

1884 ~~~~~ *Dec. 8. ~~~~~ 1885 ~~~~~ *June 22. ———	GIDEON VERNON AND MARY E. } VERNON (Plaintiffs)..... } APPELLANTS; AND WARREN OLIVER (Defendant)..... ..RESPONDENT.
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ON APPEAL FROM THE SUPREME COURT OF NEW
BRUNSWICK.

*Arbitration and award—Misconduct of arbitrators—Bill to rectify
award—Prayer for general relief—Jurisdiction of Court—Practice
—Factum—Scandalous and impertinent.*

The bill in this case was filed to rectify an award made under a submission to arbitration between the parties, on the ground that the arbitrators considered matters not included in the submission, and had divided the sums received by the defendant from the plaintiffs, because that defendant's brother and partner was a party to such receipt, although the partnership affairs of the defendant and his brothers were excluded from the submission. The bill prayed that the award might be amended and the defendant decreed to pay the amount due the plaintiffs on the award being rectified, and that, in other respects, the award should stand and be binding on the parties; there was also a prayer for general relief.

Held, affirming the judgment of the court below, that to grant the decree prayed for would be to make a new award which the court had no jurisdiction to do, but:

Held, also, reversing the decision of the court below, that under the prayer for general relief the plaintiff was entitled to have the award set aside.

The plaintiffs' factum, containing reflections on the judge in equity and the full court of New Brunswick, was ordered to be taken off the files as scandalous and impertinent.

APPEAL from the Supreme Court of New Brunswick,

*PRESENT—Strong, Fournier, Henry, Taschereau and Gwynne, JJ.
(The Chief Justice being related to some of the parties in the cause, took no part in the hearing of the appeal.)

affirming the judgment of the judge in equity dismissing the plaintiffs' bill (1).

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The facts of the case sufficiently appear in the judgment of the court.

J. Travis for appellants contended, first, that under the prayer of general relief in his Bill he was entitled to have the award rectified, and if not under that prayer, then under an amended prayer, which this court, under 43 Vic., ch. 34, has power to grant, and if the court was of opinion that the appellant was not entitled to have the award rectified, then he was entitled to have the award set aside, on the ground that the arbitrators made an award on matters not included in the submission and over which they had no jurisdiction, and relied on and cited *inter alia* Con. Stats., N.B., ch. 49, sec. 22. *Parsons on Contracts* (2); *Beaumont v. Boulbee* (3); *In re Dare Valley Railway Co.* (4); *Duke of Buccleuch v. Metropolitan Board of Works* (5).

C. A. Palmer for respondent :

The case made by the bill does not come within the class of cases where a Court of Equity will rectify an award, and the setting aside of the award would not be an alternative relief, for it is entirely inconsistent with the prayer of the bill. *Phillips v. Evans* (6); *Daniels* (7); *Stevens v. Guppy* (8); *Verplank v. The Mercantile Insurance Co.* (9).

J. Travis in reply.

The judgment of the court was delivered by
 G W Y N N E, J. :—

Three several actions had been commenced in the Supreme Court of New Brunswick against the above

(1) 23 N. B. R. 392.

(2) 7 Ed. 698.

(3) 5 Ves. 485.

(4) L. R. 6 Eq. 429.

(5) L. R. 5 H. L. 418.

(6) 12 M. & W. 309.

(7) 5 Am. Ed. 397.

(8) 3 Russ. 171.

(9) 1 Edw. Ch. Reps (N.Y.) 49.

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defendant, the one at the suit of the above named plaintiff, Gideon Vernon, another at the suit of him and his wife, and the third an ejectment on the demise of Gideon and Mary E. Vernon ; before any thing was done in these actions further than service of the writs by which they were commenced, it was agreed by and between the parties to this present suit, that the several matters in dispute between them, and for which the said actions were commenced, should be referred to arbitration, and for carrying out such agreement mutual bonds of submission were executed ; that executed by the defendant has been produced, and it contains the following statement of the matters intended to be referred :—

Whereas differences have arisen between the above named and bounden Warren Oliver on the one part, and the above named Gideon Vernon and Mary E. Vernon his wife, on the other part, and there are now depending in the Supreme Court of the Province of New Brunswick three suits at law, one brought by the said Gideon Vernon against the said Warren Oliver and one David Oliver to recover from them certain sums of money claimed to have been lent by the before mentioned Mary E. Vernon to the said Warren Oliver and David Oliver ; one by the said Gideon Vernon and Mary E. Vernon, his wife, against the said Warren Oliver to recover from him damages for an alleged trespass to the person of the said Mary E. Vernon by the said Warren Oliver ; and an action of ejectment brought by the said Gideon Vernon and Mary E. Vernon against the said Warren Oliver to eject him from certain lands situate, &c., &c., claimed by the said Mary E. Vernon to belong to her, which said differences and suits and all demands concerning the same, including mesne profits in the said last mentioned suit, the said Warren Oliver on his part, and the said Gideon Vernon and Mary E. Vernon his wife, on their part, have and do hereby agree to refer to the award and determination of, &c., &c., &c.

The submission contained further an agreement that the said arbitrators, or any two of them, should be at liberty to order and determine what they should think fit to be done by either of the said parties respecting the matters referred, and this further agreement :—

And it is agreed between the said parties that in the suit first

above named, namely, *Gideon Vernon v. David Oliver and Warren Oliver*, that the award of the arbitrators, or any two of them, shall, if it be against the said Warren Oliver and David Oliver, show the amount owing by the said Warren Oliver and David Oliver to the said Mary E. Vernon.

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Upon the arbitration the defendant's attorney presented a claim of the defendant against Gideon Vernon alone, as a set off against his demand in his action for recovery of the monies lent by his wife to the defendant and David Oliver; the plaintiff's attorney objected to the arbitrators entertaining this claim of set off, and to their receiving any evidence in respect of it, upon the ground that, as he contended, it was not within the submission, and moreover, that it was barred by the Statute of limitations; the arbitrators however, entertained the claim, notwithstanding the plaintiff's objection, and disregarding wholly the last clause contained in the submission as above set out, they did not by their award find, as they were expressly required to do, what was the amount owing in the said first mentioned suit to the said Mary E. Vernon by the said Warren Oliver and David Oliver, but made their award as follows:—

That the said Warren Oliver should, on or before the 4th August next ensuing the date thereof, pay or cause to be paid to the said Gideon Vernon the sum of six hundred and eighty-three dollars, in full payment and discharge of and for all monies, debts, damages, dues, claims and demands of the said Gideon Vernon and Mary E., his wife, or either of them, upon any account or transaction or other matter whatsoever at any time before their entering into the said bonds of arbitration as aforesaid, and that the said Warren Oliver or his heirs shall and do, on or before the said fourth day of August next ensuing the date hereof, make and execute a good and sufficient deed of conveyance of all his share and right in the lands of the estate of his late brother, Alfred Oliver, situate, &c., &c.

The award then directed that the defendant should pay to the arbitrators the sum of \$84 (eighty-four dollars) for their costs of the arbitration and award,

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and lastly, the arbitration did thereby further award and decree that the said award should be final and conclusive of all matters, actions, cause and causes of action, suits, controversies, trespasses, debts, damages, accounts and demands whatsoever, for or by reason of any matter, cause or thing whatsoever, arising out of the matters referred to them by the said bonds previous to the date thereof; the submission contained no clause, providing that it might be made a rule of any court. The plaintiffs filed their bill in equity in the Supreme Court of New Brunswick, wherein they alleged that the arbitrators, in disregard of the plaintiff's objection, had entertained the said matter of set-off which the plaintiffs insisted was not within the submission, and had allowed the same to the defendant to the amount of seven hundred and thirty-seven dollars and fifty-six cents, as against the monies lent by the said Mary E. Vernon to the said defendant and his brother David, and that they wholly neglected to find, although they were expressly required by the submission to find, what was the amount which was due by the defendant and his brother David to the said Mary E. Vernon, but that, on the contrary, they had in fact (after deducting from such amount whatever it may have been, which the arbitrators deemed to have been so due the said seven hundred and thirty-seven dollars and fifty-six cents,) divided the balance, without showing what that balance was, into two equal parts, and included in the sum of said six hundred and eighty-three dollars only one of such parts, and then awarded in effect that the plaintiffs should accept the one-half of such balance in full satisfaction and discharge of the whole amount, whatever it might be, which was really due to the said Mary E. Vernon from the said defendant and his brother; the bill then alleged that the plaintiffs, in order to take up the said award, had been obliged to

pay to the said arbitrators the said sum of eighty-four dollars, the costs of the said arbitration and award, which the arbitrators had adjudged should be paid by the defendant, and it prayed that the said award might be amended by the court in the above matters, that is to, say by expunging the credit given to the defendant for the amount of set off claimed by him, and by reinstating the half of the balance which the arbitrators had deducted from the amount due to Mary E. Vernon ; and that the defendant might be decreed forthwith to pay to the plaintiff, Gideon Vernon, the whole amount coming to him on the said award, being rectified as aforesaid in the several particulars, in which it is wrongful and improper as aforesaid ; and that in all other respects the said award should stand and be forthwith acted upon and be binding on the parties thereto ; and that the said Warren Oliver should also pay to the said Gideon Vernon, the said sum of eighty-four dollars with interest thereon, and interest on the proper sum due and payable to him under the said award, and that the plaintiffs and each of them might have all other relief in the premises to which they are entitled, and that the defendant might pay the costs of this suit and that all proper directions should be given and accounts taken.

The plaintiffs' bill is framed upon the erroneous assumption that the jurisdiction of a Court of Equity over awards extends to the making of a wholly new award in the place of that made by the judges of the parties own selection. What is the precise limit of the jurisdiction of the court over awards it is not necessary to define, for it never has been supposed that it extended so far as to justify the court in undoing what the arbitrators, in the exercise of their discretion, have by their award deliberately done, and substituting therefor a finding which, in the opinion of the court, the arbitrators should have found ; or in adding to the amount by

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an award adjudged to either party, a sum which the arbitrators have by their award deliberately disallowed, however erroneous their disallowance of that sum may have been. If, as is contended by the plaintiffs, the item of set-off which the arbitrators are by the bill charged with having allowed to the defendant was not within the submission, the allowance of that item by the arbitrators would afford ground for setting aside their award, but could not justify the court in putting themselves in the place of the arbitrators, and in making a new award quite different from that which the arbitrators deliberately, albeit erroneously, have made. It is unnecessary to enquire whether this item of set-off was or not within the submission, for, if it was, and this was contrary to the intention of the parties, the plaintiffs' remedy was to have the submission rectified; and if it was not within the submission, their sole remedy was to have the award set aside if the arbitrators entertained the matter which was not within the submission. So likewise as to the amount alleged to have been deducted by the arbitrators by the process alleged of their dividing into two equal parts, the balance of the claim of Mary E. Vernon, after deducting from the whole of such claim the above item of set-off, and including one only of such two equal parts in the amount of \$683; the court can have no jurisdiction to add to the amount awarded that part which the arbitrators have deliberately, albeit erroneously, disallowed; by so doing the court would be constituting themselves judge of the differences between the parties in the place of the judges of the parties own selection. In so far therefore as the bill claims to have the award amended by the court in the particulars, and in the manner, specified, the jurisdiction of the court has been wholly misconceived. The frame of the bill also, is most objectionable for the scandalous prolixity of its contents. The plaintiffs have

introduced therein a great mass of irrelevant matter, consisting of a lengthy correspondence between the solicitors of the parties, and other matters which are wholly irrelevant, the object of the framer of the bill being to establish by such correspondence and other matters, that the intention of all parties to the submission was that it should be confined to the claims of Mary E. Vernon, and that therefore the item of set off was not within the submission; but whether it did or not, in fact, come within the terms of the submission, must needs be determined by the submission itself. The setting out therefore of this prolix correspondence in the bill was quite irrelevant. The prolixity thus introduced into the bill is followed, to an equally irrelevant extent, in the answer of the defendant, and is carried into the evidence adduced at the trial, where the whole of the evidence taken before the arbitrators, and the accounts entered into by them, was allowed to be introduced into this case, (notwithstanding the remonstrance and objection of the defendant's counsel,) just as if the bill was by way of appeal from the decision of the arbitrators upon the merits of the case. The result has been that the printed case in appeal laid before us has become expanded into a large book of about ninety printed pages, when the whole substance of the case might have been stated almost in as many lines. It is not, however, the printed case in appeal alone which is objectionable, for the factum of the plaintiffs is framed in such a scandalous manner, in fact, in such a virulent and malignant spirit of invective of the judgments of the learned judges whose decision is appealed from, as to disgrace not only the counsel by whom it was prepared, but this court also, if it should be permitted to remain upon its files or among its records; and for this reason, and to mark the sense of the court at the indignity offered to it by such a document being laid before it, it

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should be ordered to be struck off the files of the court, and not to be kept among the records of the case.

Although, in praying the interference of the court to amend the award in the particulars in which it was contended by the plaintiffs to be erroneous, the jurisdiction of the court has been misconceived, I am of opinion that under the prayer for general relief the plaintiffs were entitled to a decree setting the award aside, assuming sufficient cause for setting it aside to be established. *Stevens v. Guppy*, which was relied upon in the court below as establishing a contrary doctrine, was a case very dissimilar in its character. The substance of the present bill is, that the award is bad in the particulars mentioned, and that being so, it should be amended in the manner asked by the plaintiff in his prayer for special relief, or set aside under the prayer for general relief. It is the ordinary case of a prayer for alternative relief. Now, that the case made by the bill and established in evidence, requires that the award should be set aside, there can, I think, be no doubt, for the arbitrators have studiously, as would seem, refrained from finding, although they were expressly required by the submission to find, what amount was due to Mary E. Vernon for the monies loaned by her to defendant and his brother; the omission to find this amount constitutes a most important defect, for it now appears by the evidence of one of the arbitrators that in the amount of \$683 awarded in bulk, not showing how much, if anything, was awarded for the debt to Mary E. Vernon, or how much for the assault, or how much for mesne profits, is included a sum which constitutes but the half of a sum which, assuming the allowance to the defendant of the set off to have been unobjectionable, was so due to Mary E. Vernon, and the award nevertheless adjudges that the sum of \$683 so constituted shall be taken by the plaintiffs in full satisfac-

tion of all actions, and causes of action, up to the time of the execution of the submission, and so in satisfaction of a larger sum of undefined amount undoubtedly due to Mary E. Vernon, although not found by the award as it was by the submission required to be. In this respect the award cannot be sustained, but in view of the gross prolixity of the irrelevant matter set out in the bill, and of the fact that the plaintiffs wholly fail in what was made the chief object of the bill as framed, the plaintiff should have no costs in the court below nor upon this appeal.

The order of this court, in my opinion, should be that a decree for setting aside the award be issued out of the Court of Equity of the Supreme Court of New Brunswick, but without costs, and that the plaintiffs' factum filed in this case be struck from off the files and records of this court as scandalous and impertinent, and that no costs of this appeal be allowed to either party.

*Appeal allowed without costs. Award ordered to be set aside and plaintiffs' factum to be taken off the files of the court.*

Solicitor for appellants: *J. Travis.*

Solicitor for respondent: *C. A. Palmer.*

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