Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of O'Rourke and another v. *The Commissioner for Railways, from the Supreme Court of New South Wales; delivered 28th June* 1890.

Present:

THE EARL OF SELBORNE.
LORD WATSON.
LORD FIELD.
SIR BARNES PEACOCK.

[*Delivered by Lord Watson.*]

The Appellants constructed part of a railway line, under a contract with the Respondent, who is the Commissioner for Railways for New South Wales; and, disputes having arisen as to the payments to which the Appellants were entitled, they brought an action against the Respondent before the Supreme Court of the Colony. Their declaration, which contains two counts on an indenture, one in damages, and a fourth in *indebitatus*, concludes for a lump sum of 100,000*l*. In the course of the litigation they furnished particulars of their claim for goods sold and delivered, amounting in all to 39,799*l*. 5*s*. 1*d*., but there is no specification in the pleadings of the sums claimed under the other counts of the declaration. The Respondent's answer consisted of a general denial of all the Appellants' allegations; and the Appellants joined issue on his pleas.

62662. 100.—7/90. A

When the cause was ripe for trial, the parties agreed to refer it, and all matters therein in dispute between them, to the determination of three arbitrators, the award of a majority to be final and conclusive. The terms of the arrangement were embodied in a decree by consent, bearing date the 22nd December 1886; and these, so far as material to the issues raised by this appeal, are as follows :—" *The award of* " *the said arbitrators to be for a sum certain for* " *the Plaintiffs, or an award for the Defendant,* " *as the arbitrators may find;* such award to be " made within one calendar month from the " close of the said arbitration, to be made in " writing, and when made to be delivered by " the said arbitrators to the Prothonotary of the " Supreme Court ; and that, unless restrained by " any order or rule of the Supreme Court or " Judge thereof, the party in whose favour the " said award shall be made may, twenty-one " days after the service of a copy of the said " award on the solicitor or agent of the other " party, *enter the said award as the verdict in* " *this cause, and shall be at liberty to sign final* " *judgment thereon*, the arbitrators to assess " their fees at the foot of the award; *the costs of* " *this action, and of the arbitration, and of and* " *incidental to the reference to arbitration, and* " *of the award, to follow the verdict so to be* " *entered and to be taxed in the ordinary* " *way*."

The arbitrators differed in opinion, and a majority signed and delivered their award on the 10th September 1887, by which they awarded the sum of 20,433*l*. 10*s*. 11*d*. to the Appellants, and assessed the fees of the three arbitrators at 1,804*l*. 5*s*. each. No application was made to set aside the award within the time prescribed, and, in terms of the decree already cited, a verdict was entered for the Appellants, on the

11th October 1887, for the sum found due to them by the award, with interest from its date, by signing an incipitur of judgment.

The Appellants then brought in their bill of costs for taxation, which included the whole costs of the action and arbitration, and incidental thereto, and also of the award. The amount of the bill was 22,983*l.* 15*s.*, which is a large sum, but the proceedings appear to have been complicated, and expensive, judging from the fees of the arbitrators, which constitute nearly one fourth of the whole. When the bill of costs came before the Prothonotary, the Respondents objected to the principle on which it was drawn up, and maintained that the Appellants were not entitled to claim costs in respect of the issues upon which they had presumably failed. After hearing parties and considering the matter, the Prothonotary, on the 2nd November 1887, issued an order adjourning the taxation until the 21st of the month, "so as to give the Defendant time "to bring in his costs for taxation on the issues "on which he has, in my opinion, succeeded." It is hardly necessary to observe that the matter, with which the taxing officer thus assumed that he had the right to deal, was one wholly beyond his jurisdiction. It involved no question of taxation, but of the Respondent's right to have a verdict entered for him, which would carry costs.

In consequence of the course taken by the Prothonotary, the Appellants moved for a rule absolute in the first instance, directing him to review the principle which he had adopted in taxing their costs. The Respondent, on the other hand, moved for a rule to show cause why the award should not be set aside, in so far as it omitted to find the several issues joined between the parties, and to specify the items and claims of the Appellants which were dis-

allowed by the arbitrators, and also why the award should not be sent back to the arbitrators, as to the matters so omitted, for such findings as might be necessary for the just and proper taxation of costs between the parties. These motions were heard together before a Full Court, who gave effect to neither of them. The learned Judges ordered the *postea* to be amended by entering a verdict for the Appellants for 20,433*l.* 10*s.* 11*d.*, and a verdict for the Respondent for 79,566*l.* 9*s.* 1*d.*, being the residue of the Appellants' demand, and declared "that "it will be competent for the Prothonotary of "this Court, on the taxation of the Plaintiffs' "costs, to satisfy himself by the evidence of the "arbitrators herein, or upon such other evidence "as may be brought before him, as to what "parts of the Plaintiffs' claim the Defendant "having succeeded is entitled to his costs."

The judgment of the Court was delivered by Mr. Justice Windeyer, who justifies the amendment of the *postea* by reference to the colonial case of Little *v.* Sandeman (12 N. S. W. Rep., 263), and the decision of the Queen's Bench of England in Traherne *v.* Gardner (8 E. and Bl., 161). Their Lordships do not question the soundness of these decisions, which nevertheless appear to them to have no application to the facts of the present case. Little *v.* Sandeman was an action in trover for eight horses. The Plaintiff having succeeded at the trial in obtaining a verdict for one animal only, the Court amended the *postea* by entering a verdict for the Defendant in the case of the remaining seven. In Traherne *v.* Gardner, the Plaintiff sued for repayment of copyhold fees paid under protest, there being separate charges applicable to each of several tenements, and, though a general verdict had been entered for the Plaintiff, it was taken subject to the opinion

of the Court upon a special case. In both instances there were several issues, upon which either the jury or the Court had separately found, and the Court were therefore in a position to amend the verdict according to the success or failure of the Plaintiff or Defendant upon each issue. But in this case (leaving out of view for the present the fact that the parties had agreed as to the course of procedure which was to be followed), the Court had no materials which could enable it to dissever the issues which had been submitted to the arbitrators, and to ascertain the findings which they had arrived at in regard to each of them. The lump sum claimed by the Appellants necessarily included unliquidated damages under the third count of the declaration; and it is clear beyond dispute that, treating the third count as a separate issue, if the Appellants got a finding for part of the damages claimed, the Respondent would not be entitled to a verdict for the balance. In that state of matters it is difficult even to speculate upon what grounds the learned Judges gave the Respondent a verdict for the excess of 100,000*l.* over the amount awarded by the arbitrators.

The directions given by the Court to their Prothonotary, in the decree appealed from, strongly illustrate the unreliable character of the cost-carrying verdict which they entered for the Respondent. They delegate to that official the duty of ascertaining, by examination of the arbitrators and others, "as to what parts of "the Plaintiffs' claim the Defendant having "succeeded is entitled to his costs." Such an inquiry is obviously beyond the functions of a taxing officer. The Court itself, and not he, must determine what were the issues raised for trial, and upon which of these, and to what extent, the Defendant is entitled to a verdict.

Their Lordships are also of opinion that the Court below erred in authorizing a general examination of the arbitrators "with a view to the Protho-" notary informing himself as to the issues upon " which the Defendant succeeded." The judgment of the House of Lords in "The Duke of Buccleuch *v.* Metropolitan Board of Works" (5, E. and I. Ap., 418), upon which Mr. Justice Windeyer relied, is, when rightly understood, a direct authority to the contrary. The principle which was laid down by Mr. Baron Cleasby in that case (p. 433), and accepted by the House, was thus explained (p. 462) by Earl Cairns:— " He (*i.e.*, the arbitrator or umpire) was properly " asked what had been the course which the " argument before him had taken—what claims " were made and what claims were admitted; " so that we might be put in possession of the " history of the litigation before the umpire up " to the time when he proceeded to make his " award. But there it appears to me the right " of asking questions of the umpire ceased. The " award is a document which must speak for " itself, and the evidence of the umpire *is not* " *admissible to explain or to aid,* much less to " attempt to contradict (if any such attempt " should be made) *what is to be found upon the* " *face of that written instrument.*" In this case, it is obvious that an examination of the arbitrators would not disclose how far the Defendant had succeeded, unless they were asked what sum, if any, they had awarded to the Appellants under each count of the declaration, a line of examination which is plainly incompetent.

The learned Judges in the Court below appear to have been influenced by the consideration, thus expressed by Mr. Justice Windeyer, that " the amount of the Plaintiffs' claim and the " amount of the arbitrators' award clearly show " that the Defendant has made a successful

" resistance to a considerable portion of the " demand made upon him, and, looking to the " amount claimed by the Plaintiffs' bill of costs, " it would be a monstrous thing if the Defen- " dant were not allowed such costs as he has " been put to in successfully resisting any " portion of the Plaintiffs' demands." These observations confirm the impression, created by the terms of the order appealed from, that the learned Judges throughout these proceedings must have assumed that they were entitled to deal with the case in the ordinary course of law, instead of following out the course which the parties themselves had agreed to. But the consent decree of 22nd November 1886 is the only measure of the rights of these two parties; and neither the Court below, nor this Board, has any right to disregard the arrangements which the parties have made, or to characterize the result of these arrangements as monstrous. Had it not been for these arrangements, the proper course might perhaps have been to send back the case to the arbitrators for special findings upon each count; but the parties have not only empowered, but have directed them to return a general award upon the whole declaration, for a sum certain, either for the Plaintiff or for the Defendant, as the case might be. In the next place, the parties have agreed that an award in these terms should, unless challenged within a time limited, be entered as a verdict for the party in whose favour it was made, who should also be at liberty to sign final judgment thereon, and both these steps have been duly taken by the Appellants, without any opposition on the part of the Respondent. Lastly, it was agreed that all costs of the action, reference, and award should "follow the verdict so to be entered," which plainly implies that the Appellants holding the award which they have

entered, are to have their whole costs as taxed, and that the Respondent is not entitled to any award or verdict carrying costs.

For these reasons, their Lordships are of opinion that the course followed by the Court below, whilst in other respects unwarrantable, is in direct contravention of the agreement of parties; and they will therefore humbly advise Her Majesty to reverse the order appealed from, with costs to the Appellants in the Court below from and after the 2nd November 1887, and to remit the cause, with directions to the Prothonotary to tax the costs of the Appellants (Plaintiffs in the Court below) upon the verdict entered for them pursuant to the award. The Respondent must pay the costs of this appeal.