, as it were, craves the assistance of the Court in setting it right;

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and to this list may be added—

(4) Discovery of material evidence which could not have been discovered with due diligence and which has been obtained since the award (see *Burnard* v. *Wainwright* 19 L.J. (Q.B.) 423; and

(5) Mistake of law or fact apparent on the face of the award.

I have thus endeavoured to reduce into a concise form the general principles governing the setting aside of awards to be learnt from decided cases; and I venture to think that it may be gathered from them that the Courts are exceedingly cautious before interfering with an award; and lean towards upholding the validity of an award, acting on the fundamental principle, namely, that the parties having selected their own tribunal are bound by its decision with the certain exceptions referred to above.

Let me now examine the first head of objections which I have set out: the Court is asked to set aside the award on the ground of mistake as to the scope of the authority conferred by the submission. The only terms of the submission, it was stated at the Bar, were those contained in clauses 1 and 2 of the lease executed on the 25th day of February, 1911. The clauses themselves are fully set out in the award; they provide, *inter alia*, clause 1, that the lessee should have the option of a further lease of ten years on the expiration of the term of the lease itself upon terms and conditions to be agreed between the parties. In the event of failure of the parties to agree then the lessor bound himself to purchase " by valuation the buildings erected by the said lessee and also the growing crops, stocks and implements." Clause 2 provides for a reference to arbitration of all matters in difference in relation to the valuation if the parties fail to agree. The parties having failed to agree on the valuation, " all matters in difference in relation thereto " were referred to arbitration, Mr. J. L. Hunt being appointed by the plaintiff to act as his arbitrator, and Mr. P. Costello by the defendant to act as his arbitrator. The arbitrators by writing under their hand appointed Mr. S. M. Bradley to be umpire. The arbitration was subject to the provisions of the Common Law Procedure Act 1854 (see clause 2, terms of submission). It is stated in the affidavit in support of the motion that " the umpire sat with the arbitrators, and heard all the evidence and addresses of Counsel."

At the hearing it was contended, *inter alia*, on behalf of the defendant that the evidence showed that all the buildings were erected before the commencement of the term of the lease of the 25th February, 1911, entered into between the plaintiff and the defendant, and that therefore the plaintiff was not entitled to recover the value of the same or for any alterations or additions thereto. It seems to me beyond dispute that the question as to what, if any, of the buildings, the defendant should be bound to purchase, having been put in issue it thereupon fell within the scope of the authority conferred by the submission, and that evidence material to this issue was admissible. The plaintiff tendered in evidence certain correspondence beginning in June, 1909, and continuing up to June, 1910, which took place between the plaintiff and the defendant, or his solicitor, in the course of their negotiations for the lease, and it is the admission of this correspondence which is objected to. The correspondence was admitted at the trial of the original action, and also forms part of the record before the Privy Council, marked as exhibits E to P inclusive, an objection being noted against the exhibits F, G, H, I, K, L and M on behalf of the defendant.

I have no doubt that this evidence was properly admitted for the purpose of determining what buildings came within the meaning of the expression " buildings erected by the said lessee," and which the lessor was bound to purchase at a valuation. The arbitrators having disagreed on this important question, the umpire gave his decision which is fully set out in the award. The case of *Walford Baker & Co*, v. *Macfee & Son*, L.J., K.B., Vol. 84, 1915, p. 2217, cited by Mr. Mann in support of his objection is authority for setting aside an award on the ground of the admission of inadmissible evidence. In that case the umpire read into a contract a provision as to the suspension of deliveries which was not contained in the contract; the only subject matter of the reference, and which it was considered no doubt influenced him in his decision. Having arrived at the conclusion that the evidence objected to was admissible, and within the scope of the authority of the terms of the submission, this case is not applicable; nor does it seem to me that this Court can go any further, and inquire into the question as to whether the umpire was right or wrong in the decision he arrived at.

Numerous cases have been cited by plaintiff's counsel in support of the proposition that an arbitrator is the final Judge of law and fact, unless it appear on the face of the award that

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there has been a mistake. In Hodgkinson *v.* Fernie C.B.R. (N.S.), Vol. 3, p. 201, Crowder, J., said:—

> I take it that the general rule of law is clear and well ascertained that the Court will not interfere to set aside an award which is good upon the face of it, on the ground that the arbitrator has made a mistake whether of fact or of law. Having selected their own Judge the parties are bound by his decision.

In the face of this and other authority I am of the opinion that this Court is precluded from going any further into the matter and that the decision of the umpire in this respect is final and binding.

The other important objection to my mind, raised by the defendant, is the question of the alleged method of valuation. Defendant alleges that the true value is the sale price which the buildings, stock, and implements would fetch if put up to auction, and not a valuation made of them as a going concern, and further, that the value of the growing crops was wrongly arrived at. I do not think it is incumbent upon me to express any opinion one way or the other upon this proposition. The affidavit in support of the Motion purports to set out in paragraphs 10 to 17 (inclusive) a summary of certain evidence given before the arbitrators and the umpire, with what object I fail to appreciate, unless it be for the purpose of inducing the Court to go into the evidence, and give a decision on the merits thereof. Plaintiff's counsel has objected to the admission of this evidence, and on the authorities and on the principles governing such matters, as I conceive them to be, and which I have already set out, I am of opinion that the objection is well made and must be sustained (*Adams* v. *Great North of Scotland Railway Co.*, 1891, A.C., 40, and *Attorney-General for Manitoba* v. *Kelly*, 1 A.C., 1922, per Lord Parmoor at page 281). The case of *Oldfield* v. *Price*, Eng. R., Vol. 141, p. 568, cited by plaintiff's Counsel, in any event seems to me to be conclusive on the question. That case is authority for saying that an erroneous principle of valuation is no ground for the Court to interfere.

The affidavit contains paragraphs 21 to 24 (inclusive) purporting to be information obtained from Mr. P. Costello, explaining and relative to all which took place when the abritrators met to consider their award. Plaintiff's counsel objects to the Court going into this question and to the admission of the information obtained from Mr. Costello by defendant's counsel.

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Now, there is ample authority for saying that if an arbitrator has made a mistake and admits it and seeks the assistance of the Court so as to enable him to rectify his mistake, the Court will send back the award. *Hutchinson* v. *Shepperton* (13 Q.B., p. 955) is a case relied on by the defendant's counsel as authority for saying that it is not the invariable rule that the Courts will not set aside an award on the ground of mistake; in that case the arbitrator omitted to give credit for a sum of money admitted to be due, the ratio decidendi being that he had not exercised any judgment. The case was decided before the date of the Common Law Procedure Act, 1854, and should, I think, be treated as a decision based on the particular facts of the particular case, and not as a case establishing any general principle; on the other hand the modern cases clearly establish that the Courts will not send back an award on the ground of mistake alone unless the arbitrator admits his mistake.

Now, is this rule in any way applicable ? In the first place Mr. Costello has not himself come to the Court and admitted that he has made a mistake, and sought the assistance of the Court, nor does it seem to me that he is in a position to do so, seeing that he is not the sole arbitrator in this matter, and further, from the affidavit it would appear that he, Mr. Costello, disagreed with Mr. Hunt, the other arbitrator, on most of the items and that on their disagreeing the umpire gave his decision. This seems to me to be quite in order and cannot be questioned, the rule in such cases being the umpire's authority commences upon the disagreement of the arbitrators (see Russel on Arbitration, 9th Ed., p. 183). The award in fact is not that of Mr. Costello, but of the umpire (see paragraph 8 of the award); and the umpire has not admitted any mistake on his part, and come to the Court for assistance. On that ground I find that the objections which I have set out under head 2 must fail. As regards the objection in the latter part of head 1 of the Motion Paper no argument was offered in support thereof, nor was I referred to any specific ground relating thereto, although at the hearing I directed counsel's attention to the allegation. In support of the objection raised under head G, it is argued that the arbitrators allowed the umpire to influence them in coming to a decision; as I have already pointed out the award is that of the umpire, and not that of the arbitrators. The latter part of objection K, namely, that the umpire was guided by outside legal advice, was abandoned in argument, the learned counsel not taking the point. Under the head of H the learned counsel pointed out that in the particulars of claim filed by the plaintiff (the

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defendant it was stated by Mr. Crompton having either neglected or refused to file any) under buildings, "1 small coolie lines" was valued at £75, whereas in the award the umpire had allowed £108; and on that item he moved to have the award set aside. I am not aware of any authority for setting aside an award on any such ground, nor was any cited in support of the submission, nor do I gather from the principles laid down that the Courts would remit back again an award on the ground of mistake, unless the umpire admitted he had made a mistake, and came to the Court to enable him to rectify it. It may seem a harsh finding, but on the other hand the total award is £1,362 5s. less than the claim; and in this respect there has been no substantial or intentional injustice or error apparent on the face of the award.

The learned counsel for the defendant stated that the alternative grounds on which it was sought to remit the award for reconsideration were practically the same as those he had argued, there will be no need therefore for me to examine them seriatim, but to find generally that they fail for the reasons set out in this decision.

The Motion is therefore dismissed with costs.

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Award. Leave to enforce motion for award did not find that the plaintiff was entitled to recover from the defendant any specific amount nor was there any direction for payment by the defendant to the plaintiff: it went no further than a valuation.

Held, award cannot be enforced against defendant on motion —award affords right of action only.

Sir ALFRED YOUNG, C.J. This is a motion by the plaintiff for a declaration that the Award dated the 11th day of March, 1924, and filed on the 22nd day of April, 1924, has the same force and effect for all purposes as a judgment in the action, and for leave to enforce the said award in the same manner as a judgment or order and for an order that the defendant pay to the plaintiff the sum of £4,200 5s. 0d., the amount of the award with costs of the application.