1889
*Dec. 11,12.

JOHN A. McRAE AND COMPANY (DEFENDANTS)..... } APPELLANTS;

AND

1890
*Mar. 21.
*Dec. 10.

E. F. LEMAY (PLAINTIFFS).....RESPONDENTS.

(By original writ.)

JOHN A. McRAE AND COMPANY (PLAINTIFFS)..... } APPELLANTS;

AND

E. F LEMAY AND LEMAY AND SON (DEFENDANTS)..... } RESPONDENTS.

(By counter-claim.)

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Arbitration and award—Award made final by submission—Motion to set aside—Grounds of objection.

An award will not be set aside on the ground that a memo., furnished by the arbitrator to the losing party after its publication, showed that the accounts between the parties were adjusted upon a wrong principle, the defect, if any, not being a mistake on the face of the award or in some paper forming part of, and incorporated with, the award, and there being no admission by the arbitrator himself that he had made a mistake.

APPEAL from a decision of the Court of Appeal for Ontario (1) affirming the judgment of the Divisional Court (2) and refusing to set aside an award in favor of Lemay & Son.

The facts of this case are fully set out in the reports of the decisions appealed from. The following statement contains all that is necessary for the purposes of this report:—

---

*Present: Sir W. J. Ritchie C.J., and Strong, Taschereau, Gwynne and Patterson JJ.

(1) 16 Ont. App. R. 348. (2) 16 O. R. 307.

1889

McRAE v. LEMAY.

McRae & Co. were contractors with the Canadian Pacific Railway Company for the construction of certain pile and trestle bridges on the line of the railway east of Port Arthur, on the north shore of Lake Superior and Lemay & Son were sub-contractors for the construction of portions of the same work. After the contract was completed a dispute arose between McRae & Co.s and the railway company in reference to the quantity of timber supplied under the contract, the difficulty arising from the use of the term "board measure" as the basis of payment. This dispute ended in a suit against the company which was settled during the trial, and the present suit was brought in which the same contest arose as to what was meant by "board measure." In this suit the parties agreed on a reference to arbitra- tion, and a submission was signed which referred "to the arbitration, award and final end and determination of George H. MacDonnell," all matters of account and counter-claim in the action in question, and all matters in difference between the parties E. F. Lemay & Son, and John A. McRae & Company. The arbitration resulted in an award being made in favor of Lemay & Son.

McRae & Co. moved to set aside the award on the grounds of the improper admission of evidence of verbal agreements varying the contract between the parties, of wrong computation by the arbitrator to ascertain the amount due the plaintiffs and not awarding payment on the basis of board measure, and of the discovery of new evidence. The affidavits in support of the motion stated that after the award was published the solicitor of McRae & Co. had a conversation with the arbitrator who informed him that a written memo., which he produced, showed his reasons for the different findings in his award, and how he arrived at the figures and results stated therein, but that he had

1889

McRAE v. LEMAY.

not published these reasons as his decision was to be final. It was claimed in support of the motion that this memo. showed that the arbitrator had proceeded on a wrong principle in making up the accounts between the parties and also that he had departed from his original intention as to his award.

In support of the ground of the discovery of new evidence taken in the motion, the affidavits stated that an important witness had been sick during the progress of the hearing before the arbitrator, and it was only ascertained a day or two before the motion was made that material evidence could be given by another person who had not been called as a witness.

The application to set aside the award was refused by the Divisional Court, and the decision of that court was affirmed by the Court of Appeal. From the latter decision an appeal was taken to the Supreme Court of Canada.

Christopher Robinson, Q.C., and *A. Ferguson*, Q.C., for the appellants, cited the following authorities: *In re Dare Valley Railway Co.* (1); *East and West India Docks Co.* v. *Kirk* (2); *James* v. *James* (3); *Kent* v. *Elstob* (4).

S. H. Blake Q.C., and *Keefer* for the respondents referred to *Dinn* v. *Blake* (5), *Ching* v. *Ching* (6), *Flynn* v. *Robertson* (7), *Hogg* v. *Burgess* (1), *Doed. Oxenden* v. *Cropper* (9).

SIR W. J. RITCHIE C.J.—This was a voluntary submission, without any provision therein for an appeal from the award; the reference could scarcely be larger, "the said action and all matters of account and counter

(1) L. R. 6 Eq. 429.
(2) 12 App. Cas. 738.
(3) 22 Q.B.D. 669; 23 Q.B.D. 12.
(4) 3 East 13.
(5) L.R. 10 C. P. 338.
(6) 6 Ves. 282.
(7) 3 H. & N. 293.
(8) 10 A. & E. 197; 2 P. & D. 497.
(9) L.R. 4 C.P. 327

1890

McRAE v. LEMAY.

Ritchie C.J.

claim therein, and all matters in difference between the parties." The case of *Hodgkinson* v. *Fernie* (1), clearly enunciates the law that where matters in difference are referred to an arbitrator he is constituted the sole and final judge of all questions both of law and fact, the exceptions to the rule being cases where the award is the result of corruption or fraud, or where the question of law arises on the face of the award or upon some paper accompanying and forming part of the award, which is approved of in *Dinn* v. *Blake* (2), where another exception is stated, viz.: where the arbitrator himself admits that there is a mistake, which, in the case before us, the arbitrator does not admit.

The award is good on its face. The draft award or memo. relied on handed to the defendant's solicitor, was neither delivered with the award, nor did it form any part of it. Neither this draft award nor the oral admissions of the arbitrators can be used for setting aside the award.

This is not the case of an application to revoke the submission. See *Dinn* v. *Blake* (3), *Leggo* v. *Young* (4).

I agree with the reasons given by Mr. Chief Justice Armour for refusing to set this award aside, and also with him that no proper case is made for remitting the award to the arbitrators on the ground of the discovery of new evidence.

For the reasons given, and on the authorities cited by Chief Justice Armour and Mr. Justice Osler, I think the decision in the court below correct, and that this appeal should be dismissed.

STRONG J.—This is an appeal against an order of the Court of Appeal for Ontario, affirming an order of the Queen's Bench Division, refusing a motion to set aside

(1) 3 C.B.N.S. 189.
(2) L.R. 10 C.P. 388.
(3) L.R. 10 C.P. 388.
(4) 16 C.B. 626.

1890

McRAE
v.
LEMAY.

Strong J.

an award upon the ground of mistake on the part of the arbitrator.

In my opinion there is no foundation whatever for the appeal.

Nothing in the law relating to arbitrations and awards is better established than the rule that the court will not set aside or otherwise interfere with an award on the ground of mistake in the arbitrator either as regards the law or the facts, except in certain well defined cases.

These exceptions are, first, where the mistake appears on the face of the award, or in some paper which forms part of the award and is by reference incorporated with it. Secondly, in cases where the arbitrator himself states:

> That in his opinion he has made a mistake of law or fact and was desirous of the assistance of the court, and willing to reserve his decision on the point on which he believed himself to have gone wrong.

For the first of these rules, the authority of the cases of *Hodgkinson* v. *Fernie* (1); *Dinn* v. *Blake* (2); *Flynn* v. *Robertson* (3); *Holgate* v. *Killick* (4); *Re London Dock Company* v. *Trustees of Shadwell* (5), may be quoted. For the second position besides the before mentioned cases of *Dinn* v. *Blake* (2), and *Flynn* v. *Robertson* (3); *Mills* v. *The Master, etc. of the Mystery of Bowyers* (6), may be referred to.

In the present case there is nothing on the face of the award or in any paper forming part of it showing any mistake, nor has any mistake been admitted by the arbitrator. It has been attempted to demonstrate that there has been a mistake by producing a draft award which the arbitrator, after he had published his award, handed to the appellants' solicitor and by arguing from what there appears that the arbitrator must

(1) 3 C. B. N. S. 189.
(2) L. R. 10 C. P. 388.
(3) L. R. 4 C. P. 324.
(4) 7 H. & N. 418.
(5) 32 L. J. (Q.B.) 30.
(6) 3 K. & J. 66.

have been mistaken, and also by an affidavit of the appellants' solicitor of what was stated to him by the arbitrator after the publication of the award. These are totally insufficient grounds for interfering with the award. In *Lockwood* v. *Smith* (7) Martin B. says:

> There must be some grounds given us to suppose that the arbitrator is satisfied that there has been a mistake.

Nothing before us indicates that the arbitrator in the present case is under any such impression or that he thinks he has in any respect committed an error; for all that appears to the contrary if the award was now referred back to him he would again make one exactly similar.

If any illustration of the wisdom of the rule referred to could be required it would be afforded by the course which was taken on the argument of the present appeal which resolved itself into nothing less than an appeal at large from the arbitrator's decision on the law and facts; therefore to entertain such an application would be, in effect, to supersede altogether the functions of the arbitrator whose arbitrament the parties had agreed should be final.

The appeal must be dismissed with costs.

TASCHEREAU J.—I am of opinion that the appeal should be dismissed with costs for the reasons given by his Lordship the Chief Justice.

GWYNNE J.—Concurred.

PATTERSON J.—I cannot see my way to hold the appellant entitled to be relieved from the award of which he complains.

The submission is by an order made by consent of parties in an action in which the present respondents are plaintiffs and the appellants defendants.

(7) 10 W. R. 628.

1890

McRAE
v.
LEMAY.

Patterson J.

There is no agreement contained in the submission that the award shall be subject to appeal under the Ontario Statute, and there is no motion to refer back the award to the arbitrator for reconsideration. The present motion is merely to set aside the award.

The appellants were contractors with the Canadian Pacific Railway Company for the construction of a part of the railway. The respondents were sub-contractors under them for the construction of certain pile and trestle bridges, and they were to be paid—with some exceptions which do not effect this contract—a price per thousand feet (board measure) for the timber, round or flatted, put into the work. The price covered the work of construction as well as the supplying of the timber, which was to be procured along the line where practicable and within reasonable hauling distance.

The dispute is over the amount awarded to the respondents, which the plaintiff alleges to be more than a measurement of the timber by "board measure" will justify.

The award adjudges that the respondents are indebted to the plaintiffs in $9,900.52, without giving any details as to how that sum is arrived at, but the arbitrator had at one time intended to have made his award in a different shape, and had prepared a draft award giving full details of the process by which the result of $9,900.52 was reached. That draft was afterwards seen by the parties or their solicitors and is brought before the court with an affidavit showing how it was obtained and stating conversations with the arbitrator.

It is objected on the part of the respondent that, under the established law relating to motions to set aside awards that are good on their face, the draft award and the conversations mentioned in the affidavit

cannot properly be taken into consideration by the court. To decide that objection would involve a discussion of some questions of fact as well as of law, including a divergence in one or two particulars between the arbitrator and the respondents' solicitor in their accounts or their understanding of the conversations, &c., referred to in the affidavits filed. In my judgment that discussion is unnecessary, because I think that, even with all the materials presented by the appellant before us, we must agree with the courts below in holding that the arbitrator did not exceed his jurisdiction.

The term "board measure" is not one that explains itself. It is shown to be a term in use among lumbermen, and among them to denote the number of square feet of 1-inch boards which a log of given length and diameter is estimated to be capable of producing. Mr. Pinkerton, a partner in the appellant firm and himself an engineer, speaks of it in his evidence, and he seems to show that a lumberman would probably make his estimate by means of Scribner's tables, though the actual yield might vary according to the thickness of the saw. One of his answers is:

> I have looked over Scribner; he gives a table, and it is pretty hard to arrive at a rule, because some saws are thicker than others, as a band saw will not waste as much as a circular saw, so there could not be any rule on that point.

The appellants by no means conceded that "board measure" according to Scribner's tables satisfied their contract with the railway company. They claimed the cubic contents of each piece of timber, and the company's engineers measured and certified on that basis. The company insisted on "board measure" by the lumbermen's scale, which, as Mr. Pinkerton explains, is much less than the cubic contents of the log, because you lose the slabs and saw cut.

On this dispute the appellants brought an action against the company which was compromised during

1890

McRAE
v.
LEMAY.

Patterson J.

the trial without a decision on the meaning of "board measure" in these contracts.

The respondents claimed against the appellants another mode of computation, at least as to a considerable part of their work They had three contracts, each for a different section of the railway. On one section there was timber available to supply the sizes, 12 inches square being the largest required. There is no difference between the measurements by which the respondents claimed and those of the appellants on that section. The same thing is said to be true of the first forty miles of the second section, but after that the available timber was smaller, and smaller sizes than the company's contract required were used and accepted by the company's engineers. It is, as I understand, with regard to these smaller timbers that the principal dispute exists. The respondents were not satisfied to be allowed merely the cubic contents of each stick, and of course were farther from submitting to the lumbermen's board measure. Their claim was for the full sizes of timbers required by the contract, although smaller sizes were used and accepted. As expressed by one of the Lemay family in his evidence before the arbitrator—

> The timber that was used as 12 by 12 was measured 12 feet to the running foot; timber used as 8 by 12 was measured at 8 feet to the running foot.

The dispute as to this made of computation was one of the matters in difference referred to the arbitrator. He does not appear to have adopted the respondents' method of making their computations. He takes their measurements which were made as just noticed, and says:

> But from the evidence I am satisfied that a large percentage of the timber measured as 12 inches in diameter was not that size. In fact John W. Lemay says in his evidence that some of it was not more than 9 inches in diameter at the small end. For me to arrive at the exact amount that should have been allowed it would be necessary to have

all the bridges re-measured. This is an impossibility, as many of the structures have already been filled in with earth by the railway company, and to do what I consider fair and right between the parties a deduction of 30 per cent. should be made from the above figures in the measurements made by plaintiff's witnesses Beauvais and Lemay.

Then he gives the figures which bring out the amount of the award. In doing this he makes the deduction of 30 per cent., not from measurements of Beauvais and Lemay but from the excess of their measurements over those put in on behalf of the appellants. I do not understand that to be an error as was urged at the bar. I understand the error to be in failing to express his meaning clearly. There are three reasons for so thinking. There is first the arbitrator's own figures. Then there is the fact that to deduct 30 per cent. from the gross measurements would reduce the measurements below those of the respondent; and lastly there is the affidavit of the solicitor who obtained the draft award and who talked the matter over with the arbitrator. He says the arbitrator—

> further stated to me that he considered there was no evidence whatever before him as to what system of measurements was, or was to be, adopted on the second and third contracts except the evidence of Ross and Lemay, and that as the work was all filled in, and he could not discover the actual measurements, he was obliged to dispose of the question of measurement of timber without any evidence and according to his own ideas of right and justice, and that he accordingly took Lemay's measurement, allowing thirty per cent. off the excess or difference between Lemay's and McRae's claims to make up for the fact that Lemay admitted that part of the timber was only nine inches in diameter.

I have carefully examined the cases cited to us and a number of others, and I do not see that either on authority or on principle we should be warranted in setting this award aside.

I think the appeal should be dismissed with costs.

Appeal dismissed with costs.

Solicitor for appellants: *A. Ferguson.*

Solicitors for respondents: *Keefer, Thacker & Godfrey.*