

THE RECTOR, CHURCHWARDENS }
 AND VESTRY OF ST. GEORGE'S } APPELLANTS; 1878
 PARISH, PARRSBORO' } *Jan'y. 28.

AND

ALIDA Y. KING RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA.

Arbitration—Award, finality of—Finding specifically on each of the matters in difference.

Plaintiffs brought ejectment to recover possession of certain lands in the Parish of *P*. After cause was at issue, under a Rule of reference, all matters in difference were referred to arbitration, and the arbitrators were to have power to make an award concerning the Glebe and Church Lands at *P*., and to make a separate award concerning the School Lands at *P*. The powers of the arbitrators were to extend to all accounts and differences between the said Parish and the late Rector, and the Defendant, as Executrix of said Rector, as also between the said Defendant individually and the Parish.

The arbitrators made two awards. First, as to the School Lands, they awarded that the Defendant was indebted to the Plaintiffs, as such Executrix, on the school moneys in the sum of \$1,400; that the Defendant should pay that sum to the Plaintiffs; and that judgment should be entered for the Plaintiffs for that amount. Secondly, as to the Glebe and Church Lands, they awarded that the Plaintiffs were entitled to recover the lands claimed on the writ of ejectment, and ordered judgment in ejectment to be entered for the Plaintiffs with costs of suit; and, after reciting that all accounts respecting the receipt and disbursements of all moneys received from the interest, rent, and sale of these lands by the late Rector, or his agents, or by the Defendant, as his Executrix, were also referred to them, as well as all accounts and differences between the said Parish and the Defendant individually, they further awarded, that the Defendant should "pay to the Plaintiffs the sum of \$1 in full of the same," saving and excepting the matters in controversy respecting the School Lands, on which they had made a separate award; and that judgment should be entered for the Plaintiffs for the

*PRESENT:—Sir William Buell Richards, C. J., and Ritchie, Strong, Taschereau, and Fournier, J.J.

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said sum of \$1. They also awarded that the Defendant should pay all the costs of the reference and award.

*Held*,—That the awards sufficiently specified the claims submitted and the various capacities in which such claims arose. That the first award, being against the defendant in her representative capacity, could not be considered against her personally, and negatived any claim of that kind, and was also an adjudication against the Defendant that she had assets; and that the finding in the second award that the Defendant should pay \$1 could be considered a finding as against her in her individual capacity for that sum, and, as to the claims of the Plaintiffs against her for moneys received by her husband or by her as Executrix, as a finding against the Plaintiffs on their claim. That the part of the second award, directing payment of the costs of the reference and award was bad, but might be abandoned.

**APPEAL** from the judgment of the Supreme Court of *Nova Scotia*, setting aside the award made between the parties.

The Plaintiffs brought ejectment to recover possession of certain lands (about four acres) in the Parish of *Parrsboro'*, in the County of *Cumberland*, in *Nova Scotia*. The action was begun 22nd May, 1876. The lands were described in the writ, and the Defendant pleaded that Plaintiffs were not entitled to the possession of the property described in the writ and declaration, or any part thereof.

After the cause was at issue, it was agreed, on 21st September, 1876, by consent of the parties, that the cause and all matters in difference between the parties be referred to the award of three arbitrators. In the rule of reference the two arbitrators named were *John M. Hay* and *Angus McGilvray*, and the third was to be chosen by them. The award of the arbitrators, or of any two of them, was to be final. The arbitrators were to have full power and authority to examine, investigate and award, either separately or in one, of and concerning all accounts respecting the receipts and disburse-

ments of moneys received from the interest, renting and sale of the glebe and church lands and the buildings thereon, at *Parrsboro'*, by the late Rev. *W. B. King*, or his agents, or by the Defendant, as his executrix, and all and every matter connected therewith, and all and every account existing or pending between the said Parish and the said Rev. *W. B. King*, or the Defendant, as executrix, or otherwise.

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They had like authority to hear, examine, &c., and to take evidence and make an award concerning the receipts and disbursements of moneys received from the sale of the school lands at *Parrsboro'*, and the rents, issues and profits of the same, and every matter connected therewith, adjusting the accounts and settling the balance due thereon; Provided, in such last-mentioned case their award should be separate from any other award or awards in the suit.

The arbitrators were to have power to order judgment to be entered in the cause, either for the Plaintiffs or Defendant, with or without costs, or to order judgments to be entered for both Plaintiffs and Defendant, with or without costs, as they should find the several issues, either for or against either party.

It was agreed that the powers of the arbitrators should extend to all accounts and differences between the said Parish of *St. George* and the late Rector, and the Defendant as executrix of said Rector, as also between the said Defendant individually and the Parish, so that the said award might, in all respects, be final and conclusive between all the parties in difference.

The two arbitrators named in the submission (*John M. Hay* and *Angus McGilvray*) named *Thomas Jennings* as the third arbitrator; and on the 13th January, 1877, the three arbitrators made two awards.

In the first, it was recited, amongst other things, that

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certain disputes which had arisen between the parties respecting the receipts and disbursements received for the sale of school lands at *Parrsboro'*, and the rents, issues and profits thereof, were referred to them ; that they had heard the parties, their counsel, attorneys, witnesses and evidence produced on behalf of either party, and duly weighed and considered the same ; and as it was provided by the rule that they should make a separate award concerning the school lands :

They, therefore, awarded that the Defendant was indebted to the Plaintiffs, as such executrix, on the said school moneys, in the sum of one thousand four hundred dollars, and they awarded "that the Defendant do pay to the Plaintiffs the said sum of \$1,400, and that judgment be entered for the Plaintiffs for that amount." The second award, dated the same day, signed by all the arbitrators, stated that the rule of Court, amongst other things, recited that the cause and all matters in difference between the parties had been referred to them ; that they had heard and examined the parties, their counsel and attorneys, and all witnesses and evidence adduced on behalf of the Plaintiffs and Defendant, and had duly weighed and considered the same ; they awarded and adjudged, of and concerning the premises, that the Plaintiffs were entitled to recover the lands claimed in the writ of ejectment in the cause, and ordered that judgment in ejectment be entered for the Plaintiffs, with costs of suit.

They further recited, that by the rule of Court, all accounts respecting the receipt and disbursements of all moneys received from the interest, rent and sale of the glebe and church lands at *Parrsboro'* by the late *W. B. King*, or his agents, or by the Defendant as his executrix, were also referred to them, as well as all accounts and differences between the said Parish of *St. George*

and the Defendant individually. They further recited that they had heard the parties, their witnesses, evidence, counsel and attorneys of and respecting the same; and having duly weighed and considered the same, they awarded that the Defendant should pay to the Plaintiffs the sum of one dollar in full of the same, saving and excepting the matters in controversy respecting the school lands, on which, as required by the rule, they had made a separate award; that judgment should be entered for the Plaintiffs for the said sum of one dollar. They also awarded and adjudged that the Defendant should pay all the costs of the reference and award.

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On the 6th February, 1877, a rule *nisi* was obtained to set aside the awards on the following grounds:

"1st. That the said award or awards, is and are not, nor is either of them, final and conclusive, or in accordance with the requirements of the rule of reference herein.

2nd. Because the arbitrators did not determine and decide all matters submitted to them under the said rule of reference and the evidence in the cause.

3rd. Because the arbitrators have not, as they were required to do, determined and passed upon all accounts respecting the receipts and disbursements of all moneys received from the interest, rent and sale of the glebe and church lands, and the buildings thereon, at *Parrsboro'*, by the late Rev. *W. B. King* or his agents, or by the Defendant, as his executrix, as well as all accounts and differences between the said Parish of *St. George* and the said Defendant individually.

4th. Because the said arbitrators did not make their award of and concerning the receipt and disbursement of moneys received for the sale of the school lands at *Parrsboro'* and rents, issues and profits of the same, and every

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matter connected therewith, adjusting the accounts and settling the balance due thereon, as required in and by the said rule of reference.

5th. Because the said award or awards, and both and each of them is and are uncertain and inconclusive, and do not finally determine the matters referred to the said arbitrators in and by the said rule of reference.

6th. Because the said award is illegal, uncertain and void."

The rule was granted on the affidavit of the Defendant's counsel stating the nature of the action. That the Defendant was the widow of the late Rev. *W. B. King*, who was in his lifetime Rector of *Parrsboro'*, and she was executrix of his will. That Defendant claimed there were large amounts due to her husband in his lifetime by Plaintiff, and to her as his executrix and in her individual capacity; and it was agreed by the parties to have all matters in difference referred to arbitration, and the rule of reference was entered into, and the usual plea in ejectment pleaded *pro formâ* in the suit. That the accounts between the Plaintiffs and the late Rev. *W. B. King* in his lifetime, and the Plaintiffs and Defendant, as executrix, since his death, were fully gone into and investigated before the arbitrators, and they made their awards. The affidavit concludes that the deponent is advised and believes that the awards so made are not in accordance with the rule of reference, and do not find the separate liability of the late *W. B. King* in his lifetime, or the liability of the Defendant, as his executrix, since the death of the said *W. B. King*, or of the Defendant in her individual capacity.

The case was argued, and, on the 17th of March, the rule was made absolute, with costs.

From that decision the Plaintiffs appealed to this Court.

Mr. *Gormully*, for the Appellant :—

The Court below ought not to have set aside the award, because, under the *Revised Statutes of Nova Scotia* (1), the grounds for setting aside the award should have been specifically set forth in the rule to shew cause.

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[THE CHIEF JUSTICE :—Was this objection taken in the Court below ?]

It does not appear by the printed case, but I am instructed it was. He cited the following authorities in support of this contention, and pointed out that in Nova Scotia the Statute required the grounds to be specifically stated :—*Boodle v. Davies* (2); *Grenfell v. Edgecomb* (3); *Gray v. Leaf* (4); *Staples v. Hay* (5).

As to the merits of the case, Appellants contend that the awards are perfectly good. By the rule of reference made with the consent of both parties, a direction was given to the arbitrators to make two awards—one respecting the school lands and one respecting the glebe lands. The arbitrators made two awards which have been set aside in the Court below. The objection to the award respecting the school lands in the Court below was, that it was not sufficiently final, and that it was not sufficiently certain. The arbitrators, after reciting that certain disputes were referred to them, and that they had heard the parties, their counsel and attorneys, as well as *all* witnesses and evidence produced for or on behalf of either party, and having duly weighed and considered the *same*, (the word “same” here necessarily means *everything* referred to them,) awarded that the Defendant, as executrix, was indebted to the Plaintiffs in the said school moneys in

(1) 4th Series, ch. 109, sec. 14.

(3) 7 Q. B. 661.

(2) 3 A. & E. 200, per Coleridge,  
 J., at 210.

(4) 8 Dowl. R. 654.

(5) 1 D. & L. 711.

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the sum of \$1,400, and that the said amount should be paid to the Plaintiffs. There was nothing in the rule requiring the arbitrators to decide as to amount due by the Defendant in her different capacities; and the following authorities support Appellant's contentions, that such an award cannot be set aside on the ground of *uncertainty*; *Russell* on awards (1); *Boodle v. Davies* (2).

Neither is there, on the face of the award, anything to show that the arbitrators have not *finally* adjudicated on all the matters referred to them. On this point reference was made to *Birks v. Trippett* (3).

Neither is the school lands award objectionable because it finds that the Respondent is indebted, as Executrix, to the Appellants in the sum of \$1,400, and directs the Respondent to pay that sum to the Appellants, and the submission by the Respondent to refer is a submission to the arbitrators of the fact, whether the Respondent, as executrix, has assets or not; and the finding is a finding of assets, and creates a personal liability to pay.

Worthington v. Barlow (4).

The other award as to the glebe lands, being an award *de premissis*, is final and conclusive. The leading case is *The Duke of Beaufort and The Swansea Harbor Trustees* (5). See also *Harrison v. Creswick* (6); and the most recent case of all *Jewell v. Christie* (7).

Moreover, the arbitrators had power under the said rule to award generally, as they have done, and were not bound to find separately the state of the account between the late Mr. King and the Appellants; between the Respondent, as executrix of the late Mr. King, and the Appellants; between the Respondent individually and the Appellant.

(1) 4th ed., pp. 277 and 278.

(2) 3 A. & E. 200.

(3) Williams' notes to Saunderson's Rep., vol. 1, p. 37, and cases there collected.

(4) 7 T. R. 146.

(5) 8 C. B. N. S. 146.

(6) 13 C. B. 399 and 416.

(7) L. R. 2 C. P. 296.

The two cases relied upon by the Court below are *Rule v. Bryde* (1) and *Whitworth v. Hulse* (2).

In these cases the question was whether the award was in accordance with the true construction of the submission, and whether it was the intention of the parties that the arbitrators should award separately on some of the matters, as, for instance, to determine the right to costs. It is submitted that, by the terms of the rule of reference here, it appears that the arbitrators were empowered to find generally as they have done; and if the terms of the rule on this point were doubtful, it was the duty of the Respondent to request the arbitrators to find specially on each matter in difference, and it does not appear that any such request was made. *Dibben v. Marquis of Anglesea* (3).

An award, though bad in part, is not necessarily bad altogether; if the good part is severable from the bad, the award will stand as to so much as is good. As to the school land award, the entry of a verdict for the Appellants, and the direction of the arbitrators as to the costs of the reference and award, even though in excess of the powers of the arbitrators, are severable from the rest of the award, and do not invalidate the same. As to the glebe land award, the entry of a verdict for the Appellants for one dollar, even though in excess of the powers of the arbitrators, is severable from the rest of the award, and is mere surplusage, and does not invalidate the same.

Doe d. Body v. Cox (4); *Howett v. Clements* (5); *Rees v. Waters* (6).

An award will not be avoided, unless it is very clearly made out that some matters in difference had not been considered by the arbitrators and determined by the

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(1) 1 Ex. 151.

(2) L. R. 1 Ex. 251.

(3) 10 Bing. 570.

(4) 4 D. & L. 75.

(5) 1 C. B. 128.

(6) 16 M. & W. 263.

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award. *Russell* on Awards (1). Even silence of the arbitrators as to some matters is sometimes presumed to be a decision thereupon. *Cargey v. Aitcheson* (2); *The Duke of Beaufort and Swansea Harbor Commissioners* (3).

Moreover, the Courts will presume everything in favor of the validity of an award, and will make every reasonable intendment and presumption in favor of its being a final, certain, and sufficient determination of the matters in dispute; and where specific differences are recited in the award and determined thereby, the Court, in the absence of evidence to the contrary, will presume that the recited differences were all the matters in difference between the parties. See *Russell* on Awards (4).

The Court will be astute to answer objections to the award.

*Mays v. Cannell* (5); virtually over-ruling *Doe v. Horner* (6).

Mr. Cockburn, Q. C., for Respondent:—

It is argued on the part of the Appellant that even silence upon one subject is sometimes to be presumed to be a decision thereupon. Now, each case must be governed by its own facts. If the submission is specific and requires that the arbitrators must find specifically on matters referred to them, and they do not, then their award is not final. The case of *The Duke of Beaufort and The Swansea Harbour Trustees* (7) is quite consistent with this view.

Now, what is the submission here? The Respondent is an executrix, and it was sworn that she claimed

(1) 4 Ed. 254.

(2) 2 B. & C. 170.

(3) 8 C. B. N. S. 146.

(4) 4 Ed. 255, and cases there cited.

(5) 15 C. B. 125, per Williams,

J.

(6) 8 A. & E. 235.

(7) 8 C. B. N. S. 146.

moneys not only as executrix but also in her individual capacity.

It was one of the matters of the reference, and Respondent had a right to expect that the arbitrators would adjust these several amounts before making their award.

It was the duty of the arbitrators to have found specifically respecting the Glebe and Church Lands at *Parrsboro'* and also the School lands at *Parrsboro'*; it was their duty to have adjusted the accounts as to both of said subject-matters, and to have found and declared how such accounts respectively stood between the deceased, *Rev. W. B. King*, in his lifetime, of the one part, and the Appellants; and between the Respondent, as his Executrix, of the one part, and the Appellants; and between the Respondent in her individual capacity and the Appellants.

See *Whitworth v. Hulse* (1).

Where two substantive matters are referred, and the arbitrator finds only on one of them, the award is bad altogether as not being conclusive.

*Haywood v. Philips* (2); *Rider v. Fisher* (3); *Fisher's Digest* (4); *Stone v. Philips* (5).

The arbitrators had no power over the costs of the reference and award; and the award No. 2, as to these costs, is in excess of their authority. See *Russell* (6).

It was also contended that the Respondent should have requested the arbitrators to award specifically on these different subject-matters. But here it was not a doubtful case. It was not, therefore, the Respondent's duty to ask the arbitrators to do what they were clearly directed to do by the submission.

*Killburn v. Killburn* (7).

(1) L. R. 1 Exch. 251.

(2) 6 A. & E. 119.

(3) 3 Bing. N. C. 874.

(4) 261-2.

(5) 4 Bing. N. C. 37; 6 D. P. C. 247.

(6) 4th Ed., p. 364.

(7) 13 M. & W. 670.

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Mr. Gormully in reply :

The award respecting costs may be cured by striking out those words, this is surplusage and it may be disregarded by the parties. Admitting that different issues were raised by the submission, it is submitted, however, that the authorities cited show that a general finding was sufficient.

The Judgment of the Court was delivered by

THE CHIEF JUSTICE :

Whatever may have been the views taken by the Courts at one time as to the necessity of an arbitrator minutely specifying in the award all questions discussed before him on a reference, such is not the doctrine of the modern cases. In *Harrison v. Creswick*, in the Exchequer Chamber (1), *Parke*, Baron, refers approvingly to the rule laid down in the notes to *Birks v. Trippett* (2), when an award professes to be made *de premissis* :

Even when there is no award [of general releases, the silence of the award as to some of the matters submitted and brought before the arbitrator does not *per se* prevent it from being a sufficient exercise of the authority vested in him by the submission. An award is good notwithstanding the arbitrator has not made a distinct adjudication on each or any of the several distinct matters submitted to him, provided it does not appear that he has excluded any.

He refers to the authorities cited for the position by the learned editor, and proceeds :

When an award is made *de premissis*, the presumption is that the arbitrator intended to dispose finally of all the matters in difference, and his award will be held final, if, by any intendment, it can be made so. The rule is this, when there is a further claim made by the Plaintiff, or a cross demand set up by the Defendant, and the award, professing to be made of and concerning the matters referred, is silent respecting such further claim or cross demand, the award

(1) 13 C. B. 416 ;

(2) 1 Williams' Saunders, 33 a.

amounts to an adjudication that the Plaintiff has no such further claim, or that the Defendant's cross demand is untenable; but, where the matter so set up, from its nature, requires to be specifically adjudicated upon, mere silence will not do.

Harrison v. Creswick was approved of in *The Duke of Beaufort and The Swansea Harbour Trustees* (1). There *Williams, J.*, said :

The cases have long ago settled, that, where several cross claims are the subject of a reference, and the arbitrator by his award directs a sum to be paid by one party without mentioning the cross claim, his silence is tantamount to a negation of the cross claim.

Willes, J., in his judgment in the same case, referring to the arbitrator stating his award to be made *de premissis*, says :

The use of that expression is unnecessary now ; for, the Court will assume that the award is made upon all the matters referred, unless it is apparent on the face of it that it is not so made.

He then refers to the argument that it might be difficult, if necessary in future proceedings to rely on the award, to show that the arbitrator intended to negative the claim in that action (for severance), and says :

That is only an objection of form ;

And adds further on :

I apprehend it would always be competent to the parties, in case a question should at any time arise as to whether or not the claim for severance damage was really disposed of by the award, to aver that that was a matter in difference before the arbitrator ; and then the finding, as it now stands, would show that the arbitrator negatived the existence of any foundation for the claim.

He referred to, and quoted from, the case of *In re Brown and The Croydon Canal Company* (2) as sustaining that view.

Harrison v. Creswick was approved of in *Jewell v. Christie* (3).

I do not think *Whitworth v. Hulse* (4) in any way interferes with the cases to which I have referred.

(1) 8 C. B. N. S. 146.

(2) 9 Ad. & E. 522.

(3) L. R. 2 C. P. 296.

(4) L. R. 1 Ex. 251.

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The argument against the award as to the Glebe and Church Lands is : suppose she were hereafter sued by the Plaintiffs for a claim against her in her representative character, for monies received by her husband in his lifetime, or by her as Executrix, could this award be set up as a defence to the action ?

It seems to me, the cases to which I have referred are authority that it could ; and the observations of Willes, J., in the case of *The Duke of Beaufort and The Swansea Harbour Trustees*, already cited, that the Defendant might in such a case aver it was a matter in difference ; and then the finding of the arbitrators that she pay the Plaintiffs one dollar in respect of the same, may, I think, under the authorities, be considered a finding as against her in her individual capacity for that sum, and as to the claims of the Plaintiffs against her for money received by her husband, or by her as Executrix, as a finding against the Plaintiffs on their claim ; and if she had any set off as to such claim the finding is against such set off or counter claim.

As to that part of the award which directs the Defendant to pay the costs of the reference and award, it was admitted on the argument that it was bad, and there is no doubt the Plaintiffs may abandon it, as they offer to do, and they can be restrained from enforcing that part of it if they attempt to do so.

The other award, as to the school lands, seems to me still less liable to objection, for the award is against the Defendant in her representative capacity, and cannot be considered against her personally, and, of course, negatives any claim of that kind. As to the suggested difficulty as to her not having assets, the award against her as Executrix and that she do pay the said sum, and that judgment be ruled against her for that amount, is an adjudication against her that she had assets. The

case of *Worthington v. Barlow* (1) established that doctrine, and I am not aware that it has ever been questioned.

In the affidavit filed it is not suggested that Defendant has not assets, or that there is any fair objection to the award, or that the arbitrators did not really decide on all the matters referred to them. The objection taken is a mere technical one, and it seems strange if there were any merits in the application or any real apprehension of difficulty from any omissions in the award, that the facts shewing such difficulty were not brought to the notice of the Court, that the matters might be referred back to the arbitrators under the Statute permitting a reference of the award to the arbitrators to amend it.

Since that power has been given to the Courts in *England*, they seem less inclined to allow mere technical objections to prevail; and when there is any serious objection to the form of the award and even the substance from some omission of the arbitrator, it is referred back to be put right.

The appeal will be allowed with costs and the rule *nisi* in the Court below to set aside the awards will be discharged with costs.

Appeal allowed with costs.

Solicitor for Appellants: *C. J. Townshend.*

Solicitors for Respondent: *McDonald & Rigby.*

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