[ORIGINAL CIVIL JURISDICTION.]

1872.
Feb. 17.

Appeal Suit No. 171.

ARDESAR HORMASJI WA'DIA'.....*Appellant.*

THE SECRETARY OF STATE FOR INDIA IN COUNCIL .....*Respondent.*

Appointment of third arbitrator under Sec. 12 *of Act VI.*, 1857—*Umpire—Award—Nullity—Notice to attend—Irregularity—Misconduct—Waiver.*

Where one of two arbitrators, appointed under Sec. 10 of Act VI. of 1857, by letter and also verbally authorized his co-arbitrator to appoint a certain person as third arbitrator, and the co-arbitrator wrote to the proposed third arbitrator informing him that he had been so appointed:—

Semble that there was a good appointment "by writing" of the third arbitrator within the meaning of Sec. 12 of Act VI. of 1857.

Where a third arbitrator appointed under Sec. 12 of Act VI. of 1857, considering that his services were required merely as an umpire, though he had due notice of the first meeting, neglected to attend that or any subsequent meetings of the arbitrators and took no part in the making of the award:—

It was held that such non-attendance of the third arbitrator did not render the award a nullity, but was only a ground for setting it aside on the ground of irregularity.

Where an officer, appointed under Act VI. of 1857 to conduct arbitration proceedings on behalf of Government, attended the first two meetings of the arbitrators and did not object to two of the arbitrators proceeding with the reference in the absence of the third arbitrator, and did not attend the subsequent meetings of the arbitrators:—

It was held that Government had thereby waived their right to insist on the non-attendance of the third arbitrator as a ground for setting aside the award.

THIS was an appeal from the judgment of Bayley, J., made in favour of the defendant on the 2nd day of December 1870.

As Act VI. of 1857 has, since the case first came before the Court, been repealed by Act X. of 1870, it has only been deemed necessary to publish the judgment of the Appellate Court from which the facts of the case and the arguments of Counsel will sufficiently appear.

The appeal was argued before WESTROPP, C.J., and GIBBS, J.

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McCulloch and *Latham* for the appellant.

The Honourable A. R. Scoble (Acting Advocate General), *Mayhew* and *Macpherson* for the respondent.

17th February 1872. WESTROPP, C.J. :—This is an appeal from the Third Division Court. The plaint in the suit was filed by Ardesar Hormasji Wádiá upon an award to recover Rs. 58,278 with interest. The award purported to be made by a majority of arbitrators appointed in accordance with Act VI. of 1857, "an Act for the acquisition of land for public purposes," and directed the defendant to pay to the plaintiff the sum already mentioned, with interest at six per cent. per annum, as compensation for a piece of land (containing 13,987 square yards) situate at Kurla in the Island and Táluká of Salsette and Collectorate of Thána, which, by notification of the Acting Chief Secretary to the Government of Bombay, dated the 27th May 1868, published in the *Government Gazette* of the following day under the provisions of that Act, was declared to be "required for a public purpose, namely, for Railway purposes." The plaint states that possession was taken of the land by the defendant on the 27th May 1868.

The defendant, the Secretary of State for India, has filed a written statement by way of defence.

The issues settled in the Division Court were :—

1. Whether any valid award was made in accordance with the provisions of Act VI. of 1857 ? This the learned Judge found in the negative.

2. Whether Mr. Campbell and Mr. Addis, before they entered upon the matter referred to them, duly by writing nominated and appointed Andrew Hay to act with them as arbitrator pursuant to Sec. XII. of the said Act ? Upon this issue the learned Judge did not consider it necessary to come to any finding.

3. Whether the defendant, by his agent, had notice of any meetings of the arbitrators subsequent to the first two meetings ? This was found in the negative.

4. Whether any award was made by a majority of the arbitrators according to the provisions of the said Act? This was found in the negative.

5. Whether the defendant is entitled to raise the 2nd, 3rd or 4th issues after the lapse of three months from the time of the making of the award? This, so far as it concerned the right to raise the 4th issue, was found in the negative. As to the right to raise the 2nd and 3rd issues, there was not any finding.

6. Whether the irregularities alleged in the 2nd, 3rd and 4th issues were waived by the defendant? So far as this related to the 3rd and 4th issues, it was found in the negative. So far as it related to the 2nd issue, there was not any finding.

7. Whether the plaintiff is entitled to recover the amount claimed or any part thereof? This was found in the negative. And the learned Judge accordingly made a decree for the defendant with costs.

From that decree the plaintiff has appealed, alleging substantially that the learned Judge ought to have found all of the above issues, upon which there were findings, in the opposite way to that in which he did find them, and that all of the issues, on which there were not findings, ought to have been found in favour of the plaintiff.

The appeal has been heard by my brother Gibbs and myself.

The facts of the case may be taken to be as follows :—

Government, having occasion, for railway purposes, to acquire land at Kurla, belonging to the plaintiff, issued, on the 27th of May 1868, the usual notification, under Act VI. of 1857, stating that the land was required for a public purpose. Act VI. of 1857 has been repealed by Act X. of 1870, but, having been the law at the time of the transactions, the subject of this suit, is the Act applicable to this case.

The parties having differed as to the amount of compensation, a reference to arbitration, as provided for in Sec. 10, became necessary.

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The Acting Collector of Tháná, by letter of the 19th June 1868 addressed to the plaintiff, appointed "the Mámlatdár of the Salsette Taluka" as the officer under Act VI. of 1857 to take steps for the acquisition of the land. The Mámlatdár, by writing, appointed Mr. Addis, a Civil Engineer, to be arbitrator on behalf of Government. The plaintiff at first appointed Mr. McClelland to be his arbitrator, but he, being about to leave Bombay, declined the office, and thereupon the plaintiff appointed, by writing, Mr. John Campbell to be his arbitrator. The regularity of those appointments has not been questioned.

By a letter in the Maráthí language, dated 29th October 1868, from Náráyan Rávji, Mámlatdár of the Táluká Salsette (who describes himself as "the officer appointed under Act VI. of 1857") to Mr. McClelland, the taking of the land, and the necessity "that the price thereof may be fixed by arbitration under the Act," are *(inter alia)* mentioned, and also the fact that Mr. Addis, "Local Fund Engineer of the Zillá of Tháná," had been appointed as arbitrator for Government. Between the date of that letter and the 4th December 1868, a new Mámlatdár of the Táluká of Salsette seems to have been appointed, for, under the last-mentioned date, we find that Trimbak Bápuji, who describes himself as "Mámlatdár of the Táluká Salsette," and as "the officer appointed under Act VI. of 1857," wrote a letter in Maráthi to the plaintiff, referring to the taking of the land, and giving him notice that "the matter of fixing its price under the Act will come on before the arbitrators on the 16th day of the month of December in the year 1868," and that the meeting of the arbitrators was to be at the office of Mr. Addis at Tháná, which meeting, however, did not then take place. The postscript of that letter was as follows:—"A sealed letter to the address of Mr. John Campbell, your arbitrator, is sent to you. Be so good as to have the same conveyed to him."

The next step to have been taken, after the appointment of Mr. Campbell and Mr. Addis, was that they should, under the 12th section of the Act, before they entered upon the

matter referred to them, nominate and appoint "by writing" a third person to act with them as arbitrator. What they did was as follows:—Mr. Addis wrote a letter to Mr. Campbell, by which, *and afterwards also verbally, he authorized Mr. Campbell* to appoint Mr. Hay to be the third arbitrator, and thereupon Mr. Campbell wrote to Mr. Hay, informing him that he was so appointed. Neither of these letters has been produced. The former would seem to have been lost or mislaid. As to the latter, it appears to have been destroyed by Mr. Hay, who states in his evidence, taken *de bene esse*, that after the arbitration was concluded, he destroyed the correspondence he had on the subject, including Mr. Campbell's letter.

Looking to the evidence of Mr. Campbell and Mr. Hay, we have come to the conclusion that Mr. Campbell, in his letter to Mr. Hay, informed the latter that he was appointed "third arbitrator and umpire." Both of these gentlemen are under the impression that this was so, and their evidence stands uncontradicted. On the 2nd February (Tuesday) 1869, Mr. Campbell again wrote to Mr. Hay thus: "Can you meet at my office on Thursday next" (that would have been the 4th February) "to commence arbitration on cost of land at Kurlá, belonging to Ardesar Hormasji Wádiá, taken up by Government? Please let me know at once. If you can do so, I will write Mr. Ardesar and Addis to be ready also for that time." Mr. Hay replied on the same day as follows:—"I understood I was to be umpire in the matter, and not an arbitrator; but the fact is I have heard nothing particular on the subject. Thursday would not suit me. Either Friday or Monday." To which on the same day Mr. Campbell replied:—"You are quite right in your understanding that *you are to be umpire (or third arbitrator, as it is one and the same thing)* in the case I mentioned to you, but, as such, I presume it is requisite that you should attend the arbitration meetings to be in a position to decide, in case we (*i.e.* Mr. Addis and myself) may happen to differ. Do I understand you that Friday afternoon at 3 P.M. will suit you to meet at my office in this

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matter? Kindly let me know that I may be enabled to inform others connected with the matter in due time." The Friday (5th February) named in that letter would seem not to have suited the parties, and no meeting appears to have been held on that day. But, upon that 5th February, Mr. Campbell wrote to Mr. Hay thus:—"Next Thursday morning at 11 A.M., Mr. Addis and I have agreed to hold our first arbitration meeting as to cost to be paid to Mr. Ardesar for land at Kurlá. If you cannot conveniently attend then, you can always have the written evidence to look over, and on which to base your opinion, in case Mr. Addis and I cannot agree." On the Thursday (February 11) named in that letter of the 5th February, the first meeting was held pursuant to the notification to Mr. Hay contained in that letter, and it is impossible to deny that he had due and ample notice of that meeting. But it is evident that he and his co-arbitrators were all of opinion that a third arbitrator was synonymous with an umpire, who would not have to arbitrate, unless Mr. Campbell and Mr. Addis differed. And, in the minutes of the proceedings of those two arbitrators, Mr. Hay is treated as umpire. By those minutes, in the handwriting of Mr. Campbell, it appears that the first meeting of the arbitrators, Addis and Campbell, opened with the following question, addressed to them by the plaintiff: "Have you appointed an umpire, in case you cannot agree?" To which Mr. Addis and Mr. Campbell replied:—"We have agreed upon Mr. Andrew Hay, Broker of Bombay, as an umpire in the matter."

Mr. Hay did not attend at the first or any other of the meetings of the arbitrators, and was not consulted by his co-arbitrators whose award was made without his having any knowledge of their decision, save that they had not differed on any point, and had, therefore, not troubled him in the matter. He was willing, he says, to have attended, if it had been considered necessary. In the award Mr. Hay is described as an arbitrator.

The Collector of Thána, within whose district the land is situated, did not personally superintend the arbitration; but

it is not disputed that the Mámlatdár, duly authorized in that behalf, attended at the first two meetings of the arbitrators, Mr. Addis and Mr. Campbell, held on the 11th and 15th of February 1869. The next meeting was on the 16th of February; at this the Mámlatdár was not present, neither was he at any of the four remaining meetings, the last of which was on the 5th of March following.

From Mr. Campbell's evidence, it would appear that, at the close of each meeting, the date to which it was adjourned was fixed. Thus, at the first meeting, the date of the second was settled; and, in accordance therewith, the Mámlatdár attended at the second meeting at which, however, no business was transacted; but a further adjournment was arranged, and although the day to which the matter stood adjourned was communicated to the Mámlatdár in his own language, he did not attend on that day. No notice was given to him of the subsequent meetings. The Mámlatdár is described by Mr. Campbell as not understanding English; but in reply to a question put by the Third Division Court, Mr. Campbell stated that there was a person present who interpreted to the Mámlatdár at both of the meetings which he attended. According to Mr. Campbell's recollection, it would appear that he and Mr. Addis informed the Mámlatdár at the first meeting of the appointment of Mr. Hay, and that they explained to the Mámlatdár such part of the proceedings as they thought it requisite for him to know. And the Mámlatdár did not make any complaint that he did not understand what was going on. Mr. Campbell's evidence stands in all respects uncontradicted. Neither Mr. Addis, nor the Mámlatdár (who would properly have been witnesses for the defence), nor any other witness was called on behalf of the defendant. Under the circumstances above detailed, we must take it that the Mámlatdár sufficiently understood the proceedings at the first and second meetings.

The Mámlatdár, though present throughout the proceedings at the first meeting, made no objection to the effect that Mr. Hay's appointment as third arbitrator or umpire was not in writing, or was in anywise irregular, nor did

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the Mámlatdár object to Mr. Addis and Mr. Campbell proceeding on that day, in the absence of Mr. Hay, with the arbitration. They did so proceed with it. On that day they examined the plaintiff and his witness, Ignacio Pereira, and received several documents in evidence. The Mámlatdár must have been fully aware that no third arbitrator was present.

The award was made on the 12th of April following, and was signed by Mr. Campbell and Mr. Addis at the same time and place. By it a sum of Rs. 58,278 was awarded to the plaintiff as compensation for his land, together with interest at six per cent. per annum until payment.

Some correspondence took place between the plaintiff and the Collector of Thána, regarding the payment of this amount, and, on the 9th of June, the plaintiff applied by letter to be furnished with a copy of the award, in accordance with the 23rd section of the Act, to which the Collector replied on the 12th June, excusing himself for not sending a copy because the original had been forwarded to Government, but promising to send him a copy as soon as the original was returned. On the 9th of July following, the plaintiff wrote to the Government Solicitor, complaining that he could get neither the money, nor a copy of the award, and threatening legal proceedings, unless one or the other were given to him. By letter of the 21st of July, the Government Solicitor informed him that Government did not consider that any award had been made in accordance with Act VI. of 1857. The plaint in this suit was filed on the 3rd December 1869.

The 31st section of the Act is as follows :—"No award of arbitrators, made in accordance with the provisions of this Act, shall be liable to be reversed or altered, except by the decision of a Civil Court on the ground of corruption or misconduct of the arbitrators. In case the award shall be so reversed, the matter shall be referred to another arbitrator or arbitrators to be appointed in the same manner as the first. All suits to set aside an award under this Act shall be instituted within three months from the date of the award."

It stands admitted by counsel on both sides that this being an action on the alleged award, the question is not whether such matter appears in evidence as would warrant the Court in setting aside the award, but, whether there is such a defence apparent as would support what in England is styled a plea of *nul tiel agard,* that is to say, whether the circumstances proved warrant the Court in pronouncing the award to be a nullity.

There are three modes in which an award made under Act VI. of 1857 may be defeated. 1. By refusing to file and execute it under Sec. 327 of the Civil Procedure Code. 2. By setting it aside. 3. By holding it to be null and void.

The various grounds of objection to an award, which would warrant the Court in adopting any one of those three courses, may be removed by the express or tacit waiver of those grounds by the parties or their duly authorized agents. For instance, an award made after the expiration of the time originally or by enlargement appointed for the delivery of it, is a nullity ; but if the parties, after the time has so expired, acquiesced in the arbitrators proceeding with the arbitration, such acquiescence precludes them from insisting upon the objection that the arbitrators' authority was at an end before they made their award. The consent or tacit acquiescence amounts to a new submission : Russell on Arbitration, pp. 134, 136. 4th Ed.

With respect to the appointment of Mr. Hay as "third arbitrator and umpire," we are inclined to the opinion that, under the circumstances which we have described, that appointment must be considered as having been in "writing" within the meaning of Sec. 12, and as made by Mr. Addis and Mr. Campbell before they entered on the question of compensation referred to them. That section neither provides that the writing shall be signed by the arbitrators, or either of them, nor specifies any formality as indispensable in the writing. It is manifest that after Mr. Addis had written to Mr. Campbell, authorizing him to appoint Mr. Hay, and before the appointment was communicated in writing by Mr. Campbell to Mr. Hay, Mr. Campbell and Mr.

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Addis had an interview, and the latter verbally agreed with the former that Mr. Hay should be appointed. The concurrence at that interview is the judicial act, and not the signing which is merely ministerial : *in re Hopper* (*a*), and distinguishes the present case from *Lord* v. *Lord* (*b*) and *Peterson* v. *Ayre* (*c*). An arbitrator may delegate a ministerial, but not a judicial function : *Thorp* v. *Cole* (*d*). The appointment of Mr. Hay as "umpire" was also, as we have seen, entered on the minutes in the presence of Addis by Campbell, when both Addis and Campbell informed the plaintiff, in the presence of the Mámlatdár, that Mr. Hay had been so appointed. Cockburn, C.J., *in re Hopper*, said : "We ought not to be over ready to set aside awards where parties have agreed to abide by the decision of a tribunal selected by themselves, unless we see something radically wrong in the proceeding, and that the parties have not had the benefit of the judgment of the arbitrators as to the appointment of a fit and proper person to be umpire." As to the alleged necessity that the arbitrators should sign at the same time, Cockburn, C.J., said : "I think that is not necessary where the arbitrators have met and discussed the appointment of the umpire and agreed upon it. That is very different from one signing the appointment alone, and then sending it to the other who, therefore, signs it ; which, as far as appears, was all that occurred in *re Lord* v. *Lord* ; there was no combined action of the two, or judicial exercise of their minds upon the matter. That case therefore is distinguishable. The signing the name to the appointment is not a judicial act, but the record of it" (*e*). The observations of Blackburn, J., are to the same effect (*f*); and Lush, J., said that the marginal note to *Peterson* v. *Ayre* was too large, as the arbitrators had never agreed upon the terms of their award ; and Blackburn, J., added that it was not shown that they had ever come together to consider it (*g*). In *Hopper's case*, the deed of submission required that the appointment of the umpire by the arbitrators should

(*a*) 8 B & S. 100 ; S.C., L. R. 2 Q. B. 367, 375.
(*b*) 5 El. & Bl. 404. (*c*) 15 C. B. 724. (*d*) 2 C. M. & R. 367.
(*e*) 8 B & S. 112, 113. (*f*) Ibid. 115. (*g*) Ibid. 109.

be "in writing *under their hands*" by endorsement on the deed. Here the Act simply requires that the appointment shall be "by writing." There is less difficulty in the way of the plaintiff here than in that of the party seeking to uphold the award in *re Hopper*, for there is an important element in this case, not in that of Hopper, namely, that if the appointment of the third arbitrator be not efficiently made, the Collector or other officer representing Government had the immediate remedy in his own hands. The third section of Act VI. of 1857 enacts that whenever any land shall have been declared to be required for a public purpose, "the Government shall direct the Collector of the district or some other officer specially appointed in that behalf to take order for the acquisition of the land," &c. Throughout the rest of the Act, the persons designated in that section are spoken of as "the Collector or other officer." The Mámlatdár is included under the term "other officer." If the arbitrators appointed by the parties do not fulfil their duty of nominating and appointing "by writing," before they enter on the matter referred to them, a third person to act with them as arbitrator, and neglect to make such appointment for a period of one week after having been required to do so, the 12th section requires that "the Collector or other officer shall appoint a third arbitrator." Neither the Mámlatdár nor the Collector did in anywise intimate an opinion that the appointment of Mr. Hay was either irregular or null. Nor did they require the arbitrators, Mr. Addis and Mr. Campbell, to appoint a third arbitrator, nor did the Mámlatdár or Collector, after the lapse of a week or any other time, appoint a third arbitrator.

This acquiescence of the Mámlatdár in the appointment and his subsequent conduct render unimportant the question, whether or not Mr. Hay's appointment was made "by writing" as required by the Act.

That subsequent conduct, as already mentioned, was this: that, although, at the first meeting of the arbitrators, the appointment of Mr. Hay was mentioned, and the Mámlatdár must have been perfectly aware that he was not present, the

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two other arbitrators were permitted by the Mámlatdár to proceed with the arbitration, and to take important oral and documentary evidence without objection on his part—a silence which indicates either that he, like the plaintiff and Mr. Addis and Mr. Campbell, considered that Mr. Hay was to be resorted to only as an umpire, or that, however that might be, he (the Mámlatdár) was willing that Mr. Addis and Mr. Campbell should proceed with the arbitration in the absence of Mr. Hay. The acquiescence of the Mámlatdár in their so proceeding is rendered all the more weighty and significant by the power with which the 16th section of the Act invests "the Collector or other officer," *i.e.*, here the Mámlatdár, with regard to all three arbitrators, "for securing their attendance and the due completion of the award" by the same coercive means which "the Collector may legally exercise towards witnesses summoned before him, when acting judicially, for the purpose of compelling them to attend and give evidence." That, however, neither the Mámlatdár nor Collector exercised in this case. On the contrary, the Mámlatdár was apparently satisfied to allow matters to take their course. Whether he informed the Collector or not, as to what that course was, does not appear, and is not important. The Mámlatdár had become and was the officer duly authorized under the Act.

It has, however, been argued for the defendant, the Secretary of State for India, that he ought not to be bound by the acts or omissions, the remarks or the silence, of a revenue officer in the subordinate position of the Mámlatdár of a Táluká. It was, however, neither the fault of the plaintiff, nor of the arbitrators, Addis and Campbell, that the defendant was not represented by a revenue officer of higher grade and greater attainments than the Mámlatdár. The Collector, we presume, either not finding it convenient to attend at the arbitration, or for some other reason not in evidence, sent his subordinate revenue officer, the Mámlatdár. If this were an imprudent act, we should greatly hesitate before we visited its consequences upon the plaintiff, whose land was being taken from him by the defendant, for public purposes,

whether he (the plaintiff) would or not, and who was not in any manner a party to the nomination of the Mámlatdár. We cannot give any weight to the argument that the Mámlatdár probably did not know the law. Like other subjects of Her Majesty, he must be presumed to know the law. He, as such subject, must be taken to be cognizant of legislative enactments (and amongst them Act VI. of 1857) and, moreover, to construe them aright: Per Lord Stowell, 1 Dodson Rep. 392. Indeed, it is manifest from their two letters, already mentioned, that both of the Mámlatdárs were acquainted with Act VI. of 1857 (and no doubt the Government translations of that Act must have been perfectly accessible to them). Even if this were otherwise, the consequences of their ignorance could not, with the semblance of justice, be placed upon the plaintiff. If an unfortunate selection of its revenue officer to act under Act VI. of 1857 in the acquisition of land for a public purpose, and in superintending the arbitration for the assessment of compensation to the owner, has been made on behalf of Government, that circumstance is no reason in law or equity for forcing the owner of the land to a new arbitration, or for not holding Government bound by the conduct of its agent and servant.

In the case of *Harbam Narsi* v. *The Government of Bombay*, which was an application, under Sec. 327 of the Civil Procedure Code, for leave to file an award made under Act VI. of 1857, two objections were made by the defendants—one was that the Court had no power to file, under the Civil Procedure Code, an award made under Act VI. of 1857. But Sir M. Sausse, C.J., held that the Court had power so to file the award after the expiration of the three months allowed by Sec. 31 of Act VI. of 1857 within which proceedings may be taken to set aside an award on the ground only of corruption or misconduct of the arbitrators. The other and, as regards the present case, most important objection made by the Government of Bombay, was that the award had not been made in conformity with the provisions of Act VI. of 1857, inasmuch as the Collector of Bombay, having duly nominated an arbitrator on behalf of Govern-

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ment, resigned his office, and the arbitrator, so nominated, was subsequently by Government appointed Collector of Bombay, and then, declining to act as arbitrator, nominated, in his collectoral capacity, another person as arbitrator on behalf of Government, who, together with the arbitrator named by Harbam Narsi, made the award. For Government it was contended that the new Collector ought to have continued to act as arbitrator, and had not authority to appoint another in lieu of himself. Sausse, C.J., however, said:—"That person" (the new arbitrator appointed by the new Collector) "was suffered by the Government of Bombay to carry on the arbitration for several months to its close, and he was an assenting party to the award, which does not appear now to be in accordance with the views or wishes of the Government. I should be strongly coerced by authority, before I would allow such an argument to prevail at this stage, where no objection was made during the pendency of the arbitration. Were there any irregularity, I would hold that the Government of Bombay had, by its acquiescence and active participation in the reference so constituted, waived any right to object upon that ground." He also held that the arbitrator, originally appointed, had, by the act of the defendants in appointing him to be Collector, become "incapable of acting" as arbitrator, and, therefore, that the nomination by him of another arbitrator on behalf of Government had become necessary, and was legal. He concluded his judgment as follows:—"If Government had any well-founded expectation that this award could have been set aside on the ground of the corruption or misconduct of the arbitrators, it would have been quite justified in impeaching it, but if they had not, (and no other ground of impeachment is allowed under Act VI. of 1857,) then I will venture to suggest that it would be more becoming the dignity of its position to yield a ready acquiescence to a legal, though distasteful, award, than to throw small and technical delays in the way of the petitioner's obtaining his rights; *for, Government must bear in mind that it is their act which has compelled this owner to part with his land, and that they have put him in the position of no longer having the con-*

trol of his property, although he has not yet obtained the compensation for it;" and he mentioned the observations of Erle, J., in *The Queen* v. *South Devon Railway Company* (*h*). The powers given to Government by Act VI. of 1857 are greater than those given by the Lands Clauses Consolidation Act to railway companies with reference to which Act the observations of Erle, J., were made.

We have not referred to passages in the judgment in *Harbam Narsi* v. *The Government of Bombay* with a view to attribute to Government any less worthy motive in resisting the present action than a desire to protect, by such means as circumstances may admit, the public treasury from what Government may believe to be too large an award of compensation, (that objection itself not being open to Government,) but we have adverted to them for the purpose of showing the importance attached by the court to acquiescence in the continuance of the arbitration notwithstanding the existence of formidable objections to the validity of its constitution, and to the indisposition of the Court by its action to render the Act more arbitrary in its operation than the language of the Legislature clearly requires. By the same principle, it will be seen, in a case in the Court of Exchequer Chamber to which we shall presently advert, that court has been recently guided. Even where arbitration is voluntarily resorted to, the court should, according to Alderson B., struggle rather to uphold than to defeat an award : *Wynne* v. *Edwards* (*i*) ; *ut res magis valeat quam pereat* as Croke J. puts it in *Berry* v. *Perry* (*j*) ; or as Coke, C.J., said : "The reason why awards are to be favoured" is "*Quia expedit Reipublicæ ut sit finis litium*" (*k*). If this be so in ordinary cases, *a fortiori* should it be so where an award of compensation has been made under an enactment by which a compulsory sale of his land is forced upon a subject by the State, and the State resists that award, the enactment too being one which largely vests the regulation and superintendence of the arbitration in an officer of the State and arms him with unusual powers.

(*h*) 15 Q. B. 1045, 1046.
(*j*) 3 Bulstrode 65.
(*i*) 12 M. & W. 712.
(*k*) Ibid. 66.

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For these reasons we think that even if the defendant had, within three months after the date of the award, taken proceedings to have it set aside, those proceedings must have been abortive.

The award was made on the 12th April 1869. On the 12th July three months had elapsed without any steps having been taken to set it aside; not until the 21st July was the plaintiff even informed that it would be disputed; and to this day no step has ever been taken to set it aside. No fatality is assigned as a reason why timely steps should not have been taken for that purpose, if the defendant had a case which would have warranted such a proceeding.

There has been, then, not only acquiescence by the Government representative, the Mámlatdár, while the arbitration was going on, but also by the silence of Government itself until the period had elapsed within which, by Sec. 31 of the Act, steps might have been taken to set aside the award on the ground of corruption or misconduct (if any) of the arbitrators.

We are, then, of opinion that even if Mr. Hay's appointment were not made by a writing or writings sufficient to satisfy the exigency of the 12th section of the Act, any such objection has been fully and completely waived, not only by the conduct of the Mámlatdár, but also by that of Government to which we have adverted.

In the same manner, the objection based upon the non-attendance of Mr. Hay, and upon his not having taken any part whatever in the making of the award, has, we think, been finally waived. *In re Marsh* (*l*) is a case in point. There, as here, the reference was to two arbitrators, Keeling and Brummitt, and a third *arbitrator* to be named by them. Keeling and Brummitt appointed Phillips *umpire*. Haywood, the party against whom the award was ultimately made, took no objection to the appointment of Phillips as umpire and did not call upon him to

(*l*) 16 L. J. N. S., Q. B. 330, also reported *nom.* *Haywood* v. *Marsh*, 11 Jur. 657.

attend the meetings. The arbitration proceeded without the intervention of Phillips—neither Haywood nor Marsh objecting—and eventually Keeling and Brummitt made an award against Haywood. On a motion to set it aside, made on behalf of Haywood, Coleridge, J., refused it, saying: "Upon the last point" (the non-intervention of Phillips in the arbitration) "there is no doubt whatever, nor does Mr. Addison" (counsel for Haywood) "dispute that if there was an acquiescence, as to the two arbitrators deciding upon the matters in difference, no objection could be taken to the absence of the third arbitrator; but he says this—that at the last meeting there having been a difference between the parties, that set the whole matter quite open and enabled him to take this objection which had been waived all the way through. If all parties agreed to the terms of the submission," (*i.e.* the two arbitrators proceeding *absente* Phillips) "it was too late to go back to take advantage of that which they had already acquiesced in. They ought in fairness to have given notice that they would object to the authority of the arbitrators. It would be a violation of all principle to admit this objection, remembering that this motion is to set aside the award which is against the applicant." In the report in the Jurist, Coleridge, J., is represented as saying: "On the last point, I think, there can be no doubt. It was too late for the defendant to go back after he had so long agreed tacitly to go on with only two arbitrators. It would be against all principle to allow it." And in *Peterson* v. *Ayre* (*m*) Jervis, C. J., giving judgment on behalf of the Court, said: "If the case had turned upon the first and fourth points only, I should have not felt inclined to disturb the award; because I think there is enough on the face of the affidavits to show that Brown" (to whom Peterson, the plaintiff, had assigned his interest in the matter in dispute, and against whom the award was made) "and the two arbitrators, by whom the award was ultimately made, treated Garford throughout, not as a third arbitrator, but as an umpire to be consulted only in

(*m*) 14 C. B. 665, 676.

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the event of a difference of opinion between the first two." And in *The Blyth and Tyne Railway Company* and *Wilson* (*n*) where the solicitor and agent of one of the parties made no objection to an irregularly appointed umpire proceeding to make an award, but assented to his doing so, Wightman, J., held that their principal had waived the objection to the improper appointment. In *Matson* v. *Trower* (*o*) Abbott, C. J., (Lord Tenterden) held an award to be good though made by an umpire appointed by two arbitrators without any authority for that purpose, and though he examined the parties separately, inasmuch as they attended him and made no objection at the time. See also as to acquiescence *Mackenzie* v. *Hume* (*p*).

As already observed, there was not only an omission to take any objection to the mode in which Mr. Hay's appointment was made, or to the other arbitrators proceeding without his presence or co-operation, but there was not any excercise of the extraordinary powers vested by Secs. 12 and 16 of the Act in the Collector or other officer (here the Mámlatdár) to appoint a third arbitrator, if Mr. Hay were not duly appointed by his co-arbitrators, or to secure his attendance as such third arbitrator. And within three months from the date of the award the defendant took no proceedings to have it set aside.

It is, however, said that inasmuch as the Mámlatdár did not attend the subsequent meetings, he cannot be regarded as having acquiesced in the absence of Mr. Hay from those meetings. And it is also objected that notice of those subsequent meetings was not given to the Mámlatdár, and that he was entitled to such notice.

We are of opinion that the Mámlatdár having waived the objection as to Mr. Hay's absence at the first meeting, by permitting the arbitration to proceed in Mr. Hay's absence, waived it altogether, and on this point *in re Marsh*, already cited, is a sufficient authority.

(*n*) 11 W. Rep. (Eng.) 705. (*o*) Ry. & M. 17.
(*p*) I Taylor & Bell 41.

Even if this were not so, and that neither by the Mámlatdár, nor by the Government, there were any waiver of the fact that the third arbitrator was not consulted by the others and did not take any part in the arbitration, it would remain a question, to which we shall presently advert, whether, although such a circumstance may have been, as evidence of mistake or misconduct on the part of the arbitrators, sufficient ground for setting aside the award, if the defendant took measures for that purpose within three months from its date, it is sufficient to support a defence of *nul tiel agard*.

As to the absence of notice to the Mámlatdár of the meetings subsequent to the first and second, we observe that he had in fact notice of the third. The third issue, therefore, must be amended in order to raise the question intended to be raised between the parties. As altered it will be "whether the defendant by his agent had notice of any meeting of the arbitrators subsequent to the third meeting." If the Mámlatdár had attended the third meeting, he would have received notice of the fourth and so on. But howsoever this may be, and whether the notice was or was not sufficient, the not giving of that notice, though it may have been an omission, which would be such irregularity and misconduct on the part of the arbitrators as would have warranted the court in setting aside the award within proper time, will not support a plea of no award : *Thorburn* v. *Barnes* (*q*) which was a much stronger case than the present, inasmuch as the arbitrators made their award without giving the plaintiff any notice of the only meeting held by them, or any opportunity of being heard. *Braddick* v. *Thompson* (*r*) is also a direct authority to the same effect.

Those cases involved charges of misconduct against the arbitrators, and also involved the question as to the mode in which a party might avail himself of such charges, and, therefore, are relevant to the question, whether, assuming that there had not been any waiver, on behalf of the defendant, of the objection existing here, namely, that two of the arbitrators out of

(*q*) L. R. 2 C. P. 384 ; S. C. 36 L. J. C. P. 184. (*r*) 8 East 344.

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three made the award without consulting the third arbitrator and treated him merely as an umpire, such an objection can support a plea of *nul tiel agard*. Those cases then lead us to the consideration of the other authorities as to the mode in which such an objection may be successfully made.

In *Beck and Jackson* (*s*) Cresswell J., adopting the rule stated in Russell on Awards p. 209 (3rd Ed. p. 208; 4th Ed. p. 206) when speaking of the duty of joint arbitrators, says: "As they must all act, so must they all act together. They must each be present at every meeting; and the witnesses and the parties must be examined in the presence of them all; for the parties are entitled to have recourse to the arguments, experience, and judgment of each arbitrator at every stage of the proceedings brought to bear on the minds of his fellow judges, so that by conference they shall mutually assist each other in arriving together at a just decision," and, accordingly, he and Crowder J., on motion made, within the proper time, to set aside an award executed by two arbitrators in the absence of, and without finally consulting, the third, granted an order absolute to set aside the award. The covenant in the submission there was to stand by and perform the award of A and B and "of such third person as should be chosen by them to arbitrate, adjudge, and determine jointly with them as aforesaid or any two of them." That case would, therefore, (if there were no waiver or acquiescence) be a strong authority for the defendant on a motion to set aside the award. *Pering* v. *Keymer* (*t*), *Templeman* v. *Reed* (*u*), *Plews and Middleton* (*v*), *Morgan* v. *Boult* (*w*), *Little* v. *Newton* (*x*), and *Hawley* v. *The North Staffordshire Railway Company* (*y*) were all motions to set aside the award—a distinction between them and the present case of an action upon the award, which, in our opinion, was not sufficiently observed by the Third Division Court.

(*s*) 1 C. B. N. S. 695. (*t*) 3 Ad. & E. 245.
(*u*) 9 Dowl. 962; S. C. 6 Jur. 324. (*v*) 6 Q. B. 845.
(*w*) 11 W. R. 265. (*x*) 2 M. & Gr. 351.
(*y*) 12 Jur. 389; S. C. 2 De Gex. & S. 33.

The fact, that it is the practice of the courts to set aside awards made by two arbitrators in the absence of the third, and without giving him notice of their meetings, shows that such awards are regarded merely as irregular, and not as null—as voidable and not as void. In *Doe d Turnbull* v. *Brown* (*z*), Abbott, C.J., said: "This is clear, where an award may be considered as a nullity, and nothing can be done upon it but by suit, the court will not interfere to set aside the award, because any suit brought to enforce it must fail." And in *King* v. *Joseph* (*a*) Gibbs, C.J., said in substance that if the award is void, it would be superfluous to set it aside, and the court would not do so. And in *Murphy* v. *Keller* (*b*) Lord Chancellor Brady, after referring to those two cases, said: "So that the courts of law have declared, and, as I think, consistently with common sense, that when an award is void, they will treat it as a mere nullity and will not, therefore, set it aside, unless under some such peculiar circumstances as those in *Doe* v. *Brown*." And Sir T. Plumer M. R. in *Goodman* v. *Sayers* (*c*) said: "If two arbitrators out of three meet alone, excluding the third, or not giving him notice; and if they receive evidence, or hear discussions, without him, their proceeding is *irregular*."

Wade v. *Dowling* (*d*), which has been much relied upon for the defendant, was an action upon an award, to which 'no such award' was pleaded. The submission was to G and S and to an umpire to be appointed by them to arbitrate, &c., concerning the matters referred, "so as the award of the said arbitrators and umpire, or any two of them, should be made in writing under their hands ready to be delivered" on or before the 1st October then next, &c., and it was provided "that the award of the said arbitrators and umpire or any two of them should be binding on the said parties." Though the third person was there styled umpire, the context of the submission shows that he was really intended to be a third arbitrator and not an umpire. C was appointed to that office by G and S who afterwards partly heard

(*z*) 5 B. & C. 384.

(*a*) 5 Taunton 453. (*b*) 2 Irish Chan. Rep. 417, 425.

(*c*) 2 Jac. & W. 261. (*d*) 4 El. & Bl. 44.

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the case, but, not agreeing, called in C who examined some witnesses and conferred with G and S. It appeared that *he left them without expressing any opinion,* but afterwards, in the absence of G and S, executed the alleged award and sent it by post to G, (whose opinion he had adopted), and G executed the same document at Bristol on the next day, and sent it back to C by whom it was published in London in due time. The fact, that the document was executed by G and S on different days, and at different places, and that there had not been any previous concurrence between G and S, was held to support the plea of *nul tiel agard.* The judgments there delivered show that it was upon that ground alone, namely, that the two arbitrators did not sign the award *simul et semel,* and that there had not been previous concurrence between them, that the Court of Queen's Bench decided against the award in that case; and it cannot be regarded as an authority that if an award is to be made by three arbitrators *or a majority of them,* the fact, that two arbitrators made the award without consulting the third, will support a plea of *nul tiel agard.*

Fátmá Bibi v. *The Collector of Surat* (*e*) was a still plainer case of no award than *Wade* v. *Dowling.* Neither the three arbitrators nor any two of them ever met and they recorded their respective opinions at three different dates and did not make any joint award whatever.

There has not been any case cited to us in which it has been decided, either in an action on the award itself or upon a bond, conditioned for the performance of the award, that if an award is to be made by three arbitrators or a majority of them, the making of the award by two arbitrators without consulting the third, will support a plea of *nul tiel agard,* and thus nullify the award, whereas there are cases of a different complexion. Of these *Sallows* v. *Girling* (*f*) and *Berry* v. *Perry* (*g*) should be mentioned. In *Sallows* v. *Gir-*

(*e*) 8 Bom. H. C. Rep. A. C. J. 79.

(*f*) Cro. Jac. 277; S. C. 1 Bulstrode 123, Yelverton 203, Brownlow 112.

(*g*) 3 Bulstrode 62; S. C. nom. *Berry* v. *Pearing,* Cro. Jac. 399, Moore 849.

ling the action was upon a bond, conditioned to stand to the award of A, B, C, and D, so as the said arbitrators or any three or two of them did make the said award under their hands and seals before a given day. The defendant pleaded that neither they nor any three or two of them made any award. The plaintiff replied that two of them made an award under their hands. The defendant demurred, and there was judgment for the plaintiff in the King's Bench. A writ of error was brought upon this judgment in the Exchequer Chamber, and it was there held that an award by two or three of the four would be good; but because the replication was that the award was made under their hands, and did not say under their hands *and seals*, the judgment of the King's Bench was reversed, which last-mentioned objection does not exist in the present case.

Berry v. *Perry* was also an action of debt on a bond to stand to the award of four men *ita quod* the award be made and delivered in writing within, &c., under the hands and seals of the four or of any three of them. The defendant pleaded *nul tiel agard.* The plaintiff replied that three of the arbitrators did make an award and delivered it under their hands and seals, and non-performance by the defendant. The defendant demurred to that replication, and the King's Bench, after hearing the case thrice argued, followed the doctrine on the first point above mentioned in *Sallows* v. *Girling,* and held the replication to be good and accordingly gave judgment for the plaintiff.

To the same effect is *Hill* v. *Langley* (*h*). It was an action of debt on a bond conditioned to perform an award. The defendant pleaded no award made. The plaintiff replied that the submission was to the award of four, so that they made it by the 16th of November and signified it under the hands and seals of two; and then he alleged an award under the hands and seals of two. The defendant demurred, conceiving the award to be void, because the submission was to four. But the court, following the two foregoing cases, gave judgment for the plaintiff.

(*h*) Ventris 50; S. C. 2 Keble 571, 580.

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Whitmore v. *Smith* (*i*) is an important case. The Exchequer Chamber (reversing the judgment of the Court of Exchequer reported 5 H. & N. 824) held that where an award is made upon all the matters of difference and is in the required form, and intended to express their decision, an objection that they adopted the opinion of a third person by which they agreed to be bound, and exercised no judgment of their own in the matter, cannot be raised under a plea of *nul tiel agard*. The argument urged by counsel for the defendant and adopted by the Judges of the Court of Exchequer was that the award was not according to the submission, inasmuch as the parties had not what they bargained for, namely, the judgment of the arbitrators; that the decision was that of a third person and not of the arbitrators; that there was not any act of the arbitrators' minds upon the question referred, and, therefore, the award was not theirs. *Wade* v. *Dowling*, *Little* v. *Newton*, and *Eads* v. *Williams* (*j*) were cited. But Willes J., in delivering the unanimous judgment of the Exchequer Chamber, after observing that the liability of the award *to be set aside* for misconduct of the arbitrators depended upon the question of fact, whether, in acting upon Rotton's opinion, they did more than the parties themselves consented to (on which question the Exechequer Chamber pronounced no opinion), the question remained, whether the objection could be raised by plea, which the Exchequer Chamber was of opinion that it could not, said: "The award was made upon all the matters referred and no more; it was made in the requisite form, and it was intended by the arbitrators to express their decision, adopting the opinion of Rotton. It was, therefore, such an award as the declaration alleges; and the plea of no such award is negatived by the facts. In truth this objection, assuming it to be well founded, is one of a sort which ought to be brought forward whilst the matter is fresh, in the manner, and within the period prescribed by the statute of Wm. III. in cases which fall within its provisions, or by the practice of the courts in other cases within their summary jurisdiction—a jurisdiction

(*i*) 7 H. & N. 509.
(*j*) 4 De Gex M. & G. 674.

now extending over a large number of cases, which formerly belonged exclusively to the Court of Chancery (see Com. Dig. Arbitrament (A), *Nichels* v. *Roe*, 3 M & K. 431)." He, then, proceeded to show the importance of maintaining that distinction. A subsequent suit in equity to set aside the same award also failed: 1 Hem. & M. 576; affirmed on appeal, 2 De Gex, J. & S. 297.

The plaint alleges the appointments of Addis, Campbell and Hay to be in writing. The award also states the appointments of Addis and Campbell to be in writing and mentions the appointment of Hay, but does not allege it to have been in writing—an omission which we could not permit to vitiate the award, if that appointment were in fact in writing, or if the absence of a writing were waived by the parties. Both in the plaint, and in the award, the latter is alleged to be made by a majority of the arbitrators. The 20th section of Act VI. of 1857 enacts that "on the close of the inquiry the arbitrators, *or a majority of them*, shall deliver a full and complete award in respect of the matter referred to them." The force of the disjunctive "or" is noticed by Parke B. in *Hetherington* v. *Robinson* (*k*) where the absence of it determined the court to refuse to enforce an award. A plea of *nul tiel agard*, under such circumstances as we have here, must aver that no award was made by a majority of the arbitrators: *Hinton* v. *Crane* (*l*). The written statement (para. 5) does accordingly deny that the award was made by a majority of the arbitrators. The submission under the Act being to the award of the three arbitrators *or* of a majority of them, the plaintiff must succeed on the fourth issue, the fact being that the award has been made by two of the three arbitrators, and upon the whole of the matter referred. In an action upon an award, as distinguished from an action upon a bond, or obligation, conditioned to perform an award, a plea that the arbitrators did not publish their award of, and concerning, the matters in difference, *modo et forma*, merely puts in issue the fact that such an award as that declared on was

(*k*) 4 M. & W. 608. (*l*) 3 Keble 675; Russell on Arb. 523, 4th Ed.

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made concerning the premises, *i.e.*, on all the matters submitted, and does not put in issue the validity of the award: *Adcock* v. *Wood* (*m*) in which case *Fisher* v. *Pimbley* (*n*) and *Dresser* v. *Stansfield* (*o*) were explained by Parke B. (*p*). If in England the award, as set out in pleading by the plaintiff, is bad, that does not raise any question for the jury. The objections on the face of the award are for the court on demurrer or in arrest of judgment.

Mr. Hay did not attend the meetings, and neither the plaint nor the award alleges that he did. Nor does the Act lay down in positive terms that all three arbitrators should attend. Assuming, however, that they ought to have done so, it is impossible to say that it was anything more than a mistake on the part of Addis and Campbell to proceed in the absence of Hay. There certainly was not any attempt to keep him away. On the contrary, Mr. Campbell's letter of the 2nd February 1869 shows that he pressed Mr. Hay to attend; and Mr. Campbell's letter of the 5th February 1869 gave to Mr. Hay express notice that the first meeting was to be held on the 11th February, although both it and his previous letter of the 2nd prove that he considered Mr. Hay to be an umpire. Mr. Campbell's evidence shows that Mr. Addis was under the same impression, and Mr. Hay also taking that erroneous view of his position did not attend. Here was a common mistake—a mistake induced by this mode of submission to three arbitrators, which so frequently misleads as to have been condemned by Mr. Justice Coleridge in *Templeman* v. *Reed* as "senseless and mischievous, founded on a totally wrong principle, expensive in operation, and constantly ending in failure and disappointment." Addis and Campbell, being aware that Hay believed himself to be umpire, and, therefore, did not intend to attend, proceeded, after giving him notice of the first meeting, with the arbitration in his absence; and so far as regards the first meeting they were well entitled thus to do: *Dalling* v. *Matchett* (*q*). Of the other meetings they ought to have given him

(*m*) 6 Exch. 814. (*n*) 11 East 193. (*o*) 14 M. & W. 822.
(*p*) 6 Exch. 819. (*q*) Willes 215, 217; S. C. Barnes 57.

notice. Their omission to do so was a mistake which, at the highest, was, under the special circumstances of this case, misconduct of a mild character which, if there had been no waiver of it by the Mámlatdár, would, we think, have been only ground for setting aside the award on some proceeding taken within the time prescribed by Sec. 31 of Act VI. of 1857 : *in re Hall* (*r*), *Sreenath Ghose* v. *Raj Chunder Paul* (*s*). In the latter case there were nine arbitrators, some of whom did not attend all of the meetings, and one arbitrator never attended any meeting. This the Court held to be an irregularity amounting to misconduct, but not such a circumstance as would nullify the award. That case may also be usefully referred to on the subject of waiver. That a mistake or misconduct of arbitrators cannot be pleaded to an action on the award is firmly settled law : *Thorburn* v. *Barnes* (*t*), *Veale* v. *Warner* (*u*), *Grazebrook* v. *Davis* (*v*), *Braddick* v. *Thompson* (*w*).

Finally, looking at the plaint and written statement (extended as they are by the issues raised between the parties ; Sec. 139, Civil Procedure Code) with all of the liberty with which the Court is in the habit of treating proceedings under the Civil Procedure Code, and whether as a Court of Law or a Court of Equity we deal with this case, we think that the defendant cannot successfully resist the award, in arriving at which there has been some irregularity,—irregularity however, which has been acquiesced in, and of which the defendant cannot be permitted to avail himself.

Although it is not absolutely incumbent upon us to arrive at findings upon all of the issues, inasmuch as the findings on some dispense with the necessity for any findings upon others, yet it may be convenient that we should do so.

We find the first, second and fourth issues in the affirmative and for the plaintiff. We find the third issue, as

(*r*) 2 M. & Gr. 847. (*s*) 8 Calc. W. Rep. Civ. R. 171.

(*t*) L. R. 2 C. P. 384 ; S. C. 36 L. J. C. P. 184.

(*u*) 1 Wm. Saunders 327a, N. (3) and notes (k) and (l) where the cases are collected.

(*v*) 5 B. & C. 534. (*w*) 8 East 344.

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amended by us, in the negative for the defendant. We find the fifth issue, so far as it regards the right to raise the second and third issues, for the plaintiff and in the negative; and so far as it regards the right to raise the fourth issue, for the defendant and in the affirmative, which fourth issue, however, we have found as aforesaid for the plaintiff and in the affirmative. The sixth issue is incorrectly framed, for no irregularity is alleged in the fourth issue. So far as the sixth issue regards the second and third issues, we find it in the affirmative, and for the plaintiff. We find the seventh issue in the affirmative and for the plaintiff to the extent of the whole amount claimed by him. We frame an eighth issue, Sec. 141 Civil Procedure Code, (the question in which was supposed apparently by the parties to have been, but in fact was not, properly raised by the fourth and sixth issues), namely, whether the defendant, by his duly authorized agent, acquiesced in the non-intervention of Andrew Hay, the third arbitrator, in the arbitration and also acquiesced in the two other arbitrators, namely, William Judson Addis and John Campbell, proceeding with the said arbitration and making an award without the attendance of the said Andrew Hay at any of the meetings of the said two other arbitrators, and without consulting the said Andrew Hay as to the matter referred to the said three arbitrators or a majority of them, and we find the said eighth issue in the affirmative and for the plaintiff.

We, accordingly, reverse the decree of the Third Division Court, and make a decree for the plaintiff for Rs. 58,278 and interest as given by the award, and costs of the suit in that Court, but inasmuch as the defendant had the opinion of the Third Division Court in his favour, we direct that the parties respectively shall bear their own costs of the appeal.

Attorneys for the plaintiff: *Leathes and Crawford.*

Attorney for the defendant: *R. V. Hearn,* Government Solicitor.