Privy Council Appeal No. 59 of 1921.

The Attorney-General of Manitoba - - - - - *Appellant*

v.

Kelly and others - - - - - - - *Respondents*

Kelly and others - - - - - - - *Appellants*

v.

The Attorney-General of Manitoba - - - - - *Respondent*

(*Consolidated Appeals*)

FROM

THE COURT OF APPEAL FOR MANITOBA.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 24TH JANUARY, 1922.

Present at the Hearing:

LORD ATKINSON.
LORD SUMNER.
LORD PARMOOR.
LORD WRENBURY.
LORD PHILLIMORE.

[*Delivered by* LORD PARMOOR.]

The appellant, the Attorney General of the Province of Manitoba, brought an action against the respondents, asking to have set aside a certain building contract which had been entered into between the respondents and the Province of Manitoba, for the erection of buildings in the City of Winnipeg; for the return of certain moneys alleged to have been improperly received; damages and other relief incident thereto. The action came on for hearing before the Hon. Chief Justice Mathers in the Court of King's Bench, and a consent judgment was entered on the 22nd March, 1917. By the said judgment certain matters were referred to two appraisers, appointed respectively by the plaintiff and the defendants, and in the event of the appraisers not being able to agree, such matters were referred to Robert Macdonald of the City of Montreal, an architect and engineer, accepted as umpire

by both parties. So far, therefore, as the appraisers agreed, they occupied the position of arbitrators; but, in the event of disagreement, their functions terminated, and an independent jurisdiction was conferred upon Macdonald, who, throughout this judgment is referred to as umpire. The judgment further provided that the report of the umpire should be final and conclusive between the parties, and that the judgment should be a final judgment for the amount shown in the said report. On the 25th May, 1917, the umpire appointed under the aforesaid order of the Court of King's Bench made his report, and on the 4th March, 1918, the respondents, by notice of motion, moved to set aside or vary the report on the ground that the umpire had exceeded his powers and purported to decide a matter not submitted to his jurisdiction, including among the debits charged against the respondents a sum of $615,213·00, being an "estimate of expenditure necessary to complete the repair of caisson foundations." After the hearing had begun before Mr. Justice Curran, sitting as a Judge in Chambers, and also in Court, a charge of misconduct against the umpire was added by amendment. On the 3rd October, 1919, Mr. Justice Curran dismissed the motions of the respondents. The Court of Appeal allowed the appeal of the respondents from the judgment of Mr. Justice Curran in so far as he refused to vary the report of the umpire by deducting therefrom the "estimate of expenditure necessary to complete the repair of caisson foundations $615,213·00," and ordered that the report of the umpire should be varied by striking out the said item, and that the principal sum recoverable by the appellant from the respondents be reduced to the sum of $592,138·65.

This is an appeal from so much of the judgment of the Court of Appeal as varied the judgment of Mr. Justice Curran. The respondents further cross appeal that the report should be set aside on the ground that the appraiser for the appellant was guilty of misconduct in forwarding a certain letter and document to the umpire and that the umpire was guilty of misconduct in withholding from the appraiser appointed by the respondents the last page of a report of Bylander, the appellant's engineer, and of not stating truthfully, honestly and accurately the contents of the last page of the said report to the appraiser appointed by the respondents, or that in the alternative an item, $34,484·03, "one-half costs of the Royal Commission appointed to investigate all matters in connection with the Parliament Buildings, known as the Mathers Commission," should be disallowed.

A preliminary objection was raised before Mr. Justice Curran, and the Court of Appeal, that the motions should be dismissed on the ground that they were misconceived and could not affect the consent judgment. It was said that the report of the umpire became, on filing, an integral part of the consent judgment, making the judgment a final judgment for the amount shown in the report, and that the judgment had not been set aside and

could not be impeached except by separate action, or petition on a charge of fraud.

Mr. Justice Curran rejected any general objection to his jurisdiction, and held that he had jurisdiction to entertain the charges of alleged misconduct by the umpire, and to hear objections based on the allegations that on certain items in his report the umpire had exceeded his jurisdiction. In the Court of Appeal Cameron, J.A., expressed a contrary opinion, and that the motions made on behalf of the respondents to set aside, or amend the report, were misconceived and futile, and should on this ground or line be dismissed. On the hearing before their Lordships, the counsel for the appellant did not press this preliminary objection, and asked their Lordships to entertain the appeal on its merits, in order that an end might be put to this unfortunate litigation. Their Lordships accordingly heard the appeal on its merits. It must not be inferred that their Lordships express any opinion adverse to that expressed by Cameron, J.A.

The report of the Board of Appraisal was issued at Winnipeg, on the 25th May, 1917. It shows on its face that on some items the appraisers agreed, and that on some items the decision was referred to the umpire.

"Under paragraph 1, the Appraisers have set aside all previous contracts between the parties interested.

"Under paragraph 2, Sub-section (*a*), the amount therein mentioned, viz., $1,680,956·84, in which amount is included the sum of $500,000 the amount of a certain bond dated the 31st July, 1913, has been taken as a debit charge against the defendant.

"Under paragraph 2, Sub-section (*b*), 'All loss to the plaintiff by reason of defective workmanship and materials, including the reasonable costs of ascertaining and remedying such defects.' The question was submitted to the umpire, and the following figures give the decision with respect to such loss.

"DEBITS.

"One-half cost of Royal Commission appointed to investigate all matters in connection with the New Parliament Buildings, known as the 'Mathers Commission,' Cost item $68,968·07	$34,484·03
"One-half cost of physical investigation made on the New Parliament Buildings which investigation disclosed the fact that caisson foundations were defective. Cost item $10,675·03	5,337·51
"Portion of cost in repairing caissons up to the 28th February, 1917	160,306·62
"Loss by reason of defective and improperly cut stonework...	12,531·57
"Loss by reason of sundry items of improper work	3,247·05
"Extimate of expenditure necessary to complete the repair of caisson foundations	615,213·00
"Under paragraph 2, Sub-section (*b*)	$831,119·78

" CREDITS.

" Under paragraph 3, ' The Defendants shall be entitled to set off against the amount provided in paragraph 2 ' :—

" Sub-section (*a*) Value of work done and materials provided.		
" Agreed upon by Appraisers ...	$241,077·51	
" Determined by the Umpire ...	818,174·80	
		$1,059,252·31
" Sub-section (*b*) Value of plant and materials taken over by the Government—		
" Agreed upon by Appraisers ...	$148,730·86	
" Determined by Umpire	92,281·72	
		$241,012·58
" SUB-SECTION (*c*) Value of work done and replaced by Defendants on account of changes in plans—		
" Agreed upon by Appraisers ...	$700·00	
" Determined by the umpire ...	3,760·08	
		4,460·08
" Under paragraph 3, Total		$1,304,724·97

On the debits and credits, as found by the Appraisal Board, there is a balance in favour of the respondents of $473,605·19, but, after bringing in the sum fixed in the judgment at $1,680,956·84, as a debit charge, against the respondents, the ultimate balance in favour of the appellant is $1,207,351·65.

In the Court of Appeal sixteen grounds of appeal were raised by the respondents ; but in the argument before their Lordships these were reduced to three :—

(1) That in respect of two items debited by the umpire against the respondents, the umpire had exceeded the authority which the agreed submission conferred upon him.

(2) Misconduct on the part of one of the appraisers, Oxton, and on the part of the umpire.

(3) That the report was against law, evidence, and the weight of evidence.

The consent judgment, which contains the terms of the agreed submission, ordered, *inter alia* :—

" (1) That all the contracts referred to in the Statement of Claim herein be and the same are hereby set aside.

" (2) That the plaintiff do recover from the defendants.

" (*a*) The sum of $1,680,956·84, in which amount is included the sum of $500,000, the amount of a certain bond dated the 31st July, 1913.

" (*b*) All loss to the plaintiff by reason of defective workmanship and materials, including the reasonable costs of ascertaining and remedying such defects.

" Provided that in ascertaining such amounts the Appraisers, or in case of disagreement, the Umpire, shall be the judges as to whether or not the work was defective and to what extent, and shall also be the judges as to what extent the investigations carried on for the purpose of ascertaining and remedying such defects were necessary, and what amount of money if any, paid for that purpose shall be charged to the defendants.

"(3) The defendants shall be entitled to set off against the amount provided for in paragraph 2 hereof.

"(*a*) The fair value of the work done and materials provided by the defendants on the New Parliament Buildings in the City of Winnipeg so far as erected on the 19th day of May, A.D., 1915, on the basis of a fair Contractors' price (including reasonable Contractors' profit) for the work done and materials furnished, having due regard to the character of the same and the purposes for which same was intended; in regard to the value of the work and material consideration shall be had of prevailing prices at Winnipeg at the time the work was done, and in estimating the wages for men employed the fair wage schedule of the Government as it stood in July, 1913, shall be followed.

"(*b*) The value of the plant and materials taken over by the Government as at the time they were placed on the ground.

"(*c*) The fair value of any work which had been done and which was afterwards torn down and replaced by the defendants by order of the Provincial Architect on account of and made necessary by change or changes in plan.

"(6) In the event of the Appraisers not being able to agree on any of the matters herein referred to, or in the event of one of the Appraisers being dissatisfied with the diligence of the other in proceeding with any matter hereunder, such matter or matters shall be referred by either Appraiser to Robert Macdonald, of the City of Montreal, Architect and Engineer, who is hereby by both parties agreed to as umpire, and whose decision thereon shall be final.

"(7) The Appraisers and the Umpire are to be entitled to form their own opinion as to the fair value and proper charge or allowance hereunder to be made in respect of all matters submitted hereunder from their own knowledge, inspection or examination, or from such other source as they may deem proper, and for that purpose may cause any work to be uncovered or any investigations to be made which the Appraisers agree upon or the Umpire desires.

"(11) The appraisal hereunder shall not be subject to the provisions of the Manitoba Arbitration Act."

"(12) If on striking the balance hereunder it is found that the balance is in favour of the plaintiff, the defendants shall pay to the plaintiff the balance so found with interest at the rate of five per cent., from the 1st July, 1914, to date of payment.

It is noticeable that, under (6), the decision of the umpire, agreed to by both parties as umpire, is to be final; and that under (7) the appraisers and the umpire respectively are entitled to form their own opinion on all matters submitted to them either from their own knowledge, inspection, or examination, or from such other sources as they may deem proper, thus constituting them judges both of the materiality and of the weight of all evidence which they deemed it proper to admit.

A voluminous mass of evidence was adduced before Mr. Justice Curran. Only a small portion of this evidence is admissible or should have been admitted. The transcript of the proceedings, when the appraisers, and the umpire, met before the umpire issued his report, is not admissible unless it can be regarded as a document so closely connected with and incorporated in the report as to be considered part of the report, and to be looked at in the same way as the report itself. In the opinion of their Lordships it is not possible to accept this view. These proceedings are

nothing more than informal discussions which took place before the issue of the report, and they may, or may not, have influenced the umpire in making his report. Cameron, J.A., states that he is at a loss to know on what ground these proceedings can be considered as evidence for any purpose whatever, and their Lordships concur in this opinion. No doubt extrinsic evidence is admissible on an issue of jurisdiction, or of misconduct; but subject to the ordinary principles which apply to the admissibility of all evidence. How far, in the present case, extrinsic evidence is admissible on these issues can be more conveniently considered at a subsequent stage. It is not difficult to see that if evidence of this character should be held to be generally admissible, there would be a risk of undermining the principle of finality, which, subject to certain recognised exceptions, has long been established as a settled principle in arbitration proceedings, and on which their value largely depends.

Evidence was further adduced before Mr. Justice Curran, giving the opinion of experts on the method in which the inquiry was conducted, and traversing the conclusions of the umpire, as stated in the report. In effect, the Court on this evidence was asked to review the decision of the umpire on questions submitted to him, by the parties, for his final decision. Such evidence would not be admissible in the case of an award under arbitration proceedings conducted according to ordinary practice. In the present submission, the umpire is entitled, under the terms of the submission, to form his own opinion as to the fair value and proper charge or allowance to be made in respect of all matters submitted to him from his own knowledge, inspection or examination, or from such other source as he may deem proper. Unless, therefore, the umpire has been guilty of misconduct, it is within his discretion and authority either to act on his own knowledge, inspection or examination, or to obtain information from any other source, which in his opinion he may deem proper. It is not incumbent on him to state how he has acted, and it is impossible for the Court to ascertain what considerations have affected his judgment. The matter is one which the parties have intended to withdraw from the Courts in order that the issue in the litigation may be finally determined by their chosen nominee, and all extrinsic evidence that other experts would have proceeded in a different manner, or reached a different conclusion should, in the opinion of their Lordships, have been rejected as inadmissible.

The jurisdiction of the umpire is derived solely from the agreement of the parties contained in the consent judgment. This document is a written document, which cannot be explained, and much less varied, by extrinsic evidence, of subsequent facts or events. Except so far as the pleadings in the action are of assistance in the interpretation of the document, by showing the surrounding conditions when the agreement was made, none of the evidence adduced before Mr. Justice Curran, is admissible

or should have been admitted in determining the extent or limitations of the umpire's authority. Whenever there is a difference of opinion between the parties as to the authority conferred on an umpire under an agreed submission, the decision rests ultimately with the Court and not with the umpire. (*Produce Brokers Co.* v. *Olympia Oil and Cake Co.*, 1916 A.C. 314, pp. 327–329). It would be impossible to allow an umpire to arrogate to himself jurisdiction over a question which, on the true construction of the submission, was not referred to him. An umpire cannot widen the area of his jurisdiction by holding, contrary to the fact, that the matter, which he affects to decide, is within the submission of the parties. In the present instance there has been a difference of opinion as to the extent of the jurisdiction which has been conferred by the submission upon the umpire. The majority of the Court of Appeal have adopted a narrower construction than Mr. Justice Curran and Cameron, J.A. The crucial paragraph in the submission is paragraph (2) (*a*). The words "all loss" with which the paragraph commences would naturally cover all loss ascertained or ascertainable by reason of defective workmanship and materials, irrespective of when, or whether, the defects have been remedied, and of whether, or not, out-of-pocket expenses have been incurred, at the time when the assessment of damage is made. It is open to the party in whose favour the assessment is made either to repair the damage on which his claim is based, or to take the risk of leaving the defects as they are, and to place the money to his credit as compensation. The majority of the Court of Appeal have held that, owing to the conditions under which the agreed submission was made, to the context in which the words are found, and to the terms of the interest paragraph, the words "all loss" have a limited meaning and only include such loss as had been already ascertained and in respect of which monies had been actually disbursed. Perdue, C.J.M., says in his judgment, "The word loss in paragraph (2), subsection (*b*), taken in the connection in which it is found, means money loss, money out of pocket." This construction was supported in an able argument by the counsel for the respondents before their Lordships on various grounds. It was said that the interest paragraph (12), which provides that, if there is a balance in favour of the plaintiff, the defendants shall pay on such balance interest at 5 per cent. from July, 1914, to date of payment, shows that the plaintiff must be deemed to be out of pocket, in respect of any balance found in his favour, and that this provision was not applicable, if it was open to the umpire to estimate damage in respect of a loss that might not occur, and which, if it did occur, might not be remedied. On the other hand it was argued, on behalf of the appellant, that the 1st July, 1914, was simply a compromise date, agreed between the parties, and that there was no reason why interest should not run from this date on the balance in favour of the plaintiff, whether that balance is based solely

on out-of-pocket expenditure, or includes a sum assessed by the umpire in respect of ascertainable loss, although, so far, no expenditure in respect of such loss had been made. Suggestions were made before their Lordships as to the reasons why the date of 1st July, 1914, had been chosen, but their Lordships are concerned to consider the actual language employed, and it is beyond their province to enter the region of speculation. Their Lordships cannot find in paragraph (12) any more than a provision for interest from an agreed date, in itself not inconsistent with giving to the words " all loss " in paragraph (2) (*b*) their ordinary and normal meaning.

It was further argued that the words " including the reasonable cost of ascertaining and remedying such defects " excluded an estimate of loss not based on actual out-of-pocket disbursements. Their Lordships, however, cannot construe the word " including " as connoting exclusion. The words " such defects " are equally apposite, whether they refer back to a limited loss calculated on out-of-pocket expenses, or to a loss which comprehends all sources of ascertainable damage. The respondents further relied on the word " paid " which occurs at the end of the proviso, but the context shows that the word " paid " is not applied to " loss " but to expenditure on investigations carried on for the purpose of ascertaining and remedying defects. This passage authorises the umpire to estimate to what amount money, if any, paid for the purpose of investigation, shall be charged to the debit of the respondents. It is under this provision that the umpire has debited the respondents with the sum of $34,484·03, being one-half cost of the Royal Commission, known as the Mathers Commission.

Their Lordships have considered the important matter raised prominently in the judgment of Dennistoun J.A., that unless the words " all loss " are restricted to out-of-pocket disbursements for work done, to the exclusion of any estimate of expenditure necessary to complete the repair of the caisson foundations, there is a risk that the respondents would be charged twice over for their defective workmanship and materials in connection with the caisson foundations. The appellant denies that there is any proof that the umpire has made any such error in his report. No question was raised by the respondents as to the summary of the credits found in their favour, amounting in the aggregate to $1,304,724·77, and under each head a proportion of the total amount has been agreed by the appraisers. Of the total of $1,304,724·77, no less than $1,059,252·31 represents the value of the work done and materials provided. If the inclusion of an estimate for ascertainable damage under the word " loss " results in a double charge against the respondents for defective workmanship and materials, such double charge would only be included if, in calculating the credit amounts in favour of the respondents, the umpire had taken into account deductions for bad work or faulty material, and had in consequence of such

deductions given the respondents something less than the full fair value to which they are entitled under paragraph (3) (*a*).

There is, however, no ground for any such assumption, and no evidence that the umpire has made the error attributed to him. Following the order prescribed in the submission, and adopted in the report, the umpire would consider first the debits. The suggestion is that after making a charge under the head of debits for all defective workmanship and materials, the umpire made a deduction of the same items in calculating the credits due to the respondents. It is not admissible to assume that the umpire made such a mistake, and no such mistake appears upon the face of the report. It is not immaterial that a proportion of the credits, under each item, was not determined by him, but agreed by the appraisers.

Mr. Justice Curran and Cameron, J.A., do not construe the terms of the submission in the limited sense adopted by the majority of the Court of Appeal. Mr. Justice Curran expresses his opinion with some hesitation, but Cameron, J.A., regards the terms of the consent judgment as amply wide enough to support the umpire's findings, and to include the item of estimate of expenditure necessary to complete the repair of caisson foundations. Their Lordships agree with Cameron, J.A., and are unable to find, either in the conditions under which the agreement of submission was made, or in the context, or from the general scope of the agreement, any ground for limiting the words "all loss" to money loss, money out of pocket.

Has the umpire included in his report any items not within the terms of the agreement of reference as above construed? The report is a written document which speaks for itself and which cannot be interpreted, or varied, or contradicted, by extrinsic evidence. If there is any doubt as to the subject matter over which the umpire was purporting to exercise jurisdiction, evidence may be given showing what was the subject matter into which he was enquiring, in order to enable the Court to determine whether he has exceeded the limits of his jurisdiction. Such evidence may be given by the umpire himself or by any other competent witness; but it should be limited to the issue of fact, and, in the words of Lord Cairns, "is not admissible to explain or to aid, much less to attempt to contradict (if any such attempt should be made), what is to be found on the face of the written instrument" (*Buccleuch* v. *Metropolitan Board of Works*, 5 H.L. 418).

In the present case the umpire sets out, in the report, separate items under the head of debits and credits. There is consequently no difficulty in determining from the language used in the award, without the aid of extrinsic evidence, the subject matter over which the umpire was exercising jurisdiction. He finds that the physical investigation made on the new Parliament buildings did disclose the fact that caisson foundations were defective, and awards in respect thereof two items; (1) Portion of cost in

repairing caissons up to the 28th February, 1917, $160,306·62; (2) Estimate of expenditure necessary to complete the repair of caisson foundations, $615,213·00. It is in respect of this latter item that the respondents have raised the issue of excess of jurisdiction. They base their objections on the allegation that the estimate is one not based on actual expenditure, and therefore not a "loss" to the appellant by reason of defective workmanship and materials within the meaning of paragraph (2) subsection (*b*) of the consent judgment. The appellant on the other hand argues that a loss of this character is within the meaning of paragraph (2), subsection (*b*), and therefore within the jurisdiction of the umpire. Their Lordships have already stated their opinion that the contention of the appellant as to the meaning of paragraph (2), subsection (*b*), is correct, and it follows that there was no excess of jurisdiction on the part of the umpire in including this item in his award.

The respondents further, in the cross appeal, question the item of the half cost of the Royal Commission. It was not argued at any length before their Lordships. All the judges in the Courts below, before whom the question has come, are unanimously of opinion that the item comes within the authority of the later portion of the proviso to paragraph (2) (*b*). In this opinion their Lordships concur.

On the issue of misconduct a distinction arises between the misconduct attributed to Oxton and to the umpire. There is no evidence that either of the appraisers, in exercising his duties as appraiser, acted in any way improperly. The report shows on its face that Oxton agreed certain items with Burt. On coming to this agreement his duty as an appraiser came to an end. These agreed items are incorporated in the report of the umpire. The allegation really is that Oxton acted improperly in attempting to influence the umpire after his duties as an appraiser had come to an end, and when the decision on such matters, as had not been agreed upon between the appraisers, stood referred to the umpire. The only way in which the alleged misconduct of Oxton, at this stage of the enquiry, can affect the validity of the report, is if it can be proved that such misconduct influenced in any way the decision of the umpire. On the question of misconduct both the Courts below have decided in favour of the appellant.

Under the terms of the submission, the umpire, in case of the disagreement of the appraisers, was constituted the sole judge as to whether or not the work was defective and to what extent. He was entitled to form his own opinion as to the fair value, and proper charge or allowance, to be made in respect of all matters submitted to him, from his own knowledge, inspection, or examination, or from such other source as he might deem proper. It was therefore within the competence of the umpire to consult and consider at any time any of the five pamphlets sent to him at Montreal by Oxton, and no objection could have been taken if he had followed this course. It makes no difference

that pamphlets, which the umpire had authority to consult, were forwarded to him by Oxton. He was entitled to act as he did, and is in no way responsible for the action of Oxton. It was alleged that the umpire had read the pamphlets on his way from Montreal and Winnipeg. In the opinion of their Lordships this allegation is not important, as it was within the competence of the umpire to read the pamphlets at any time, without being subject to a charge of misconduct. The umpire, however, made an affidavit, which has been accepted as accurate, and on which he was not cross-examined :—

> "I have never read the evidence before the Public Accounts Committee. I did not read the report of the Mathers Commission, nor the reports of the Public Works Department prior to my arrival in Winnipeg, as I preferred to keep an open mind until both sides could be heard. The report of the Mathers Commission was on my table before us (Mr. Burt, Mr. Oxton and myself) from the beginning of the proceedings, and was referred to from time to time in the discussion."

A further charge of misconduct against the umpire is based on Oxton having supplied him with a full copy of one of Bylander's reports, whereas at the same time he supplied Burt with a copy which omitted the last page. It is alleged that the umpire falsely and dishonestly stated to Burt that the part so omitted from the Bylander report had no bearing upon the matters in question on the appraisement, whereas the part so omitted was vitally important and material. Their Lordships can find no evidence which gives any support to the allegation that any false or dishonest statement was made by the umpire to Burt, in connection with the Bylander report, or that there was anything untruthful or improper in his statement. During the discussions between the appraisers and the umpire, which preceded the making of the report of the umpire, it is manifest that Burt did know that the umpire had full copies of both the Bylander reports. The umpire states in answer to Burt that he has them both in his possession, and then occurs the following conversation :—

> "Mr. Burt : I have the first one in full, but I have not the last page of the second.
>
> "Mr. Oxton : I showed it to you, Mr. Umpire, but I didn't give Mr. Burt access to it because it concerned a question of policy that I didn't consider he would be interested in."
>
> "Mr. Burt : If it is a question of policy that affects this appraisal I might be quite interested in it."
>
> "The Umpire : It does not."

Even if it is assumed that the last page of the report did contain matter which might have affected the decision of the umpire, the umpire, under the wide power as to evidence contained in the terms of the submission, was entitled to take the view that the question of policy, therein discussed, did not affect the appraisal. Unless a charge of dishonesty can be established, for which in the opinion of their Lordships there is no justification, there is no foundation on which to rest a charge of misconduct. Burt, as

one of the appraisers, had no right or claim to be informed of the evidence brought before the umpire, or of the weight which the umpire attached to any particular evidence, or of the extent to which the umpire acted on his own knowledge and inspection. There was no duty on the umpire to give Burt that information, and, apart from dishonesty, no breach of duty in withholding it from him, on which a charge of misconduct could be sustained.

The appraisers did not stand in the position of ordinary arbitrators. Their functions as appraisers were discharged as soon as they had agreed the items on which agreement was possible. The terms of the submission did not impose any further duty upon them. In the discussion before the umpire they were in the position of volunteers, although the umpire was perfectly within his authority in inviting them, or any other person, whom he might desire to consult, to state their opinions, and in listening to the reasons which they adduced in support. There may well be a difference of opinion as to the materiality of the statements contained in the last page of the Bylander report, but under the terms of the submission the materiality of evidence, as well as its weight, was left in the discretion of the umpire. If a charge of misconduct could have been established, it would be difficult, in the opinion of their Lordships, not to set aside the whole award, as infected in all its findings.

It has been convenient to deal first with the special objections to the report based on misconduct and excess of jurisdiction. The more general objection is raised, that the report is against law, evidence, and the weight of evidence. It appears that this objection was argued at considerable length in the Courts below, but it occupied less time in the argument before their Lordships. The principles applicable in arbitrations, where there are no special statutory provisions, have long been established. The submission in the consent judgment contains a special term, that the appraisal, thereunder, shall not be subject to the provisions of the Manitoba Arbitration Act.

In a submission, in which the parties have agreed, that the decision of the umpire, on the matters referred to him, shall be final, the Courts will not enquire whether the conclusion of the umpire on the matters referred to him is right or wrong, unless an error appears on the face of the award, or on some document so closely connected with it that it must be regarded as part of his award, or unless the umpire himself states that he has made a mistake of law or fact, leaving it to the Court to review his decision.

Holgate v. *Killick*, 7 H. & N. 418, 31 L.J. Ex. 7. *Fuller* v. *Fenwick*, 3 C.B. 705, 16 L.J.C. *McRae* v. *Lemay*, 18 S.C.R. 280. *Adams* v. *The Great North of Scotland Railway Co.* [1891], A.C. 31. *British Westinghouse Electric and Manufacturing Co., Ltd.*, v. *Underground Electric Railways Co. of London, Ltd.* [1912], A.C. p. 673.

This principle is approved by Baron Parke in *Phillips* v. *Evans*, 12 M. & W. 309, on the ground that although, possibly, injustice may be done in particular cases, it is better to adhere to the principle of not allowing awards to be set aside for mistakes, and not to open a door for enquiry into the merits, as this might lead to such an enquiry in almost every case. In the present case the umpire has not admitted any mistake, and there is no error on the face of the report. There is a further consideration which arises in the case of the present report owing to the special provision, as to evidence, contained in the submission. The umpire is entitled to form his own opinion in respect of all matters submitted, from his own knowledge, inspection, or examination, or from such other source as he may deem proper. The effect of this provision is that it is not possible for the Court to have before it all the material on which the umpire based his decision, and that even if the Court should remit the report it could have no effective control over the ultimate decision.

The older cases are reviewed by Lord Halsbury in *Adams* v. *The Great North of Scotland Railway*. The Lord Chancellor, referring to the case of *Knox* v. *Symmonds*, 1 Ves. Jun. 369, says :

> " This case shows that where there are real arbitrations, and where the parties have selected their judge, in such cases you have to show a great deal more than mere error on the part of the arbitrator in the conclusion at which he has arrived before the Court can interfere with his award. And in the Court of Common Pleas, forty years ago, in a case in which the arbitrator had a question of law submitted to him according to the ordinary forms of pleading, the Court, having come to the conclusion that the decision of the arbitrator was, in the sense in which they understood the words, erroneous in deciding upon a question of law on demurrer, nevertheless held that the parties, having submitted that question to the arbitrator, it was for the arbitrator to determine it ; in their own language, the parties had agreed to accept the arbitrator's decision upon the question of law, as well as his decision upon the facts. In the Court of Queen's Bench, thirty years ago, that decision was adopted as being the law which would guide the Court in the decision of such questions."

In the later case of *Re King* and *Duveen*, in 1913, 2 K.B. p. 32, Mr. Justice Channell, after referring to the case of *British Westinghouse Electric and Manufacturing Co., Ltd.*, v. *Underground Electric Railways Co. of London, Ltd.*, says :—

> " It is equally clear that if a specific question of law is submitted to an arbitrator for his decision, and he does decide it, the fact that the decision is erroneous does not make the award bad on its face so as to permit of its being set aside. Otherwise it would be futile ever to submit a question of law to an arbitrator."

The learned Judge refers to *Stimpson* v. *Emmerson*, 9 L.T. 199, a case which had been referred to in *Adams* v. *Great North of Scotland Railway* as a clear authority in favour of this view.

Where a question of law has not specifically been referred to an umpire, but is material in the decision of matters which have been referred to him, and he makes a mistake, apparent on the face of the award, an award can be set aside on the ground

that it contains an error of law apparent on the face of the award ; but no such issue arises in the present appeal. In *British Westinghouse Electric and Manufacturing Co., Ltd.*, v. *Underground Electric Railways Co. of London, Ltd.*, it was held that where an arbitrator had made an award expressed to be made on the basis of an erroneous opinion given upon a special case stated by an arbitrator under the Arbitration Act, 1889, in regard to questions of law arising in the course of the reference, the award is subject to appeal, if that opinion is erroneous.

In the course of his judgment Lord Haldane, the Lord Chancellor, says :—

> " It was further argued before your Lordships that the arbitrator was in reality made judge of law as well as of fact, and that the well-known case of *Hodgkinson* v. *Fernie* 3 C.B. (N.S.) 189, was wrongly decided. I see no ground for this contention, and I am of opinion that the doctrine of *Hodgkinson* v. *Fernie*, to the effect that where an error of law appears on the face of the award the error can be reviewed, is a well-established part of the law of the land. I do not think that the Arbitration Act intended to make any modification of the existing rule in this respect, or that the decision in *In re Knight and the Tabernacle Permanent Building Society* [1892] 2 Q.B. 613, is an authority for the proposition that it did. It is, therefore, competent for this House to review the law which the arbitrator, as he was bound to do, adopted from the Divisional Court and set out in his award."

The result is that the respondents fail to make good their objections to the report of the umpire or to any part thereof. The appeal succeeds and the cross appeal fails. Their Lordships will humbly advise His Majesty that the appeal should be allowed with costs here and in the Court of Appeal, that the cross appeal should be dismissed with costs, and that the judgment of Mr. Justice Curran should be restored.

In the Privy Council.

THE ATTORNEY-GENERAL OF MANITOBA

v.

KELLY AND OTHERS.

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(*Consolidated Appeals.*)

DELIVERED BY LORD PARMOOR.

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