

1879
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 \*Oct. 29.  
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STEPHEN D. OAKES.....APPELLANT ;

AND

THE CITY OF HALIFAX.....RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA.

*Award—Final judgment—Power of attorneys to enlarge time for making award—Appeal, additional ground on.*

In an action on contract, the matters in difference were, by rule of court, by and with the consent of the parties, submitted to arbitration. By the rule of reference the award was directed to be made on or before the 1st May, 1877, or such further or ulterior day as the arbitrators might endorse from time to time on the order. The time for making the award was extended by the arbitrators till the 1st of September, 1877. On the 31st August, 1877, the attorneys for plaintiff and defendants, by consent in writing endorsed on the rule of reference, extended the time for making the award till the 8th September. On the 7th September the arbitrators made their award in favor of the plaintiff for the sum of \$5,001.42, in full settlement of all matters in difference in the cause.

*Held*—reversing the judgment of the Supreme Court of *Nova Scotia*—that where the parties, through their respective attorneys in the action, consent to extend the time for making an award under a rule of reference, such consent does not operate as a new submission, but is an enlargement of the time under the rule and a continuation to the extended period of the authority of the arbitrators, and therefore an award made within the extended period is an award made under the rule of reference, and is valid and binding on the parties.

2. That the fact of one of the parties being a municipal corporation makes no difference.
3. That in *Nova Scotia*, where the rule *nisi* to set aside an award specifies certain grounds of objection, and no new grounds are added by way of amendment in the court below, no other ground of objection to the award can be raised on appeal.

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\*Present:—Ritchie, C. J., and Fournier, Henry, Taschereau and Gwynne, J. J.

**APPEAL** from the judgment of the Supreme Court of *Nova Scotia* pronounced on the 31st day of March, A. D. 1879, setting aside an award made in favor of the appellant.

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The suit was brought by the appellant against the respondents on a contract for the construction of certain sewers across the north common in the city of *Halifax*. After the cause was at issue, by a rule of the Supreme Court, the matters in difference were referred to two arbitrators named in the rule, with power to select a third arbitrator in case of a difference between them. The arbitrators named appointed a third.

The award was to have been made on or before the 1st day of May, 1877, or such further or ulterior day as the arbitrators, or any two of them, might endorse from time to time on the order. The arbitrators first extended the rule to 1st July, 1877, and then to 1st September, 1877. On the 31st August, 1877, by consent in writing endorsed on the rule of reference, the attorneys for plaintiff and attorney for the defendants, who is by statute the Recorder of the city, and as such is bound to act as counsel and attorney for the city in any suits within the Provincial Courts, to which the corporation is a party, extended the time to the 8th of September.

On the 7th of September, the following award was made:

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Supreme Court.

"*Stephen D. Oakes*, plaintiff, v. *The city of Halifax*, defendants.

"We have heard the parties and their witnesses and fully considered the matters referred to us under the annexed rule made in this cause on the 28th day of December, A.D., 1876, and the endorsements thereon, and we do award and order that the city of *Halifax*, defendants herein, do pay the plaintiff the sum of five thousand and one dollars and forty-two cents (\$5,001.42),

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in full settlement of all matters in difference in this cause.

"In making this award we have disallowed an item of \$1,727.00 in the defendants set off, alleged to have been paid *J. B. Neilly & Co.*, as we considered that it was not a matter of set off against the plaintiff in this suit, or payment on the contract to a person authorized to receive it.

"*Halifax*, 7th September, 1877.

"Fees for 29 meetings, \$400.00.

"(Signed) B. G. GRAY,

"(Signed) J. N. RITCHIE,

"(Signed) ROBERT SEDGEWICK,

} Arbitrators."

A rule *nisi* was subsequently obtained by the respondents from a judge in chambers returnable before the court *in banco* to set aside the rule of reference and the award on a great number of grounds, the following grounds being chiefly relied upon, viz:—

"17. Because the said award was not made until after the first day of September now last past, and the time for making said award expired on the first day of September.

"18. Because no extension of the time for making the award was made by said arbitrators, or any two of them extending beyond the first day of September, A.D. 1877, and said award was not made until after that day, to wit: on the seventh day of September aforesaid."

After argument of the said rule *nisi* the Supreme Court of *Nova Scotia* (*Weatherbe*, J., dissenting,) set aside the award.

From the rule setting aside the award, the appellant appealed to the Supreme Court of *Canada*, and the respondent there moved to quash the appeal on the ground that the court had no jurisdiction to entertain the appeal, because the rule appealed from was not a final judgment within the meaning of the Supreme and Exchequer Court Act. This motion was rejected.

Mr. *Cockburn*, Q. C., for appellant :

There are two grounds only on which this award was set aside, viz.: That there was not a valid enlargement of the time for the arbitrators to make their award, and that there was no valid waiver by defendants' counsel as to certain irregularities in the conduct of the arbitrators. It is true that the last enlargement was made by the attorneys in the cause, but this is sufficient. See ch. 109, sec. 19, of the Rev. Stat. N. S., 4th series. But independently of this statute, the enlargement was valid. Instead of being a nullity, it was a continuance of the former submission, an enlargement by a higher authority than that of the arbitrators—the authority from which alone the arbitrators obtained their power—the parties themselves, acting through their attorneys.

[The CHIEF JUSTICE:—We will hear what Mr. *Gormully* says on this point.]

Mr. *Gormully*, for respondents :

The parties here are not, I think, to be governed by sec. 19, of ch. 109, of the Rev. Stat. of *Nova Scotia*, just cited, but by the 1st sec. of that Act. The reference in this case was by rule of court, and, being a delegated authority, it must be construed strictly. The enlargement could only be made by the two arbitrators in a particular manner. They properly made an enlargement until the 1st of September. They did not make their award, however, till the 7th September. It is true the parties, through their attorneys, enlarged the time to the 8th of September. This enlargement was not in pursuance of the rule of reference. If anything, it amounted to a new submission, and, if so, the attorney on the record, representing a municipal corporation, could not, as such attorney, and by virtue of his retainer only, bind such corporation by a new submission, not in a suit.

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Then there is another point, whether the award is valid on the face of it,

[The CHIEF JUSTICE:—Was this point raised in the Court below? if not, it cannot be raised on appeal.]

No, my lord, but that objection is open, because it appears on the face of the award. This fact was before the Court below, and this is merely a new argument on the fact.

The award in this case does not find specifically on each issue. By the law of *Nova Scotia* the costs of each issue are borne by the party against whom such issue is found. This award does not so dispose of the issues as to enable the Court to tax the costs.

Mr. Cockburn, Q. C., was not called upon to reply.

RITCHIE, C. J. :

We all think this appeal should be allowed. The last point suggested by counsel for the respondent I do not think is open. In the first place, I do not think, as at present advised, that the award is bad on the face of it. We should read this award, as it ought to be read, as the language of persons to whom this matter has been referred should be read, that is, reasonably, by principles and rules which ought to guide us in construing language in the ordinary transactions of life. They have directed the sum awarded to be paid in full settlement of all matters in difference. The reasonable inference is that they took into consideration all matters in difference. They could not have done that without considering all the issues in the cause, and in doing that and awarding as they did, they must have found for the plaintiff upon all those issues. They found nothing in favor of the defendant at all, and as to one issue—the plea of set-off—they explained that they had not allowed it, because they did not think it was a matter of set-off against the plaintiff. In such a

case as this, where the rule was taken out on a certain number of points submitted for the consideration of the court and argued before the court below on those points, and where no application was made to that court to alter the rule, so as to allow other grounds to be put forward, as is necessary in the *Nova Scotia* Supreme Court, I think it is too late now to raise an entirely new point here and make this court as it were a court of original jurisdiction.

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As to the extension of time, it appears to me that this was a proper continuation of the original submission.

I do not think any sufficient ground is shewn for setting aside the award, and I think, therefore the appeal must be allowed with costs.

FOURNIER, J., concurred.

HENRY, J. :

I have looked through the pleas, and I cannot find any of them that is not answered by the statement made in the award. It covers every single one of them, and I can see no difficulty at all in saying that the arbitrators found for the plaintiff on every issue that was raised in the trial. The rules in regard to corporations appearing by an attorney, I think, in a case like this, are the same as if the attorney appeared for an individual. I consider that the attorneys for the corporation had by law the full authority of the corporation to refer this matter to arbitration, in the first place without consulting them at all; and in the next place, the same power to extend the time; and, although there is a provision in the rule of reference giving the arbitrators power to extend it, it does not interfere with the inherent right of the attorneys to extend the time independently of it. In these rules of reference under the common law, it is not strictly speak-

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ing, the action of the court. In order to keep the cause in court and enable the court to have jurisdiction either to set aside the verdict, or confirm it and enter judgment upon it, it is necessary that it should have the sanction of the court; but it is virtually, to all intents and purposes, a mere agreement between the parties to refer the case to arbitration. I think, therefore, that the attorneys, having the original power, had the power afterwards to extend the time independently of what is stated in the rule. The other is an extra power given to the arbitrators to extend the time, whether both parties are willing or not, and to that extent, it takes away from either party the power to say the time for making the award shall not be extended. That is the object of the provision, and that is accomplished up to September 1st, whether the parties like it or not; but one or two days before that time arrives the attorneys, fully authorized, as I think they were, extended the time. I think that binds the principals of both parties, and the extension of time in question is no ground for setting aside this award. In regard to the rule *nisi* on the order of a judge out of court, I may say that I am not at all satisfied that any judge has the power to interfere in that way in a case of that kind. I know that in *Nova Scotia* the practice has been that the judges, in place of making any order in the matter of an award, or taking any affidavits, have refused them, and given instead an order to stay proceedings, until the parties could have an opportunity of applying to the full court to set it aside. This case appears to have been different. This plaintiff had not an opportunity of an argument before the full court before this rule *nisi* was granted by a single judge. I think neither the rule of reference appointing the arbitrators, nor their award, as I understand the practice in *England*, and the power of a judge in chambers

there, can be controlled by a judge sitting at chambers; nor do I think that a judge in *Nova Scotia* can grant an order returnable before the whole court, except where he has power to decide the whole case itself. Entertaining these views, I certainly concur in saying that this appeal should be allowed, and that the plaintiff in this action should have judgment for the amount of his award.

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TASCHEREAU, J., concurred.

GWYNNE, J. :—

We have no right, neither had the court below, to enter into this case upon the merits. We have nothing, therefore, to do with the facts, and I must say it seems strange to me that an award which the court setting it aside pronounced to be unimpeachable on the face of it, and made by a court of arbitrators, which the chairman of the Board of Works, the member of the corporation most conversant with the matter, admitted to be composed of gentlemen most eminently competent to decide the matters in difference, should be set aside upon a technical point, such as that of the power of the attornies to extend the time. I am of opinion that the parties represented by attornies had, by their attornies, power to extend the time for making the award, and that their doing so was only an extension of the time under the old submission, and not a new submission.

It would, I think, have been a matter much to be regretted, if the Court had come to the conclusion that this case had not been appealable. In a matter in which the court below should set aside an award for some cause which may be said to come within the exercise of their discretion, a right of appeal might be well questioned, but here the court has proceeded wholly upon what they pronounced to be a point of law, viz. :



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that an extension of the time by the attornies was null  
and void.

*Appeal allowed with costs.*

Gwynne, J.

Solicitor for appellant : *J. S. D. Thompson.*

Solicitor for respondents : *William Sutherland.*

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