THOMAS R. JONES, ROBERT T. A. SCOTT, AND NORMAN ROBERTSON (Plaintiffs) ..... } APPELLANTS;

AND

WILLIAM H. TUCK (Defendant)..... RESPONDENT.

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*Feb'y. 28.

*June 23.

APPEAL FROM THE SUPREME COURT OF NEW BRUNSWICK.

Arbitration by order of Court at Nisi Prius—To be entered as a verdict—Motion to set aside—Judge's order—Special paper Sup. Court, N. B.—Affidavits in reply—New matter—Discretion of Court below.

The cause was referred by Court of *Nisi Prius* to arbitration, the award to be entered on the postea as a verdict of a jury. After the award the appellants obtained a judge's order for a stay of proceedings, and for the cause to be entered on the motion-paper of the Court below, to enable the appellants to move to set aside the award and obtain a new trial, on the ground that the arbitrators had improperly taken evidence after the case before them was closed. Before the term in which the motion was to be heard, appellants abandoned that portion of the order directing the cause to be placed on the motion paper, and gave the usual notice of motion to set aside the award and postea, and for a new trial, which motion, by the practice of the court, would be entered on the special paper. Defendant, in opposing such motion, took the preliminary objection that the judges order should be rescinded before plaintiffs could proceed on their notice, and presented affidavits on the merits, and plaintiffs requested leave to read affidavits in reply, claiming

* PRESENT—Sir W. J. Ritchie C.J., and Strong, Fournier, Henry and Gwynne JJ.

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that defendant's affidavits disclosed new matter. This the court refused, and dismissed the motion, the majority of the judges holding that plaintiffs were bound by the order of the Judge, and could not proceed on the special paper until that order was rescinded, the remainder of the court refusing the application on the merits. On appeal to the Supreme Court of Canada.

Held,—That the cause was rightly on the special paper, and should have been heard on the merits, and the court should have exercised its discretion as to the reception or rejection of affidavits in reply; *Strong* J. dissenting on the ground that such an appeal should not be heard.

Per *Ritchie* C.J.—A Court of Appeal ought not to differ from a court below on a matter of discretion, unless it is made absolutely clear that such discretion has been wrongly exercised. The statute (1) applies as well to motions for new trials, where the grounds upon which the motion is based are supported by affidavits, as in other cases. It makes no distinction, but applies to all "motions founded on affidavits."

APPEAL from a judgment of the Supreme Court of New Brunswick refusing to set aside an award in favor of the defendant and to grant a new trial.

The cause was referred to arbitration by order of the Judge at *Nisi Prius*, and the award under it was to be entered as a verdict of a jury. After the award was made, the plaintiffs obtained an order from Judge Weldon staying the proceedings and ordering the cause to be placed on the motion paper of the following term, and heard by the court on a motion to set aside the award. Before the term, plaintiffs gave notice of motion to set aside the award and have a new trial, and by that notice abandoned the portion of Judge Weldon's order directing the cause to be placed on the motion paper, and they entered it on the special paper, according to the usual practice in moving for a new trial. When the case was called the defendants objected that Judge Weldon's order was still in force and must be disposed of before plaintiffs could proceed, and the court allowed the hearing subject to such objection. The defendants

(1) Con. Stats. N. B. ch. 37, sec. 173.

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then presented affidavits on the merits, whereupon plaintiffs asked leave to read affidavits in reply, claiming that defendants affidavits disclosed new matter. This the court refused, and finally gave judgment for the defendants, some of the judges holding the preliminary objection fatal, the rest of the court refusing the application on the merits. The plaintiffs appealed from that judgment.

G. F. Gregory and *J. G. Forbes* for appellants :—

The appellants had a right to abandon that portion of Judge Weldon's order directing the cause to be entered on the motion paper, as it was opposed to the practice of the court, and the judge had no power so to order, and it was not necessary to have the order rescinded. *Black* v. *Sangster* (1). In fact being a nullity it could not be rescinded. *Sellars* v. *Dawson* (2). See also on this point *Clarke* v. *Manns* (3) ; *Lander* v. *Gordon* (4) ; *Woosnam* v. *Price* (5) ; *The King* v. *The Inhabitants of Diddleburry* (6) ; *The Queen* v. *The Inhabitants of St. Pancras* (7).

Again, we should have been allowed to answer the new matter in the respondent's affidavits opposing our motion in the court below. Admitting that our application was properly made, it is clear that we had such right under sec. 173 of the Con. Stats. And it is not a matter of discretion with the court, but they are bound to grant such an application.

It is submitted that your Lordships should hear our affidavits in reply and decide on the merits of the case, or failing that, that the case should be remitted to the court below to be heard on the merits there.

Tuck Q.C. respondent in person, submitted the case to the court.

(1) 1 C. M. & R. 521.
(2) 2 Dick. 738.
(3) 1 Dowl. 656.
(4) 7 M. & W. 218.
(5) 1 C. & M. 352.
(6) 12 East 359.
(7) 3 Q. B. 347.

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Ritchie C.J.

Sir W. J. RITCHIE C.J.—To the court below belongs the right to say whether, in their discretion, the parties should be allowed to produce affidavits in reply; therefore as affidavits in reply could only be properly before the court below, or before this court, after the court below had determined that the defendant's affidavits introduced new matter, and had given permission to plaintiffs to produce affidavits in reply, and no such permission having been given or affidavits read in reply, but on the contrary the court having refused that permission, we have no right now to look at any affidavits or other material not before the court below upon the mere statement of the party that he would have read them in reply if he had been permitted to do so. The question of the preliminary objections being now put aside, the case, in my opinion, should be fully heard on the merits in the court below, but I think we are not to anticipate what the court will or will not do on the hearing on the merits, still less to assume that the court will improperly refuse to allow affidavits to be read in reply if the case is such as to entitle the plaintiffs to that privilege.

I think there is nothing in the objection that the case should have been heard on the motion paper, and that it was not open to the court to hear it on the special paper (where, according to the rules and practice of the court, it clearly belonged), but that it should have been heard on the motion paper, (where, according to the rules and practice of the court, it clearly did not belong). If called on that paper it would seem to me the court, of its own motion, should have refused to hear it, but have ordered it to be placed on its proper paper, viz., the special paper in accordance with the 48th sec. of chap. 12, 44 *Vic.*

In the Supreme Court of New Brunswick there are

two papers; one called the motion paper, on which is entered cases where the party moving has fourteen days before the court served on the opposite party copies of the motion he intends making and of the affidavits on which he bases his motion, and when the motion comes on the party opposing is heard, and the motion is granted or refused.

There is also a special paper on which are entered all cases where cause is to be shown, and in which rules *nisi* have been granted or demurrers are to be heard.

Formerly, in cases of motions for new trials, the practice was to move on the first Friday or Saturday in term for a rule *nisi* to set aside the verdict or to enter a non-suit; if granted it was entered on the special paper of the next term, and if no sufficient cause shown, was made absolute (except in the county of York, where the motion for a rule *nisi* was made on the first day of term, and, if granted, was entered on the special paper of the same term).

Formerly, motions for new trials were motions *nisi*, and the causes in which rules *nisi* were granted were in the following term set down by the party to show cause on the special paper.

Now, motions "to set aside verdicts or for judgments *non obstante veredicto*," or for a repleader, are regulated by Act of Assembly, 44 Vic. cap. 12, sec. 3, which dispenses with rules *nisi* and allows the party seeking a new trial to give notice of the motion to the judge who tried the cause, and to the opposite party; also a statement of grounds of motion with the authorities relied on, and file statement with the Clerk of the Pleas; whereupon such causes shall be entered on the special paper without any rule *nisi* having been granted. But under neither the old nor the new system were motions for new trials ever entered on the motion paper.

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But I am doubtful (very) as to the propriety of the court refusing to allow affidavits in answer. Had a majority of the court in their discretion thought affidavits in answer should not have been received, on the ground that defendant's affidavits disclosed no new matter entitling the plaintiff to produce affidavits in reply, I should have hesitated before interfering with such an exercise of their discretion, because a Court of Appeal ought not to differ from the court below on a matter of discretion, unless it was made absolutely clear that they had exercised their discretion wrongly (1); but instead of this being the case, two of the learned judges—the Chief Justice and Judge Fraser—were of opinion that new matter was disclosed, and that plaintiffs should have an opportunity of answering such new matter; the other three judges expressed no opinion on this point, Judge Weldon being of opinion that there cannot be a postponement to permit affidavits in answer to be produced on motions for new trials; but in my opinion, the statute applies as well to motions for new trials, where the grounds on which the motion is based is supported by affidavits, as in other cases. The Cons. Stats., ch. 37, sec. 173, makes no distinction; but applies to all "motions founded on affidavits." Judge Palmer appears to base his judgment on the preliminary objection that the case should have been heard on the motion paper, but, on the question of allowing affidavits in answer, intimates that, in his opinion, it is not new matter arising out of the affidavits. Judge Wetmore, without expressing any opinion as to the granting of time, says, "I agree with the views of Mr. Justice Palmer as to the effect of the stay of proceedings."

So that in fact the question as to the propriety of plain-

(1) *Hugh* v. *Beal*, 44 L. T. 131.

tiffs being allowed to answer those affidavits has never been adjudicated on, the majority of the court having decided against the plaintiffs on other grounds, which I do not think tenable, and which did not involve the exercise of a discretion on this point; and this case should be remitted to the Supreme Court of New Brunswick, and there heard as if no preliminary objection had been raised, or rather that the preliminary objection should be overruled, and the hearing proceeded with on the merits.

STRONG J.—As regards the point of practice raised by this appeal I feel bound to follow the Supreme Court of New Brunswick, not merely because I incline to think the judgment of Mr. Jnstice Fraser and those of the other judges who agreed with him was correct, but also because I consider this court ought not to interfere to reverse a decision upon a mere question of practice, and that, too, a practice regulated by rules peculiar to the court appealed from.

Upon the merits also, at it appears to me, the appeal fails. The affidavits contain ample evidence to show that what Mr. DeForest did in inspecting books, and in making further inquiries of witnesses who had been examined, was authorised by agreement.

I need not enter more fully into the case, as it does not involve any question of law of general interest, and I am a single dissentient from the present judgment. It suffices therefore to say, that I, in all respects, agree with and adopt the reasens given in the judgment of Mr. Justice Fraser.

FOURNIER J.—I entirely agree with the views expressed by the Chief Justice.

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HENRY J.—Perhaps, under all the circumstances of the case, this matter had better be referred back to the court below. I have prepared no written judgment. The court below did not decide upon the matter of discretion in regard to the receipt of the affidavits on the part of the appellants against the validity of the award, and I think they should have done so; and if they had done so I think this court would have no right to interfere with the exercise of that discretion. Not having done so the affidavits are not in evidence, and not being in evidence, the judgment ought, consequently, to be, on the grounds stated by my brother Strong, in favor of the respondent. I think, however, under the circumstances of the case, the ends of justice would be better served by requiring, in all these cases where discretion is to be used by the courts below, the exercise of that discretion one way or the other, before this court decides upon the merits. It is with that view I consent to have the case referred back, but I think it should be without any costs whatever as far as this court is concerned.

GWYNNE J.—The circumstances under which the appeal in this case arises are somewhat peculiar, and the point raised by the appeal appears to have originated in a question of procedure. It appears that by the practice in New Brunswick there are two papers upon which all motions are entered in order to be heard in court, without any rule *nisi* being required, the one called the "special paper," upon which all motions for setting aside verdicts and for new trial are put, and the other simply the "motion paper" upon which all other motions are put. In the present case the action was referred to arbitration by a rule of reference at *nisi prius*, which directed that the award should be entered on the record as a verdict. An award was

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made in favour of the defendant, and as it was to be treated as a verdict for the defendant, the plaintiffs, in moving to set it aside, and for a new trial upon the ground that, as was alleged, the arbitrators had, after the close of the case taken further evidence behind the plaintiffs' back, must needs, according to the practice of the court, proceed by giving notice to the defendant and setting down the case for argument upon the special paper. The 184th section of ch. 37 of the Consolidated Statutes of New Brunswick, provides for staying proceedings in the case of an award ordered to be entered as a verdict, as follows:—

In any case in which a reference to arbitration shall be made at *nisi prius*, and it shall be ordered that the award of the arbitrators shall be returned on the *postea* as a verdict of a jury, the officer returning the *postea* shall set down on the margin thereof the day on which the award shall be so filed with him; and judgment on the *postea* shall not be signed until the expiration of twenty days after the day so set down; and any judge in any such case in which justice may appear so to require, may, either upon summons or not according to the circumstances of the case, order the returning of the *postea* and the signing of judgment to be stayed, until the court shall make order in the matter at the next succeeding term.

The award was made on the 12th July, 1883; on the 4th August the defendant served the plaintiffs with notice of taxation of costs, for the purpose of entering up judgment, for the 6th of August. On that day Mr. Justice Weldon, to whom an application was made for an order to stay proceedings under the above 184th section of the act, made an *ex parte* order, entitled in the Supreme Court and in the cause, as follows:—

Upon reading the affidavit of J. G. Forbes, the plaintiffs attorney in this cause, I do order that all further proceedings in this cause be stayed until an opportunity be afforded the said plaintiffs of moving this honorable Court in the ensuing Michaelmas Term. And I do further order that the said cause be set down in the motion paper at said ensuing Michaelmas Term for argument without any further order of this honorable court.

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This order was served, and thereby the entry of judgment was stayed until term. In the meantime, however, the plaintiffs being of opinion or advised that it was necessary to the practice of the court, that the case should be set down for argument on the special paper, as a motion for a new trial, and that the last clause of Mr. Justice Weldon's order should be treated as inserted by mistake and inadvertence, or as a false designation of the paper on which the case should be entered, and might, therefore, be disregarded or abandoned, gave notice to the defendant on the 6th October, according to the requirements of the rule of practice for setting down motions for new trial on the special paper as follows, entitled in the court and cause: "The plaintiffs will move to set aside the award and *postea*, and for a new trial in this cause, at the ensuing Michaelmas term of this honorable court, on the following grounds:

"The improper reception of evidence and explanations, by the arbitrators or some of them, in the absence of the plaintiffs and their counsel, and after the testimony for both sides had been submitted to the said arbitrators, and the case closed and given to them for their final order, determination, arbitrament and award.

"The following authorities will be relied on." Here follows a list of the cases relied upon by the plaintiffs.

Upon the 8th October, the plaintiffs gave to the defendant the further notice following in like manner, entitled in the court and cause:

Take notice that the plaintiffs on the motion to set aside the award and *postea* and for a new trial in this cause, will use the affidavits, copies of which were served upon you with the notice of said motion, and also the evidence taken before Amon A. Wilson, Esq., a barrister, under the order of His Honor Mr. Justice Palmer, in this cause, a copy of which was also served upon you, and that the plaintiffs will also use the order of His Honor Mr. Justice Weldon, made in this cause on the 6th August, A.D. 1883, a copy of which is

herewith served upon you. And take notice that the plaintiffs abandon so much of said last mentioned order as relates to this cause being set down on the motion paper without any further order of this honorable court.

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Upon the coming on of the motion upon the special papers for argument in Michaelmas term in the latter end of the month of October, the defendant took the preliminary objection following to the motion for new trial being heard, namely :

That all proceedings in the cause were stayed by the order of Mr. Justice Weldon dated 6th August, 1883, and the plaintiffs could not give any notice of motion for new trial, but were bound to act upon Mr. Justice Weldon's order which had not been set aside.

The force of the contention involved in this objection, assuming it to prevail, would seem to be that as a motion for a new trial could not properly be entered upon the "motion" paper, and as Mr. Justice Weldon had ordered that the motion by his order authorised should be entered on the "motion" paper, the plaintiffs had no right to move for a new trial at all, and that all that could have been moved for, under Mr. Justice Weldon's order, would have been to set aside the award, and that in such case the plaintiffs would take nothing by their motion, inasmuch as the award having been entered as a verdict, could only have been set aside by setting aside the verdict, which could only have been done upon a motion entered on the special paper, thus impaling the plaintiffs inextricably upon the horns of a dilemma. The court, however, ordered the motion for setting aside the award and *postea*, and for a new trial, to be proceeded with, subject to the preliminary objection. In the course of the argument defendant's counsel produced and read affidavits to the effect that what had been objected to by the plaintiffs as having been done by the arbitrators after the close of the case, had been done in pursuance of leave for that purpose, given by the parties and their counsel to the arbitrators

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at the close of the case, if they should desire to apply to any of the witnesses already examined for any further information before making their award. Upon this affidavit being read, on behalf of the defendant, the plaintiffs applied to the court, under the provisions of section 173 of ch. 37 of the Consolidated Statutes, for leave to file affidavits in answer to these affidavits, which contained, as was contended, new matter which plaintiffs had a right to contradict. That the matter was new and of such a character, that if not true, the plaintiffs should have been given an opportunity to contradict them by affidavits in reply, cannot, I think, admit of a question; but although the court had already ordered that the motion should be heard subject to the preliminary objection, which order involved a full hearing upon the merits reserving the consideration of the preliminary objection until the close of the argument upon the merits, they disposed of the plaintiffs application for leave to file affidavits in reply, as follows:

The court consisted of five judges. Of these the Chief Justice and one other were of opinion that the plaintiffs should be permitted to file affidavits in reply; two others were of opinion that the preliminary objection was fatal, and that Mr. Justice Weldon's order of the 6th August could not be abandoned after service, and that therefore the plaintiffs had no right to set down the motion upon the special paper, and for this reason they refused leave to the plaintiffs to file affidavits in reply.

The effect of the judgment of the two learned judges was, that although the court was proceeding with the argument upon the merits, subject to the preliminary objection, there was no use in proceeding with the argument, as in their opinion the preliminary objection was fatal, and the fifth learned judge was of opinion

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that the court could not grant leave to file affidavits in reply upon a motion for a new trial. Why the court could not grant leave to file affidavits in reply to new matter upon motions for new trials, as well as upon other motions, no reason is suggested.

The result was that the leave was refused, and the case was reserved for the consideration of the court upon the affidavits already filed, and the court, after taking time to consider the case, pronounced judgment as follows: The two learned judges, who, upon the plaintiffs application for leave to file affidavits, in reply to the affidavits filed on the defendant's behalf, were of opinion that the preliminary objection was insurmountable, adhered to that opinion, and expressed no opinion upon the merits. The Chief Justice was of opinion that there was no force in the preliminary objection, and that the motion was properly before the court. He was of opinion however, that the application had been answered on the merits, although he was of opinion that the plaintiffs should have been given the opportunity, which was refused them, to answer the defendant's affidavits. The learned judge who, upon the application for leave to file affidavits in reply, had agreed with the Chief Justice that the leave should be granted, gave a long judgment terminating in the conclusion that the preliminary objection was well founded, and that the plaintiffs could not take any proceeding in the cause while the order of Mr. Justice Weldon, of the 6th August, remained in force, and consequently could not give the notice they had given, and which was necessary to be given to support the motion. He, however, expressed his opinion also, that the motion was sufficiently answered upon the merits; although the court, by refusing leave to the plaintiffs to file affidavits in reply, can scarcely be said to have been in a position to pronounce upon the merits of a case in which the

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statement of both parties as to the facts were not permitted to be brought before the court, and the other learned judge, while he thought that the case was properly before the court, expressed his opinion to be in favour of the award as valid, and that the rule to set it aside, and for a new trial, should be refused on that ground, although this was the point upon which the plaintiffs had been refused leave to file affidavits in reply.

He added, however, "the majority of the court do not decide upon the merits, but that my order was not carried out." But from the above analysis of the judgment it appears that although three out of the five judges constituting the court did pronounce the preliminary objection to be sufficient, yet only two proceeded upon that point alone, and that the other and the remaining two (also constituting three in a court consisting of five) pronounced their judgment against the plaintiffs upon the merits, which, in point of fact, were only half heard if the plaintiffs should have been given leave to file their affidavits in reply. The arguments upon which the preliminary objection was maintained, appear to me to be altogether too technical and refined. The better course would have been to have treated Mr. Justice Weldon's order as a stay only of proceedings by the defendant within the meaning of the 184th sec. of the ch. 37, which was all the plaintiffs wanted, so as to have given them an opportunity to make the proper motion which the circumstances of the case and the practice of the court required; or, as it is admitted, that the special paper was the proper paper for a motion of the particular character of that which the plaintiffs had to make to appear upon, to have read that part of Mr. Justice Weldon's order, as to the motion being put on the "motion paper," not as a vital part of the order, but as a *falsa demonstratio* inserted by error

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or inadvertence ; and that, in treating it as not vital, and that in giving notice of motion as the plaintiffs did, and in setting down their motion on the special paper—they being in strict accord with the practice of the court, as to a motion of this character—the case was properly before the court, and should have been adjudicated on upon its merits, for which purpose, as it appears to me, the ends of justice required that the court should have received and read the affidavits offered by the plaintiffs in reply, and that in refusing to do so there has been a miscarriage ; and as those affidavits have been brought before us, the motion should, I think, be disposed of by us upon its merits, instead of remitting the case to be reheard by the court below at great, and as I think, unnecessary expense.

Upon an appeal from a rule refusing to grant a new trial, such as this appeal is, our duty under the statute, I think, is to do what the court below ought to have done, and that, in my opinion, was to receive the affidavits tendered in reply, and to adjudicate upon the merits, whether or not the verdict should be set aside and a new trial granted. As a majority of the court, however, is of a different opinion, I express no opinion upon the merits.

Appeal allowed.

Solicitor for appellants : *J. G. Forbes.*

Solicitor for respondent: *W. H. Tuck.*