ORIGINAL CIVIL.

Before Sir Basil Scott, Kt., Chief Justice, and Mr. Justice Chandavarkar.

1913.
January 23.

AISHABAI, APPELLANT AND PLAINTIFF *v.* ESSAJI, RESPONDENT AND DEFENDANT.*

Civil Procedure Code (Act V of 1908), Schedule II, clause 11—Arbitration—Reference to arbitration on condition that certain adjustments should not be taken into consideration—Adjustment, difference between treating as an account stated and as a mere admission—Admissibility of documents in support of particular items though excluded as evidence of a general settlement—Arbitrator, misconduct of—Evidence, honest though mistaken admission of a document by an arbitrator in violation of a rule of introduced pro hac vice.

The defendant in an action brought to recover certain sums claimed by the plaintiff under a mortgage and two deeds of further charge consented to the suit being referred to arbitration on a condition, which was embodied in the consent order referring the case to arbitration, to the following effect :—

"And it is further ordered that the said arbitrators do proceed on the basis of there having been no adjustments, and the adjustments relied upon by the plaintiff in this suit shall not be taken into consideration."

The arbitration proceedings were carried on before arbitrators appointed for the purpose and afterwards before an umpire and in the course of the proceedings the umpire in spite of the defendant's protests admitted one of the adjustments in evidence as proof of an admission by the defendant that a certain item of Rs. 1,300 included in the adjustment was due from him to the plaintiff. Previously the other of the two adjustments had been used by the plaintiff without protest from the defendant to prove one item therein.

The defendant protested and asked the umpire to submit a special case for the consideration of the Court under clause 11 of the Civil Procedure Code. The umpire doubted whether that clause would apply but postponed further consideration of the item in question to enable the defendant to move the Court, if so advised, for leave for the umpire to state a special case.

The defendant thereupon purported to put an end to the umpire's authority and refused to go on with the reference, which nevertheless was proceeded with before the umpire *ex parte* and an award made.

Held, that the passage in the consent order quoted above was reasonably susceptible of two constructions, that it was either a particular and specific, following upon a general, exclusion of all adjustments *qua* adjustments ; or, as

* Appeal No. 35 of 1912: Suit No. 917 of 1910.

contended by the defendant, a stipulation that certain documents containing the adjustments should not be admitted in evidence for any purpose; and that it was possible to admit a document as evidence in support of a particular item and at the same time exclude it as evidence of a general settlement.

Held, further, that if the defendant's contentions were correct the stipulation relied on was a rule of evidence introduced *pro hac vice*, and that the honest though mistaken admission by the umpire of a document in violation of that rule would not be a ground for setting aside the award, and that the defendant's conduct in rejecting the umpire's offer to adjourn consideration of the item under discussion in order to give the defendant an opportunity to obtain the Court's leave for a statement of the case and in deciding to withdraw from the reference without the leave of the Court was incorrect.

THIS was an appeal from a judgment of Mr. Justice Davar whereby he set aside an award upon motion of the respondent on the ground of misconduct on the part of the umpire.

The original appellant and defendant was one Haji Ahmed Hassam, and on his death by an order of the Court dated the 11th of January 1913 there were substituted for his name the names of one Aishabai, his widow, and one Mahomed Yusuf Haji Esmail Hassam as appellants and plaintiffs in the appeal.

The points in dispute between the parties are sufficiently indicated in the judgments of the learned Judges.

Raikes, with him *Strangman*, *Inverarity* and *Moos*, for the appellant.

Setalwad, with *Kanga*, for the respondent.

SCOTT, C. J.:—This is an appeal from a judgment of Davar, J. whereby he set aside an award upon motion of the respondent on the ground of misconduct on the part of the umpire named in an order of reference.

The reference was made in a suit filed by the appellant against the respondent to recover the amounts alleged to be due on a mortgage and two deeds of further charge.

1913.

AISHABAI v. ESSAJI.

In the plaint an adjustment of account, dated the 31st of August 1910, was alleged from which it appeared that the sum of Rs. 5,71,770-2-0 was found to be due to the plaintiff which sum had been slightly reduced by payments made by the defendant prior to the date of suit, namely, on the 11th of October 1910.

The defendant by his written statement pleaded that his signature to the said adjustment was obtained by fraud and that accounts should be taken.

On the 16th of March 1911 a consent order was obtained whereby the suit and all matters in dispute therein were referred to the determination of two arbitrators and in the event of their failing to make their award to Mr. K. F. Modi as umpire.

The defendant's case is that his solicitor made it an indispensable condition of the reference that all alleged adjustments of account should be set aside; and that the plaintiff's attorneys agreed to this and it was accordingly provided by the consent order as follows :—

"And it is further ordered that the said arbitrators do proceed on the basis of there having been no adjustments, and the adjustments relied upon by the plaintiff in this suit shall not be taken into consideration."

It appears from the plaintiff's affidavit of documents, dated the 2nd of December 1910, that he relied upon two statements of account adjusted and signed by the defendant one of which was the basis of and contemporaneous with the earlier of the two deeds of further charge and the other was the adjustment referred to in the plaint and written statement.

The defendant thus describes the proceedings before the arbitrators and the initial proceedings before the umpire in paragraphs 12, 13 and 14 of his affidavit in the motion.

12 The arbitrators appointed by the said order of reference took up the reference on the 6th day of April 1911, directed the plaintiff t allow

me this deponent inspection of all the entries in his own personal books of account relating to the dealings and transactions between us and also directed him to give me inspection of the books of account relating to the plying of the said steamers on my account all which inspection the plaintiff had theretofore refused to give me because of the said adjustment of 31st August 1910 and others before it. Thus as directed by the said consent order of reference the alleged adjustments were set aside. The arbitrators further directed the plaintiff to bring in his accounts. Accordingly the plaintiff brought in two accounts, one of which contained all the several sums with interest thereon which were alleged by him to have been lent and advanced to me on the mortgage of my properties and were included in the said adjustment of the 31st day of August 1910 and included in addition a sum of Rs. 17,529 for further interest from the date of the said adjustment to 30th December 1910 and an altogether new sum of Rs. 68,251 alleged to be due by me to the plaintiff in respect of the plying of the said steamers. This last mentioned sum was not included in the alleged adjustment of 31st August 1910, nor in the second deed of further charge which was executed on 17th June 1909 in respect of the alleged losses in the plying of the said steamers. It was also not claimed by the plaint and is entered on 21st December 1910 in a fraudulent account got up by the plaintiff after the filing of this suit. This account has in the proceedings before the arbitrators and the umpire been referred to as the 'mortgage account.' The plaintiff was also directed to bring in an account of the plying of the said steamers by him on my account. To both these accounts I, this deponent, was directed to bring in my objections and surcharges. In this manner the accounts between me and the plaintiff were opened up as if there had been no adjustments of account between me and the plaintiff and the same were not taken into consideration.

13. The arbitrators having omitted to extend the time for making their award at the proper time and there being no possibility of their agreeing owing to a strong bias betrayed in favour of the plaintiff by the arbitrator appointed by him, they had to give up proceeding further and the reference was taken up by the umpire on the 8th day of September 1911 under the provision in that behalf contained in the order of reference.

14. The umpire accepted the accounts brought in by the plaintiff and the objections and surcharges brought in by me this deponent and the proceedings before him thus commenced on the footing of there being no adjustments. My objections to the mortgage account brought in by the plaintiff were first taken in hand and they were proceeded with in accordance with the usual practice, the burden of proving the items objected to being considered to be on the plaintiff.

1913.

AISHABAI v. ESSAJI.

It is thus conceded by the defendant that the proceedings were commenced before the umpire on the footing of there being no adjustments.

If the accounts had been taken as settled subject to surcharge and falsification the burden of proof in regard to the items objected to would have lain upon the objector: see *Gething* v. *Keighley*[1]. The first item dealt with was an objection that a sum of Rs. 7,053-8 was not due but only Rs. 7,000, because the Rs. 53-8 was attributable to interest if calculated at 9 per cent. In proof of the item objected to the plaintiff's solicitor put in without objection the earlier of the adjusted accounts, which had also been put in before the arbitrators, as an admission that the sum claimed had been transferred to the defendant on the 13th of March 1908. The same item also appears in the adjusted account of the 31st of August 1910. The defendant then led evidence to show that the interest should have been calculated at 6 per cent. only. In the course of that evidence the adjusted account of the 31st of August was referred to by the defendant's solicitor and was marked for identification at his instance and the same account was afterwards used in cross-examination of the defendant by the plaintiff's solicitor without any objection.

At a later stage of the proceedings when all the items of objection but two relating to a sum of Rs. 1,300 and to certain bills of costs had been dealt with or transferred to other accounts for investigation the plaintiff's solicitor put in the second adjusted account of the 31st August 1910 as proof of an admission that a sum of Rs. 1,300 was due by defendant upon a transfer to the plaintiff of a debt due to the defendant by one Mulla Fazalalli, and contended that the onus of proving that the plaintiff had not relinquished his claim against Mulla Fazalalli for this amount with the consent and at the request of

(1) (1878) 9 Ch. D. 547 at p. 552.

the defendant was by the admission shifted on to the defendant.

Although this was merely a repetition of the procedure adopted with reference to the sum of Rs. 7,053-8, some months earlier, it gave rise to lively protests on the part of the defendant's solicitor and the umpire was asked to submit a special case for the opinion of the Court, under clause 11 of Schedule II of the Civil Procedure Code. The umpire said he was doubtful whether that would apply but postponed further consideration of the item of Rs. 1,300 in order to give the defendant's solicitor an opportunity to move the Court if so advised for leave for the umpire to state a special case. This was on the 20th of March 1912. On the 22nd the defendant's solicitor appeared before the umpire and stated that as the umpire had admitted the document containing the adjustment notwithstanding the defendant's objection the arbitration fell through and that the defendant was no longer bound to go on with it. He also said that as the umpire had acted in contravention of the order of reference the defendant put an end to the umpire's authority and retired.

The umpire then requested the plaintiff's solicitor to give notice to the defendant's solicitor that the reference would be proceeded with next day and if he did not attend the reference would be proceeded with *ex parte.* This notice was accordingly given by letter of the same date. The following day the reference was proceeded with *ex parte* and the defendant's solicitor being absent the surcharges remaining to be dealt with were disallowed. The plaintiff was called and gave evidence of the correctness of the steamer account which had been the subject of 222 objections by the defendant after inspection of the account books relating to it.

The plaintiff's solicitor then withdrew his claim to the Rs. 1,300 and interest thereon so that the defendant's

1913.

AISHABAI v. ESSAJI.

objections were allowed. He also withdrew a claim with regard to certain bills of costs.

This completed the inquiry and an award followed whereby the sum of Rs. 7,06,639 was awarded to the plaintiff with interest at 9 per cent. and costs.

The learned Judge was of opinion that the adjusted account could, once it was admitted on the record, be used as a deadly and destructive piece of evidence against the defendant, and that, as the defendant had specifically stipulated in the reference that it should not be so used, its admission by the umpire was misconduct and sufficient ground for setting aside the award. In considering whether this view is correct the first question which arises is whether the reference contained any unmistakable stipulation which has been disregarded by the umpire.

It appears to me that the passage in the reference relied upon by the defendant is reasonably susceptible of two constructions. It was either a particular and specific, following upon a general, exclusion of all adjustments *quâ* adjustments; or a stipulation that certain documents containing the adjustments should not be admitted in evidence for any purpose. If the defendant's solicitors intended to provide for complete exclusion of these documents they did not choose words placing their intention beyond dispute. It is possible to admit a document as evidence in support of a particular item and at the same time exclude it as evidence of a general settlement. Thus in *Middleditch* v. *Sharland*[1], a general account was decreed against a steward notwithstanding a receipt in full signed by the principal, which was only allowed as proof of a particular payment and not of a general release or discharge upon an account stated.

[1] (1799) 5 Ves. 87.

1913.

AISHABAI v. ESSAJI.

The acquiescence of the defendant's solicitor in the admission, as *primâ facie* proof of the item of Rs. 7,053-8-0, of the account containing the adjustment of the 18th of August 1908, and in the cross-examination of the defendant upon the account containing the adjustment of the 31st of August 1910, suggests that the defendant's solicitor did not then think that the documents had been excluded for all purposes by the terms of the reference.

It appears from an argumentative paragraph in the defendant's affidavit that the umpire, when he committed the act of misconduct charged against him, conceived an adjustment to be the totalling up of the two sides of an account and the striking of a balance. There is authority for this view. It is stated in Daniell's Chancery Practice (Ch. VIII, s. 3, p. 418, 7th edn.) on the authority of *Burk* v. *Brown*[1] that "a plea of stated account must show that it was in writing, and likewise the balance in writing, or at least set forth what the balance was."

If the defendant's construction of the order of reference is correct the stipulation relied on was a rule of evidence introduced *pro hac vice*, and the honest though mistaken admission by the umpire of a document in violation of that rule would not be a ground for setting aside the award: see *Ghulam Jilani* v. *Muhammad Hussan*[2]. The scope of the reference was not affected by the mistake.

It appears to me that the action of the defendant was incorrect. The umpire when asked to state a case offered to adjourn consideration of the items under discussion for a week in order to give the defendant an opportunity of obtaining the leave of the Court for the statement of a case under clause 11 of the second Schedule

(1) (1742) 2 Atk. 397. (2) (1901) L. R. 29 I. A. 51 at p. 60.

1913.

AISHABAI v. ESSAJI.

of the Code. I do not think there would have been any difficulty in framing an award so as to raise the point in dispute as was done in *Scott* v. *Van Sandau*[1].

The defendant's rejection of this course and his decision to withdraw from the reference without the leave of the Court suggests uncertainty as to his position, and doubts as to the strength of his case on the remaining items of surcharge and steamer account.

In consequence apparently of the strong line taken by the defendant's solicitor, the plaintiff's solicitor to avoid all disputes gave up the items of Rs. 1,300 and Rs. 26-10 for interest thereon and the award in effect allows the defendant's objections to these items. I doubt whether the admission of the adjusted account in evidence was so fatal to the rest of the defendant's case as the learned Judge thinks. It is pure speculation that it would have been used with fatal effect in resisting the defendant's surcharges. No attempt was made so to use it in the long inquiry into the surcharge of Rs. 5,000. I fail to see also that it would have been of any value on the steamer account items of Rs. 1,270 (objection 30); Rs. 70,893 (objection 32); and Rs. 68,251 (objection 50).

The item of Rs. 1,270 was composed of Rs. 800 for stamp charges and Rs. 470 for transfer fee on 940 shares of the Bombay Steam Navigation Company, as to which evidence must have been easily obtainable.

The items of Rs. 70,893 and Rs. 68,251 were the totals of all items claimed on steamer account for two different periods and the account Ex. H brought in by the plaintiff showing all the items included in those totals was the subject of 222 objections resulting from inspection of the steamer account books. The item of Rs. 68,251 did not appear in the adjusted account at all and the transfer of the objection as to the Rs. 70,893 to the steamer

(1) (1844) 6 Q. B. 237.

account inquiry shows that it was recognised that it must, if the defendant wished, be dealt with item by item on the defendant's steamer account objections.

For the above reasons I am of opinion that the umpire's action does not amount to misconduct and that the interests of justice do not require that his award should be set aside.

The judgment appealed from must be reversed and the motion dismissed with costs throughout on the respondent.

CHANDAVARKAR, J. :—This is an appeal from an order of Davar, J. setting aside the award made by Mr. Kaikhashru Framji Modi, as umpire on a reference to arbitration by order of the Court in Suit No. 917 of 1910.

The suit had been brought by the appellant to recover from the respondent the sum of Rs. 500,000 and odd due on certain mortgages and other adjusted accounts. In defence the respondent pleaded *inter alia* that the adjustments were vitiated by fraud and misrepresentation and prayed that "proper accounts should be taken by and under the directions of this Hon'ble Court of all the dealings and transactions" between the parties.

The cause was, however, referred to arbitration with the consent of the parties by an order of the Court and the material portion of the terms of the reference, with which we are concerned in this appeal, is contained in the provisions in the submission that "the said arbitrators do proceed on the basis of there having been no adjustments and the adjustments relied upon by the plaintiff in this suit shall not be taken into consideration by them."

The arbitrators named in the reference having failed to arbitrate, Mr. Modi, appointed umpire thereby, took their place, and the enquiry before him commenced on

1913.

AISHABAI
v.
ESSAJI.

the 8th of September 1911. At the sitting on the 19th of March 1912, one of the questions before the umpire related to an item of Rs. 1,300 debited by the appellant to the respondent. The question was whether the debit was proved. The onus at the outset lying on the appellant, his solicitor sought to discharge it by tendering in evidence an adjusted account, in which the item appeared, and the signature on which the respondent has admitted in his written statement.

The respondent's solicitor objected to the admissibility of the said adjusted account on the ground that the umpire had no authority, under the terms of the reference, to look at and take into consideration any adjustment between the parties which had been relied upon by the appellant in his suit.

The umpire overruled the objection of the respondent's solicitor and admitted as A 18 the "account purely as a statement of account acknowledged to have been signed by defendant."

In so admitting the statement, Davar, J. has held that the umpire "was guilty of what in law is called misconduct," inasmuch as, the statement having been an adjustment relied upon by the appellant (plaintiff) in his suit, had been deliberately excluded from the umpire's consideration by the express terms of his authority contained in the reference.

The question before us turns upon the proper interpretation of the clause in the reference which provided that "the adjustments relied upon by the plaintiff in this suit shall not be taken into consideration" by the umpire.

It is contended for the respondent that under that clause every adjustment or settled account in the suit was made inadmissible and outside the jurisdiction of the umpire.

On the other hand, the contention for the appellant is that all the clause in question provided was that the umpire should not treat the account stated as an *adjustment* and give it the operation it would have in law as such; but that it did not prevent him from receiving it as an ordinary piece of evidence and considering its weight in that character.

In valuing the comparative force of these rival contentions, we must start with the fact that as the suit had been framed it was on an account stated, so that had it gone to trial in the usual course it was the respondent who would have had to begin his case at the outset and establish his pleas of fraud and misrepresentation before he could get rid of the binding character of the account and become entitled to go behind it and re-open the whole account between the parties. If those pleas were not proved, it was open to him to prove some one mistake at least in the account stated before he could get the right to surcharge and falsify. In the latter case, notwithstanding the mistake proved, the account stated would have continued to retain its character as such in law and the only liberty allowed to the respondent would have been to prove that certain items had been wrongly credited or wrongly omitted in *the* account; but he would not have been allowed to go into the general account. In either case, the account stated would have been a bar to all discovery and relief unless the respondent had first established his right to open the account either wholly or partially. (See Story's Equity, 2nd Edn. English, section 523: p. 346; *Gething* v. *Keighley*[1].) The law on the subject is even more tersely but clearly stated in Coote's Law of Mortgage (5th Ed.): "In every case the account stated is

[1] (1878) 9 Ch. D. 547.

1913.

AISHABAI *v.* ESSAJI.

liable to be opened for fraud, or, the party will be allowed, in case of specific error alleged and proved, to surcharge and falsify. He cannot, however, in the latter case go into the general account, though fraud will be a sufficient ground to open the whole account."

When, therefore, the suit was referred to arbitration, the terms of the reference relieved the suit from its nature as an action on an account stated and directed the arbitrators, and on failure of them the umpire, to treat it as a suit for a general account between the parties. The respondent became entitled to go behind the account stated, without any restrictions as to proof of fraud or specific error and to get discovery. The reference required the umpire not to take "the adjustments" into consideration, *i.e.*, not to look at them *quâ* adjustments; and not to give them the legal character and operation which an account stated has. But that did not prevent him from looking at them in any other light, so long as he did not, by treating the adjustments as accounts stated, deprive the respondent of his right under the terms of the reference to go into the general account and to discovery.

In my opinion, therefore, the language of the terms of the reference is in favour of the appellant's construction that all the umpire was restricted to was the consideration of the accounts stated in the suit in the light of *adjustments*. The language used is apt for the purposes of that construction, when the reference says that the umpire shall not take into consideration "the adjustments". In plain English it means, he shall not consider the fact that there has been any adjustment. The submission does not say that he shall not receive the account in evidence and consider it at all, whether as an adjustment or otherwise.

In any case, the language used may fairly be said to be ambiguous, and extrinsic evidence can be admitted to explain the real meaning. We have that evidence afforded by the conduct of the parties in the earlier stage of the enquiry before the umpire to show what meaning they all attached to the term of the reference which has led to the present dispute.

We find from the proceedings that the enquiry before the umpire having begun on the 8th of September 1911, on the 4th of October 1911 an *adjustment* or account stated (statement marked B) was tendered in evidence by the appellant's solicitor on the ground that by means of the adjustment and his written statement the respondent had admitted the execution and receipt of consideration and that under those circumstances the *onus* of proving that the respondent had not received the moneys of the item then under discussion lay on the respondent. Respondent's solicitor did not then object to the statement B, which was an adjustment relied upon by the appellant in this suit, going in on the ground that by the term of the reference the umpire had no authority to receive it as a piece of evidence and treat it as such. On the other hand, he said he could not dispute the proposition of law, urged by the plaintiff's solicitor. The result was that, the respondent's solicitor not objecting, the statement B was put in. Further in examining his client, respondent's solicitor put questions to him with reference to some of the adjustments (see p. 20 of part II of the Paper Book); and respondent admitted having signed "another statement of account," besides B. The appellant's solicitor then produced another statement but in answer to his solicitor respondent could not say whether that was the other statement which he has signed. That statement was then marked M. I. for the identification; and res-

1913.

AISHABAI
v.
ESSAJI.

pondent was asked questions with reference to it. And it is this very statement which on the 19th of March was objected to by respondent's solicitor as outside the umpire's authority and jurisdiction when the appellant's solicitor tendered it in evidence as a mere admission. The objection came very late then; and the previous conduct of the respondent at the enquiry is sufficient to show what meaning he in common with the plaintiff had attached to the term of the reference which is now in dispute. And if that meaning is admissible, we should accept it in preference to the other, which, if acted upon, makes all the proceedings held, and the expenses incurred at the enquiry before the umpire, abortive.

But it has been urged for the respondent before us that the result of the admission in evidence of the adjustment A 18 was practically such as to give it the character and operation of an account stated, the very thing which the terms of the reference had prohibited, inasmuch as the moment the adjustment went in, as a piece of evidence it might be, the umpire was at liberty to consider it and hold that it shifted the onus of proof as to the item of Rs. 1,300, for which it was admitted or any other item in the said account, on to the respondent. That was so no doubt; but there was still an important difference between the character of the onus so shifted had the account retained the aspect of an account stated, and the nature of the onus thrown on the respondent by the admission of the account as an ordinary piece of evidence. In the former case, the respondent could not have sought discovery and the right to go into the whole account without laying the foundation for his right thereto by proving fraud or misrepresentation. Or, if fraud and misrepresentation failed, he could have, in the event of any specific error in the account stated proved, only secured

the right to surcharge and falsify but not the right to go into the general account. He could not have called upon the appellant to produce his books and discover his documents before removing the preliminary bar in his way in either case. But for the purposes of the reference that bar stood entirely removed; when the account stated (A 18) went in, there was nothing to prevent him from at once calling for discovery and going into the general account, without regard to proof of fraud or misrepresentation or mistake concerning the account stated.

Had the parties intended to shut out the adjustments absolutely even as mere admissions, not having the operation of an account stated, they could have taken care to say so and ought to have said so in the submission in distinct terms and refrained from dubious language, which laid a trap, as it were, for the umpire and made it open to either party to repudiate the reference after all the labour and expense of arbitration had been undergone. If, again, respondent felt that the umpire was exceeding his authority by misconstruing an important term of the reference he could have sought the help of the Court and asked it to construe the term and facilitate the arbitration.

I think the circumstances of this case are such as to make applicable to it the observations of Alderson, J. in *Faviell* v. *Eastern Counties Railway Co.*[1]. There the claims referred to arbitration were "an action of debt." But the plaintiff claimed before the arbitrator a sum for extra expenses which could be recovered only as damages, not debt. The arbitrator, in spite of defendant's protest, received the evidence of the extra work, and gave an award in respect of it in plaintiff's favour. The Court declined to set aside the award and treat it as a nullity, and Alderson, J., one of the Judges

(1) (1848) 2 Ex. 344.

1913.

AISHABAI
v.
ESSAJI.

who composed the Court, said :—" when the defendants saw the arbitrator entertaining a question which he ought not to entertain, it was their duty to interpose and apply to a Judge for the purpose of being allowed to revoke the submission, which, no doubt, would have been granted, had it appeared by affidavit that the arbitrator intended to exceed his jurisdiction. The question as to the construction of the submission would then have been raised before the Judge; but, instead of doing that, the defendants, though they find the arbitrator going on, do not interpose, but make the question one for his determination, and he has determined it." Similar was the case here. The respondent's solicitor objected before the umpire that the account stated could not be looked at, whether as an adjustment or otherwise and that by admitting it the umpire would exceed his jurisdiction. But the solicitor did not seek the interposition of the Court for a proper construction of the term of the reference; he withdrew from the case; and allowed the enquiry to go on; and it was only when the award had been made that the respondent asked for the interposition of the Court to interfere and set aside the award as a nullity. I think it would be bad law and injustice if under the circumstances of the case and having regard to the language of the reference defining the umpire's jurisdiction we were to hold that the award was void and the enquiry before the umpire was all infructuous.

On these grounds I concur in holding that the appeal should be allowed and the order appealed from should be set aside with costs.

Attorneys for the appellant: *Messrs. Payne & Co.*

Attorneys for the respondent: *Messrs. Ardeshir, Hormusji, Dinshaw & Co.*

Order set aside.

H. S. C.