IN THE MATTER OF THE ARBITRATION

BETWEEN

EUGENE DOBERER.....APPELLANT;

AND

WILLIAM RIGGS MEGAW.....RESPONDENT.

1903

*Oct. 20, 21.

*Nov. 10.

ON APPEAL FROM THE SUPREME COURT OF BRITISH COLUMBIA.

Arbitration and award—British Columbia Arbitration Act—Setting aside award—Misconduct of arbitrator—Partiality—Evidence—Jurisdiction of majority—Decision in absence of third arbitrator—Judicial discretion.

A reference under the British Columbia Arbitration Act authorized two out of three arbitrators to make the award. After notice of the final meeting the third arbitrator failed to attend, on account of personal inconvenience and private affairs, but both parties appeared at the time appointed and no objections were raised on account of the absence of the third arbitrator. The award was then made by the other two arbitrators present.

Held, reversing the judgment appealed from (10 B. C. Rep. 48), that under the circumstances there was cast upon the two arbitrators present the jurisdiction to decide whether or not, in the exercise of judicial discretion, the proceedings should be further delayed or the award made by them alone in the absence of the third arbitrator, and it was not inconsistent with natural justice that they should decide upon making the award themselves.

Held, further, that although the third arbitrator had previously suggested some further audit of certain accounts that had already been examined by the arbitrators, there was nothing in this circumstance to impugn the good faith of the other two arbitrators in deciding that further delay was unnecessary.

Where it does not appear that an arbitrator is in a position with regard to the parties or the matter in dispute such as might cast

*PRESENT:—Sir Elzéar Taschereau C.J. and Sedgewick, Davies, Nesbitt and Killam JJ.

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suspicion upon his honour and impartiality, there must be proof of actual partiality or unfairness in order to justify the setting aside of the award.

APPEAL from the order of the Supreme Court of British Columbia (1) dismissing an appeal from an order of the Honourable Mr. Justice Irving, setting aside an award of arbitrators.

By an agreement in writing dated 24th October, 1902, questions in dispute between the appellant and the respondent were submitted to arbitration, the agreement providing that the arbitrators or any two of them should make and publish their award on or before 15th December, 1902. By an order of the Honourable Mr. Justice Irving, dated 5th January, 1903, the time within which the arbitrators might make their award was extended for one month from the date of said order. Two of the arbitrators made and published their award in writing, dated 10th January, 1903, awarding the appellant $4,800.95 in respect of the matters referred to them. The respondent applied to set aside this award, and on the 25th of March, 1903, the Honourable Mr. Justice Irving set it aside with costs to be paid by the appellant. The appellant appealed from this order to the full court of the Supreme Court of British Columbia, which, on the 22nd day of June, 1903, dismissed the appeal with costs. From this latter order the present appeal has been taken.

Sir C. Hibbert Tupper K.C. for appellant. No charge of misconduct can be considered established against an arbitrator in the absence of some evidence of acquiescence by him in improper communications by a party, and the authorities shew that the arbitrator's denial on such a question is conclusive. The authorities place an arbitrator in the same position as a judge against

(1) 10 B. C Rep. 48.

whom misconduct will not be inferred in the absence of positive evidence of the clearest character. See *Crossley* v. *Clay* (1); *Wood* v. *Gold* (2); *Falkingham* v. *Victorian Railways Commissioner* (3), at p. 463; Russell on Arbitration, (7 ed.) 116; Redman on Awards, (3rd ed.) 109. As was said in *Moseley* v. *Simpson* (4), there must be clear evidence of a corrupt act and corruption—mere suspicion is not sufficient. Whenever the conduct of arbitrators is sought to be impeached the court should look with a jealous and scrutinizing eye through the evidence adduced for that purpose. *Brown* v. *Brown* (5). *In re Maunder* (6); *Davy's Executors* v. *Faw* (7).

In *Dalling* v. *Matchett* (8), the very point is covered of an arbitrator being hindered by other engagements from being present. *White* v. *Sharp* (9); Russell (7th ed.) p. 666: Redman, (3 ed.) 111; *Levick* v. *Epsom and Leatherhead Railway Co.* (10); *In re Hotchkiss and Hall* (11), at page 427. In *Ex parte Pratt* (12), it is said that no one has a right so to conduct himself before a tribunal as if he accepted its jurisdiction and afterwards, when he finds that the decision is against him, to deny its jurisdiction. See also *In re Elliott and South Devon Ry. Co.* (13); *Re Marsh* (14); *Bright* v. *River Platte Construction Co.* (15).

Davis K.C. for the respondent. The partisan attitude of Smith, one of the arbitrators making the award, and his acceptance of notes on the disputed matters made by the appellant, shew misconduct and the power to remove for misconduct by sec. 12 of the Arbitration

(1) 5 C. B. 581.
(2) 3 B. C. Rep. 281.
(3) [1900] A. C. 452.
(4) 28 L. T. 727.
(5) 23 Eng. Rep. 384.
(6) 49 L. T. 535.
(7) 7 Cranch 171.
(8) Willes, 215.
(9) 12 M. & W. 712.
(10) 1 L T. 60.
(11) 5 Ont. P. R. 423.
(12) 12 Q. B. D. 334.
(13) 2 DeG. & S. 17.
(14) 16 L. J. Q. B. 332.
(15) 70 L. J. Ch. 59.

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Act has been rightly exercised. The absent arbitrator, Buscombe, had insisted that the accounts of the Grand Forks business should be gone into before the award was made, but Ceperley peremptorily closed the award. There was considerable correspondence, but Ceperley and Smith proceeded to Vernon on the 9th of January, knowing that it was impossible for Buscombe to be present, and made an award, giving Doberer a large sum of money. The good faith of both Smith and Ceperley is impeached. Smith, in the course of the conferences, acquired very great influence over the mind of Ceperley, which subsequently culminated in Ceperley taking the course which he did, and which, together with Smith's improper conduct, are the acts complained of and chiefly relied upon in the application to set aside the award.

It may be said that there are two points, viz.: 1. Whether the award should be set aside; and, 2. Assuming that the evidence discloses sufficient material to set aside the award, has the respondent waived his right?

Upon the first point, the correspondence clearly shows that the other two arbitrators knew that it would be almost impossible for Buscombe to attend on the final making of the award. They knew that Buscombe insisted upon going into the accounts between the parties before the award was made, and he never had any opportunity of doing this. The action of Ceperley and Smith prevented his doing so. The two arbitrators in fact insisted upon making the award without listening to the advice of their colleague, and refused to admit the evidence and do that which, in his opinion, was necessary before an award should be made. *Templeman* v. *Reid* (1); *Morgan* v. *Bolt* (2). The conduct of Smith and Ceperley is highly reprehensible.

(1) 9 Dowl. 962.

(2) 7 L. T. 671.

With respect to waiver, a person will not be deemed to have waived a right unless at the time of the alleged waiver he was fully cognizant of such rights and of the facts of the case, nor unless the acts relied upon as constituting a waiver were done under such circumstances that he may reasonably be presumed to have intended to waive the right. *Darnley* v. *London Chatham & Dover Railway Co.* (1), at page 57. It must be shewn that Megaw had assented to something amounting to a waiver after he had become aware of the irregularity or impropriety of the arbitrators' conduct. *Hayward* v. *Phillips* (2). We refer also to *Conmee* v. *Canadian Pacific Railway Co* (3), at page 648; *Harvey* v. *Shelton* (4); *Race* v. *Anderson* (5); *Re Haigh's Estate* (6); *Dobson* v. *Groves* (7), at page 648; *Smith* v. *Sparrow* (8), at page 611.

The judgment of the court was delivered by:

KILLAM J.—We are all of opinion that there was no sufficient ground for setting aside the award in question upon this appeal.

There was no proof of actual misconduct on the part of any of the arbitrators. The utmost which the evidence can be taken to suggest is a partisan attitude of the arbitrator appointed by the appellant and an arrangement by him to take "notes" from the appellant, behind the backs of the other arbitrators, respecting the matters in question. Both he and the appellant deny that he received any such "notes." There is no proof that he did, or that he consulted with or received suggestions from the appellant separately, and the evidence does not appear to us to warrant the

(1) L. R. 2 H. L. 43.
(2) 6 A. & E. 119.
(3) 16 O. R 639.
(4) 7 Beav. 455.
(5) 14 Ont. App. R. 213.
(6) 31 L. J. Ch. 420.
(7) 6 Q. B. 637.
(8) 4 D. & L. 604.

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inference that he assented to the adoption of any such course. The only affidavit charging expressions of the arbitrator distinctly showing partiality was directly contradicted and does not appear to have been relied on in the court below.

Undoubtedly, an arbitrator should be careful to conduct himself not only with scrupulous fairness towards all parties, but also in such a manner as to cast no suspicion upon his honour and impartiality. But when he is not shown to have been so situated towards any of the parties, or the subject matter in dispute, or otherwise, as to render him unfitted to be an arbitrator in the matter, there should be some proof of actual partiality or unfair action.

The reference authorized the making of an award by two of the arbitrators. It is true that this would not have justified any two in proceeding without reference to the third; but on the other hand, it would be unreasonable that one of three arbitrators should be allowed to prevent the other two from making an award under a reference authorizing the two to make it. Here the third had full notice of the final meeting and an opportunity to attend. His reason for not being present was personal inconvenience and personal business. The other arbitrators were notified that he proposed to go to a distance on business, and upon his own letters it would appear uncertain that he would return before the expiration of the time then fixed for the making of the award. He had refused to concur in fixing any date prior to his departure for a meeting of the arbitrators.

At the appointed time both parties appeared and an opportunity was given them by the arbitrators present to raise any point or objection. No objection was raised, and no request was made for delay to enable

the third arbitrator to meet the others, although the respondent was fully advised of the situation.

Under such circumstances, there was cast upon the two arbitrators the jurisdiction to decide whether, in the exercise of a judicial discretion, the proceedings should be further delayed or the award made by themselves alone, and it does not appear that they acted in a manner inconsistent with natural justice in deciding to make their award.

The basis of the award had already been settled by the three arbitrators. The third arbitrator had indicated his view that there should be an audit of certain accounts of the respondent for the purpose of ascertaining whether further credits should be allowed to him. These accounts were before the arbitrators. There is no suggestion that they indicated a right to any credits which have been overlooked,—nothing whatever to impugn the good faith of the two arbitrators in deciding that further delay was unnecessary.

The appeal must be allowed, and the order setting aside the award discharged, with costs in all courts.

Appeal allowed with costs.

Solicitors for the appellant: *Tupper & Griffin.*

Solicitors for the respondent: *Wilson, Senkler & Bloomfield.*