[HIGH COURT OF AUSTRALIA.]

THE MELBOURNE HARBOUR TRUST COMMISSIONERS . . . . . } APPELLANTS;

AND

HANCOCK . . . . . RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF VICTORIA.

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MELBOURNE, *Mar.* 14-17; *June* 9.

Knox C.J., Isaacs, Gavan Duffy, Rich and Starke JJ.

Arbitration—Award—Setting aside award—Construction of contract—Question of construction left to arbitrator—Application of wrong principle—Uncertainty of award—Misconduct of arbitrator—Arbitration Act 1915 (*Vict.*) (*No.* 2614), *sec.* 19.

A contract between the appellants and the respondent, for the carrying out by the respondent of certain works in connection with the construction of a wharf, contained a clause providing that the appellants' engineer should have the power of requiring from time to time the omission of any particular portion or portions of the work and of deducting the value of the omitted part from the amount of the contract and that the respondent should have no claim for loss, damage or compensation on that account. Certain omissions having been required by the engineer and a dispute having arisen between the parties, a reference was made to an arbitrator of the question whether under the contract the omission could properly be made. The arbitrator by his award determined that the omission was not one that could properly be made under the contract, and he stated in his reasons for his award that the contract did not authorize the engineer to require an omission which fundamentally altered the contract, as he found that the particular omission did.

Held, (1) that the reasons of the arbitrator should be read with his award; (2) that the construction of the contract was a matter committed to the arbitrator, that his decision thereon was correct and, the question whether the particular omission did fundamentally alter the nature of the contract being one for the arbitrator alone, that his award was not open to attack on the ground that in construing the contract he had proceeded upon wrong principles of construction or had otherwise been guilty of some error of law.

Kelantan Government v. *Duff Development Co.*, (1923) A.C. 395, applied.

The contract also contained a clause providing that the respondent, on receiving a written notice from the engineer, should from time to time suspend the whole or any portion of the works as might be directed, and another clause providing that none of the provisions of the contract should be varied, waived, discharged or released unless by express consent of the appellants under their seal.

Held, that notwithstanding the last-mentioned clause the appellants might be precluded by their conduct from relying on the absence of a written notice directing a suspension.

Craine v. *Colonial Mutual Fire Insurance Co.*, (1920) 28 C.L.R. 305; *Yorkshire Insurance Co.* v. *Craine*, (1922) 2 A.C. 541; 31 C.L.R. 27, followed.

The arbitrator in respect of a claim for loss occasioned by a suspension of certain portion of the work awarded a certain sum and, in the event of the Supreme Court of Victoria determining that certain views expressed by him in his reasons as to the meaning of the clause relating to suspensions were erroneous, a certain larger sum.

Held, that in the absence of any such determination the alternative award did not come into operation and the award was not thereby rendered uncertain.

The arbitrator during the course of the arbitration stated that he would, by stating a case or otherwise, afford the appellants an opportunity of obtaining the opinion of the Supreme Court upon the question of the construction of the contract, and the appellants were thereby induced to refrain from applying to the Court under sec. 19 of the *Arbitration Act* 1915 (Vict.) for an order directing the arbitrator to state a case for the opinion of the Court. The arbitrator made his award, and at the same time issued his reasons for his award, whereby the appellants were enabled on a motion to set aside the award to raise the substantial points of law upon which it relied.

Held, that the arbitrator was not guilty of misconduct.

Decision of the Supreme Court of Victoria (Full Court) affirmed.

APPEAL from the Supreme Court of Victoria.

On 9th January 1924 a contract was entered into between the Melbourne Harbour Trust Commissioners and Charles Daniel Hancock. The contract was embodied in a printed contract form executed by both parties, incorporating by reference four other documents, namely, Hancock's tender, the specification, the conditions of the contract and the acceptance of the contract. In the specification the contract was described as a contract "for the demolition of existing wharf and sheet piling and construction of a new wharf for river berths between Victoria Dock and proposed

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Appleton Dock entrance." The conditions of the contract contained the following, among other, clauses :—

" 1. This contract is a schedule of prices contract, subject to such extras, additions, deductions, enlargements, deviations, alterations, and omissions, required by the engineer, as herein provided. The contractor shall, if required, furnish on demand a schedule of his estimated quantities, rates and amounts for each item of work described in such schedule, or required in order to carry out all the works of the contract; and in case the items described in the schedule do not include all the descriptions of work and material required for the entire completion of the contract, the contractor shall enter upon the schedule all such additional items as may be necessary in order to form his correct estimate, and arrive at the bulked sum named in his tender, which bulked sum must correspond in amount with the total arrived at by the summing up of the various amounts carried out in his schedule. The schedule is intended to show how the amount named in the tender has been estimated for the information of the Commissioners only and their officers and is to form a part of the contract, and to be the basis for progress or other payments or valuations."

" 13. The engineer shall have the power of requiring from time to time the omission of any particular portion or portions of the works of this contract, and of any materials or other matter to be supplied by the contractor, whether such omitted portion or portions may or may not be requisite or necessary to complete the whole of the works, and of deducting the value thereof from the amount of the contract, at rates to be fixed by the engineer under his hand, whose decision shall be binding and conclusive on all parties; and the contractor shall have no claim for loss, damage, or compensation on this account anything herein contained to the contrary notwithstanding."

" 21. The contractor, on receiving a written notice from the engineer, shall from time to time suspend the whole or any portion of the works as may be directed; and the contractor shall have no claim for loss or damages on this account until after and from the expiration of thirty working days from the dates of such suspensions, and such suspensions shall in no wise vitiate the

contract. All claims for loss or damage caused by such suspensions after the expiration of the said thirty days in each case of suspension shall be settled by the engineer, whose decision shall be binding and conclusive on the Commissioners and on the contractor."

"35. None of the clauses or provisions of the specification or of these conditions, or of any other part of this contract, shall be varied, waived, discharged, or released, either in law or in equity, unless by the express consent of the Commissioners under their seal."

The tender was on a form of specification prepared by the Commissioners in which the quantities of the various items of work and material were set out in a "schedule of quantities" on which was a printed notification that "the quantities in this schedule are not guaranteed as correct, but are merely given for the guidance of intending contractors. The final quantities will be taken from actual measurements on completion of the works." The tender consisted of a document containing a copy of the schedule of quantities with the rates for the various items filled in and the amounts of the cost of those items calculated from the quantities and rates. Those amounts were added together and the total was about £130,000 with a deduction of 1s. 9d. for every cask of cement supplied by the Commissioners.

An important portion of the work consisted of a large quantity of excavation and reclamation work. The work under the contract having proceeded for some time, on 1st July 1925 a written notice was given by the engineer to Hancock requiring the omission from the contract of certain portions of the specified work, and on 9th September 1925 the engineer gave a further written notice that in respect of the required omissions he deducted £55,894 16s. 10d. from the amount of the contract.

Disputes having arisen between the parties, on 9th December 1925 an indenture of submission to arbitration was executed by the Commissioners (therein called "the Trust") and Hancock (therein called "the contractor") which, so far as is material, was as follows:—

"Whereas by a certain contract in writing made 9th January 1924 between the Trust of the one part and the contractor of the other part it was agreed that the contractor should execute the works and provide the materials specified in the said contract at the rates and upon and

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subject to the terms and conditions in the said contract particularly set forth And whereas by notice dated 30th June 1925 certain works and materials of the contract were required to be omitted from the contract And whereas the sum of £55,894 16s. 10d. has been deducted from the amount of the contract by reason of the said works and materials having been required to be omitted from the said contract And whereas the contractor while admitting that the omission and deductions were made under and in accordance with the requirements of the contract alleges that the said omission was not such as could properly be made under the said contract and the contractor claims for loss occasioned by performing the remainder of the contract the sum of £10,045 2s., particulars of which are as follows—(a) £9,185 2s. by reason of the omission of 256,776 cubic yards from excavations required by the contract and the consequent increase in the cost per cubic yard for the reduced excavations; (b) £860 by reason of the reduction of the number of piles from 2,113 (the number required by the contract) to 1,038—the sum claimed is for the cost of moulds made but not required owing to the reduced number of piles And whereas the contractor also alleges that prior to the requiring of such omission as aforesaid portions of the said works of such contract were suspended and the contractor claims £3,000 for loss occasioned by such suspension And whereas the Trust denies all the said allegations of the contractor and disputes all the claims of the contractor: Now this indenture witnesseth as follows:—(1) The allegations and claims of the contractor hereinbefore recited are hereby referred to the award and final determination of Sir *Edward Fancourt Mitchell*, K.C.M.G., K.C. (hereinafter called the "arbitrator") so that the award of the arbitrator concerning the same be made in writing ready to be delivered to the said parties or either of them on or before the day of December next or any later day to which the arbitrator may by writing under his hand endorsed on these presents from time to time enlarge the time for making his award. . . . (9) The provisions of the *Arbitration Act* 1915 so far as consistent herewith shall be deemed to be incorporated herein."

On 16th April 1926 the arbitrator issued his award which, so far as is material, was as follows :—" I do award and adjudge that the said omission was not such as could properly be made under the said contract. And do further award and adjudge that of the contractor's said claim for loss occasioned by performing the remainder of the contract as to (a) being the said sum of £9,185 2s. by reason of the omission of 256,776 cubic yards from excavations required by the contract and the consequent increase in the cost per cubic yard for the reduced excavations : I do award and adjudge the sum of £9,000 and award and direct the Trust to pay such sum to the contractor. And I do further award and adjudge that in the event of the Supreme Court of Victoria or any other Court of competent jurisdiction hereinafter finally determining in any proceedings duly brought by either of the said parties in respect of this my award that the views expressed in my reasons for this award published contemporaneously herewith to the effect that I have no jurisdiction under the terms of the indenture of reference to award damages or compensation to the contractor in respect of the said claim of the contractor on the basis of a ' quantum meruit ' claim are erroneous and that I had jurisdiction to make an award in respect of the said sum of £9,185 2s. on such basis then I award and adjudge that this part of my award should be varied by increasing the said amount of £9,000 to the sum of £9,185 2s. and in such event I do award and direct the Trust to pay the sum of £9,185 2s. to the contractor in lieu of the sum of £9,000. And as to (b) being the sum of £860 by reason of the reduction of the number of piles from 2,113 (the number required by the contract) to 1,038 : The sum claimed being for the cost of moulds made but not required owing to the reduced number of piles I do award adjudge and direct that the Trust do pay to the contractor the whole of the said sum of £860. And I do further award and adjudge that prior to the requiring of the said omission as aforesaid portions of the said works of such contract were suspended. And do further award adjudge and direct that of the contractor's said claim of £3,000 in respect thereof the Trust do pay to the contractor the sum of £2,500. And I do further award and determine that in the event of the Supreme Court of Victoria or any other Court of competent jurisdiction hereinafter finally

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determining in any proceedings duly brought by either of the said parties in respect of this my award that the views expressed in my reasons for this award published contemporaneously herewith to the effect that such suspension is a suspension to which the terms of condition 21 of the general conditions of contract . . . apply are erroneous to the extent that such suspension was not one to which the provisions of such condition 21 applied then I award and adjudge that this part of my award should be varied by increasing the said amount of £2,500 to the sum of £3,000 altogether and in such event I do award and direct that the Trust do pay the sum of £3,000 to the contractor in lieu of the sum of £2,500." To the award the arbitrator's reasons were attached.

The Commissioners moved the Supreme Court to set aside the award, and the Full Court dismissed that motion and ordered that the amount of Hancock's claim for loss occasioned by performing the rest of the contract as set forth in par. (a) of the reference be remitted to the arbitrator for his reconsideration.

As to the construction of the submission *Irvine* C.J. was of opinion that the recital that the contractor admitted that the omissions and deductions "were made under and in accordance with the requirements of the contract" was limited to matters of form. In reference to a contention that the arbitrator had been guilty of misconduct in that he had stated that he would, by stating a case or otherwise, afford the Commissioners an opportunity of obtaining the opinion of the Court upon the question of the construction of the contract, that the Commissioners were thereby induced to refrain from applying to the Court under sec. 19 of the *Arbitration Act* 1915 (Vict.) for an order directing the arbitrator to state the question for the opinion of the Court, and that the effect of the award in the form in which it was made was to prevent that opinion being obtained, *Irvine* C.J. said:—"It would appear that the learned arbitrator thought that the making of his award and attaching thereto his reasons, which he throughout indicated as one of the alternatives he might decide to adopt, and which he, in fact, adopted, would give all parties the same rights to review his decisions on points of law as if he had stated those points of law in a special case under sec. 19 of the *Arbitration Act*. It would appear also that the

representatives of the Board accepted his opinion, and did not in fact apply to a Judge to direct the statement of a special case, nor apply to the arbitrator at the close of the evidence for a special case, as suggested by him. If he was wrong in this view, as to any of the points of law specifically referred to him, the honest expression of his view, even if it lulled the Board into a false security, does not, in my opinion, amount to 'misconduct,' invalidating the award, nor can the arbitrator's words or actions be taken to amount to any kind of warranty that the effect of the course, which he had many times announced as one of the alternatives he could adopt and which he has in fact adopted, would have all the legal effects which he thought it would have. If the Trust desired to safeguard itself its course was clear—namely, to apply at the close of the evidence for a special case. It is not probable that a Judge would have ordered a special case where questions of law were specifically referred to the arbitrator, and the parties had selected for this very purpose an eminent lawyer. 'The dominant factors, guiding the discretion of the Judge in ordering a special case under sec. 19, are, what is the nature of the point of law and what are the qualifications of the arbitrator for deciding the point in question' (*In re Nuttall and Lynton and Barnstaple Railway Co.* (1), adopted by *Schutt* J. in *In re President &c. of the Shire of Wodonga and Carr* (2); and see same case on appeal to the High Court (3)). It would, I think, be unjust to the other party to the arbitration that all the cost and trouble of the arbitration should be rendered useless by the fact that the Trust, relying on a possibly incorrect view of the arbitrator as to the extent to which the Court's power to review his award might be affected by the form it took, omitted to apply for a special case."

From the decision of the Supreme Court the Commissioners now, by leave, appealed to the High Court.

Other material facts are stated in the judgments hereunder.

Ham K.C. (with him *Spicer*), for the appellants. The finding by the arbitrator that the omission was not one that could properly be made under the contract was open to question before the Court

(1) (1899) 82 L.T. 17, at pp. 19-20, per *Collins* L.J.

(2) (1924) V.L.R. 56, at p. 62; 45 A.L.T. 89, at p. 92.

(3) (1924) 34 C.L.R. 234, at p. 242.

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and should be set aside, for upon the face of the award and the reasons for it that conclusion is wrong in law. It is not disputed that if a pure question of law is referred to an arbitrator his decision thereon cannot be upset on the ground that his decision is wrong in law. But, assuming that a question of the construction of a contract is a pure question of law, the question referred in this case was not only as to the construction of the contract, and, even if it was, the decision can be upset if it be shown that the arbitrator applied a wrong principle of construction. The arbitrator did apply a wrong principle of construction in that he held that clause 13 could not be construed in such a way as to put the respondent at the mercy of the appellants. There was no legal ground for the implication that clause 13 did not apply to omissions which fundamentally altered the nature of the contract. The arbitrator was wrong in holding that the appellants were not entitled to take advantage of clause 13 because they were responsible for bringing about the condition of affairs which rendered the omission necessary or advisable. [Counsel referred to *British Westinghouse Electric and Manufacturing Co.* v. *Underground Electric Railways Co. of London* (1); *Champsey Bhara & Co.* v. *Jivraj Balloo Spinning and Weaving Co.* (2); *Kelantan Government* v. *Duff Development Co.* (3); *Carr* v. *Wodonga Shire* (4); *In re King and Duveen* (5); *Young* v. *Walter* (6); *Kent* v. *Elstob* (7); *Parsons* v. *Brixham Fishing Smack Insurance Co.* (8); *Czarnikow* v. *Roth, Schmidt & Co.* (9); *R.* v. *Peto* (10).]

[ISAACS J. referred to *In re Olympia Oil & Cake Co. and MacAndrew Moreland & Co.* (11).]

The arbitrator indicated by his award and reasons that he did not intend to make an award upon any other basis than that his award should be subject to correction by the Court; the appellants are, therefore, not precluded from obtaining that correction. As to the £9,000 in respect of the omission and the £2,500 in respect of the suspension, the award is not final, for it is in each

(1) (1912) A.C. 673, at p. 686.
(2) (1923) A.C. 480, at pp. 486-488.
(3) (1923) A.C. 395, at pp. 408, 416.
(4) (1924) 34 C.L.R. 234.
(5) (1913) 2 K.B. 32.
(6) (1804) 9 Ves. 364.
(7) (1802) 3 East 18.
(8) (1918) 118 L.T. 600.
(9) (1922) 2 K.B. 478, at pp. 484, 491.
(10) (1826) 1 Y. & J. 37.
(11) (1918) 2 K.B. 771.

case subject to a condition. As to the claim in respect of the suspension the arbitrator was not entitled to find that there had been a waiver of the provision that a notice of suspension must be in writing. Under clause 35 a waiver must be under seal, and even if that could be waived there was no evidence of a waiver by the appellants, who alone could waive the requirement of clause 35.

Owen Dixon K.C. (with him *Robert Menzies*), for the respondent. Clause 13 of the conditions does not operate upon so much of the contract as is to be paid for according to the rates of payment. It cannot operate so as to enable some fundamental change to be made in the character of the work, or, in other words, so as to enable the appellants to stop the work or rescind the contract. There was not an omission from the works but a change in the character of the works. The effect of *Kelantan Government* v. *Duff Development Co.* (1) is that if parties by a contract agree to refer a question of construction to an arbitrator his conclusion upon that question is final. Here, looking at the submission, the parties did submit a question of construction to the arbitrator. The construction of a document is not a question of law. It is a matter for the determination of the Court; but that does not mean that it is a question of law. The *Kelantan Case* is the only case which suggests that it is a question of law. [Counsel referred to *In re Nuttall and Lynton and Barnstaple Railway Co.* (2).] The arbitrator did not intend to leave to the Court any question which was finally committed to him, but he intended to leave to the Court those questions which would be open to the Court if the only question left to him was the question of construction, and by doing so he has not prevented the appellants from obtaining the decision of the Court upon any question which they were entitled to have determined by the Court. The decision that the appellants were not entitled to rely on the fact that the notice of suspension was not in writing is correct in view of the decision in *Craine* v. *Colonial Mutual Fire Insurance Co.* (3). The appellants did not disavow, but adopted, the act of the engineer, and they are not entitled to say that the legal

(1) (1923) A.C. 395. (2) (1899) 82 L.T. 17.
(3) (1920) 28 C.L.R. 305.

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consequences did not flow from the notice because it was not in writing. The award in respect of the loss occasioned by the suspension is not uncertain. The award of an alternative sum does not depend on anything extrinsic to the award but depends solely on whether the award is held to be bad. There is no lack of certainty as to what was awarded but only as to whether the award was good.

Ham K.C., in reply.

Cur. adv. vult.

June 9.

The following written judgments were delivered :—

KNOX C.J. AND GAVAN DUFFY J. This is an appeal by special leave from an order of the Supreme Court of Victoria dismissing a motion to set aside an award. The submission to arbitration is contained in a deed the material portions of which are in the words following :—[The material portions of the submission were set out.]

The arbitrator by his award adjudged (1) that the omission directed by the notice of 30th June 1925 was not such as could be properly made under the contract; (2) that in respect of claims (a) and (b) respectively the appellants should pay to the respondent the sum of £9,000 and £860 respectively, and (3) that in respect of the claim for loss occasioned by suspension of the works the appellants should pay to the respondent the sum of £2,500. The award contained references to the reasons of the arbitrator published contemporaneously therewith. In the opinion of the majority of the Supreme Court, with which we agree, these reasons are to be read with the award.

The principal ground of attack on the validity of the award was that the decision of the arbitrator that the omission in question was not such as could properly be made under the contract was wrong in law. It was argued for the appellants that it appeared from the reasons that the arbitrator in arriving at this conclusion had wrongly construed clause 13 of the contract and had in doing so proceeded on wrong principles of construction. This, it was said, amounted to error in law appearing on the face of the award and afforded sufficient ground for setting it aside. If we assume this to be so, the first question to be considered is whether the

decision of the arbitrator that the omission was not such as could properly be made under the contract is subject to review. In *Kelantan Government* v. *Duff Development Co.* (1) it was decided by the House of Lords that where a question of construction is specifically referred, or is the very question referred, to arbitration, the decision of the arbitrator on that point cannot be set aside because the Court would have come to a different conclusion unless it appears on the face of the award that the arbitrator has acted illegally, e.g., by deciding on evidence which is inadmissible or on principles of construction which the law does not countenance. In that case Viscount *Cave* L.C., with whose reasoning Lord *Shaw of Dunfermline* agreed, said (2) :—" The reference, therefore, was a reference as to construction. If this be so, I think it follows that, unless it appears on the face of the award that the arbitrator has proceeded on principles which were wrong in law, his conclusions as to the construction of the deed must be accepted. No doubt an award may be set aside for an error of law appearing on the face of it; and no doubt a question of construction is (generally speaking) a question of law. But where a question of construction is the very thing referred for arbitration, then the decision of the arbitrator upon that point cannot be set aside by the Court only because the Court would itself have come to a different conclusion. If it appears by the award that the arbitrator has proceeded illegally—for instance, that he has decided on evidence which in law was not admissible or on principles of construction which the law does not countenance, then there is error in law which may be ground for setting aside the award; but the mere dissent of the Court from the arbitrator's conclusion on construction is not enough for that purpose." And Lord *Parmoor* said (3) :—" In the present appeal it was argued by the counsel on behalf of the appellants that the question of the construction of the deed had not been specifically referred to the arbitrator, although the construction of the deed was absolutely necessary for the determination of the disputes which had been referred to him. In my opinion this contention is not maintainable. Whether, however, a question of law has been

(1) (1923) A.C. 395. (2) (1923) A.C., at p. 409.
(3) (1923) A.C., at p. 418.

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specifically submitted to arbitration, falls in each case to be determined on the terms of the particular submission. If the Court, before which the award is sought to be impeached, comes to the conclusion that the alleged error in law, even if it can be maintained, arises in the decision of a question of law directly submitted to the arbitrator for his decision then the principle stated by *Channell* J. in *In re King and Duveen* (1) applies, and the parties having chosen their tribunal, and not having successfully applied to the Court under either sec. 4, or sec. 19, of the *Arbitration Act* 1889, are not in a position to question the award, or to claim to set it aside." Lord *Sumner* gave no reasons for concurring in the motion to dismiss the appeal, while Lord *Trevethin* appears to have thought that the decision of the arbitrator was open to review but was well founded. On the terms of the submission in the present case it is clear that one question specifically submitted to the arbitrator for final determination was whether the omission could properly be made under the contract, and the answer to that question depended wholly on the meaning of the contract and on the nature of the required omission. This view of the intention of the parties seems to us to be supported by reference to par. 31 of the contract, which provides in very wide terms for the reference to the engineer, to be settled and decided by his award, of almost every conceivable kind of dispute between the parties, including disputes " touching or concerning the meaning of this contract, or touching or concerning any order made by the engineer." The inference which we draw from the insertion of this clause in the contract is that the parties intended to forego the right to submit for determination by a Court of law any dispute which might arise in carrying out the contract. They have, in effect, by the submission done no more than substitute an eminent lawyer for the engineer, being probably influenced in so doing by the nature of the questions submitted. On this view of the meaning of the submission the next question for consideration is whether it appears on the face of the award, including the reasons published therewith, that the arbitrator proceeded on wrong principles of construction. A careful consideration of the passages which are referred to in the

(1) (1913) 2 K.B., at p. 36.

reasons of *Mann* J. as leading to the conclusion that the arbitrator proceeded on wrong principles has failed to satisfy us that he did so. No doubt the arbitrator gave additional reasons in support of the conclusion at which he arrived, but he definitely decided that the notice to omit was not within the provisions of clause 13 of the contract because on a consideration of all the terms of the contract and the nature and extent of the work to be done under it he thought that the words of the clause should be read as excluding omissions the extent and nature of which would render the remaining part of the work a fundamentally different undertaking from that originally covered by the contract. If this can be described as a principle of construction, it is not, in our opinion, erroneous as a rule to be applied, though its application in a particular case may be erroneous.

The appellants also attacked the award made on the claim for £3,000 for loss occasioned by the suspension of the work. The award on this claim is in the words following:—"I do further award and adjudge that prior to the requiring of the said omission as aforesaid portions of the said works of such contract were suspended. And do further award adjudge and direct that of the contractor's said claim of £3,000 in respect thereof the Trust do pay to the contractor the sum of £2,500. And I do further award and determine that in the event of the Supreme Court of Victoria or any other Court of competent jurisdiction hereinafter finally determining in any proceeding duly brought by either of the said parties in respect of this my award that the views expressed in my reasons for this award published contemporaneously herewith to the effect that such suspension is a suspension to which the terms of condition 21 of the general conditions of contract . . . apply are erroneous to the extent that such suspension was not one to which the provisions of such condition 21 applied then I award and adjudge that this part of my award should be varied by increasing the said amount of £2,500 to the sum of £3,000 altogether and in such event I do award and direct that the Trust do pay the sum of £3,000 to the contractor in lieu of the sum of £2,500." It was said for the appellants that this award was bad (1) because it was uncertain and not final and (2) because the arbitrator had

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wrongly construed clause 21 of the contract as applying to a suspension of work not ordered in writing. As to the first objection there is, in our opinion, no uncertainty in the award. The arbitrator held that clause 21 applied, and on that footing assessed the loss at £2,500. The alternative award of £3,000 was expressed to be conditional upon the determination by the Court that the arbitrator was wrong in holding that clause 21 of the contract applied, and in the absence of any decision to that effect never came into operation and may be treated as a nullity. In support of the second objection Mr. *Ham* for the appellants argued that, as the notice to suspend was not in writing, clause 21 did not apply and that, having regard to clause 35 of the contract, the arbitrator was wrong in law in holding that the condition requiring a notice in writing could be and was waived. That he so held appeared from his reasons. Clause 35 of the contract is in the words following:— "None of the clauses or provisions of the specification or of these conditions, or of any other part of this contract, shall be varied, waived, discharged, or released, either in law or in equity, unless by the express consent of the Commissioners under their seal." The decision of this Court in *Craine* v. *Colonial Mutual Fire Insurance Co.* (1) is authority for the proposition that the appellants might be precluded by their conduct from relying on the absence of a notice in writing notwithstanding the existence of clause 35 of the contract. The question whether they were so precluded was one the determination of which was for the arbitrator. For these reasons we think that the appellants have failed to establish an error in law appearing in the award and the attack on this part of the award fails.

The validity of the award was also challenged on the ground of misconduct on the part of the arbitrator. It was said that the arbitrator had on various occasions in the course of the proceedings before him stated that he would, by stating a case or otherwise, afford the appellants an opportunity of obtaining the opinion of a Court upon the question of construction, that the appellants were induced by these statements to refrain from applying to the Court under sec. 19 of the *Arbitration Act* for an order directing the

(1) (1920) 28 C.L.R. 305.

arbitrator to state the question for the opinion of the Court, and that if the effect of the award in the form in which it was made was to prevent the opinion of the Court being obtained on this question, the arbitrator was guilty of misconduct in the technical sense. We agree with the learned Judges in the Supreme Court in thinking that, for the reasons stated by *Irvine* C.J., this objection to the award cannot be sustained.

In our opinion the appeal should be dismissed.

ISAACS J. The appellants contend that the award should be set aside, and for reasons that resolve themselves into three issues: first, as to the omissions—that clause 13 of the contract does not permit so fundamental a set of omissions as were directed by the engineer; next, as to the suspension under clause 21—that it was not within the contract because it was not in writing and that objection could not be held to be waived by reason of any conduct short of writing; and lastly, as to both branches—that there was misconduct of the arbitrator.

The first two reasons are dependent on the application of a rule now established beyond discussion, namely, that an award may be set aside for error of law appearing on its face. The meaning and extent of that rule has occasioned considerable argument and has occupied a great amount of time. But I think its formulation is not difficult when the governing authorities are carefully read. With one qualifying observation, I think that Lord *Trevethin* in the *Kelantan Case* (1) collected in a short passage the broad sense of the matter as found in the cases from *Hodgkinson* v. *Fernie* (2) to the *Kelantan Case*. His Lordship said that the arbitrator's decision cannot be questioned, though the law be bad on the face of the award, only "when the submission is of a specific question of law, and is such that it can be fairly construed to show that the parties intended to give up their rights to the King's Courts, and in lieu thereof to submit that question to the decision of a tribunal of their own." As to "specific question of law" as there used, I do not understand that to be confined to a question of law separately

(1) (1923) A.C., at p. 421.

(2) (1857) 3 C.B. (N.S.) 189.

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and categorically stated in the form of a legal proposition, but a question of law *necessarily* forming an integral part of the matter submitted. The governing notion is contained in the rest of the passage quoted. To express the rule in my own words, I would say that as to every question of fact and of law necessarily included within the inner area of the submission, and therefore expressly confided to the judgment of the arbitrator, every conclusion of the arbitrator is final, however plainly it appears on the face of the award; but as to any matter of law not so included, however necessary it may be as an approach to the inner area, any error appearing on the face of the award is open to the consideration of the Court, because that has not been confided to the arbitrator. I take that to be the essence of the observations of Viscount *Cave* L.C. in the *Kelantan Case* (1), where he states the principle, leaving till later in his judgment the application of the principle to the particular case before the House.

It remains to apply that rule to the present case, remembering that an error of law appearing on a document bound up with the award is an error appearing on the face of the award itself. As to clause 13 two objections are taken. It is said that one error of law appearing on the face of the award is that the arbitrator determined that so fundamental an alteration of the works as was caused by the engineer's direction in respect of omissions was foreign to the contract. The answer to that is that the contention mingles two things which must be left distinct, namely, the enunciation of a principle, and its application. The principle enunciated on the face of the award is that a fundamental change of the works to be done under a contract would be foreign to the contract, unless, of course, provided for, and would leave one party at the mercy of another. That is not an error: it is a sound proposition. Then, taking that general proposition in his hand, the arbitrator entered the inner area itself, namely, the construction of the clause, and, gauging it by that proposition, found it in his opinion too narrow to allow of so wide an omission as was directed. That being within the inner area, his conclusion is final. Even if wrong in the opinion of a Court, it is an error within his exclusive

(1) (1923) A.C., at p. 409.

jurisdiction and is not what Lord *Dunedin*, in *Champsey Bhara & Co.* v. *Jivraj Balloo Spinning and Weaving Co.* (1), calls a "legal proposition which is the basis of the award."

Another objection touching clause 13 is that, even if the restricted view be given to the clause, no proper ground of damages is shown thereby. I agree that the claim referred means a claim on recognized legal grounds and not one to be determined by a merely moral sense of justice. But again I see no error of law appearing on the face of the award. In a contract of this nature, where such vast powers of direction, control and ultimate decision are vested in the engineer, it is quite reasonable, if the facts sufficiently appear, to find that the contractor yielded to the direction as an exertion of power, while contesting the right. This the arbitrator finds was the case, and his decision does not, even if wrong, constitute an error of law on the face of the award. Nor was the direction for omission and the contractor's compliance a necessary or integral part of the new arrangements. As found, they were not; and so it seems to me.

An objection was made that the claim being for loss of cost in respect of the work done—not omitted—was inherently unsustainable. Strictly read, that might be so; but read as the parties, judging by the evidence, understood it, it is plain enough. It means, as I understand, that costs which but for the omissions would have been distributed over all the works of excavation, and recouped generally, were thrown exclusively on the smaller quantity of excavation without the opportunity of recovering them later, as anticipated. As there has been a remittal of this claim to the arbitrator, nothing further as to that need be said.

Next, as to the suspension. The fact that it was verbal and that the requirement of clause 21 is that it should be in writing does not give rise to any necessary basic error of law. The findings of the arbitrator really show a case of estoppel by conduct, which is not inconsistent with the non-waiver clause. The only other objection respecting the branch as to suspension is with regard to form. It is said not to be final. I think it is final in the necessary sense. It is as final as if a case were stated.

The last question is whether there has been what is called "misconduct" on the part of the arbitrator. The word is here used

(1) (1923) A.C., at p. 487.

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only in its technical and often misleading sense. No one suggests, or could suggest, the smallest deviation from the strict path of honour. But the word "misconduct" as employed in this connection includes even a mistake in the procedure which has or may have unjustly prejudiced a party (see per Lord *Watson* in *Adams* v. *Great North of Scotland Railway Co.* (1)). Therefore, the appellants say that the arbitrator in the course of the proceedings used language leading the appellant to believe that there would be no necessity to make an application to the Court under sec. 19 of the *Arbitration Act* because the award would be stated in such a way as to enable all the disputed questions of law to be considered by the Court. Acting on this assurance, say the appellants, they waited until the award was made, and now they are shut out from discussing the true construction of clause 13 and the true effect of clause 35 upon clause 21, or any other question of law excluded as the award stands. There can be no shadow of doubt the arbitrator did indicate that he would so frame and publish his award as to afford that opportunity to the appellants. Neither is there any shadow of doubt that the arbitrator endeavoured faithfully to carry out his promise, and expressly stated he desired the parties to have the opportunity if they so desired. That the appellants find barriers is not what either the arbitrator or the parties expected. There was a mistake, one easily made, in an intricate subject, and which has, I do not say of necessity, but not without precedent, brought about days of discussion. Justice, I think, requires that if the appellants would be deprived of a tenable ground of objection to the award which they would have had on an application under sec. 19, their present request to reopen the award should be acceded to. Sec. 19 is one which gives the Court a discretion, and, if it sees that the point of law relied on cannot be sustained, the application will be refused. Its function is clearly stated in *Carr* v. *Wodonga Shire* (2). It touches questions of law, whether they are within the inner area of the arbitrator's jurisdiction, or are on the approaches, so as to be a basic foundation on which to rest the conclusions directly affecting the matters within the inner

(1) (1891) A.C. 31, at p. 45, 46. (2) (1924) 34 C.L.R., at pp. 241, 242.

area. The opinion of the Court, as stated at p. 242 of *Carr's Case* (1), is not a "decision," and, though the arbitrator is "bound" to follow it, yet the general law as to his jurisdiction is not impaired, and, if the opinion is followed, that general law prescribes when and how and to what extent his award may be challenged. That again is stated in *Carr's Case*, where the final authorities are cited. When, therefore, I proceed to consider how the Court in an application under sec. 19 would regard the points raised here, and unavailing in this form of award, I find that the appellants have not been prejudiced. To put the matter shortly, I agree with the arbitrator that clause 13 does not extend to authorize so extensive and so transforming a scheme of omissions as were directed. They were part of a larger scheme of operations intended by the Trust in consequence of its discovery that its first plan of operations had proved impracticable. The Trust then proceeded with the scheme, which involved the stoppage of the original scheme contracted for, and for the substitution of another which, though subserving the same needs, cannot be identified as the same as the first. The omissions did not preserve the old scheme in general character, but either treated the work done under it as useless or annexed it as subsidiary to the new and substituted scheme. True, the Trust assumed to act under clause 13 so far as formalities went, and the contractor waived formalities, but as to the Trust's right to order the omissions I am of opinion the arbitrator's construction of clause 13 is correct, and as to this part of the matter the appellants fail. With regard to the Trust's contention respecting clause 35 and its effect on clause 21, I am of opinion that the law as stated in *Craine's Case* (2) operates to preclude the Trust from relying on any such contention. All contentions with respect to the true measure of damages are already made available under the order to remit. Consequently, as an application under sec. 19 would not have been of any service to the Trust, it has not been prejudiced by the accidental disappointment occasioned by the form the award has taken, in not being technically in the form of a special case.

The appeal should, therefore, be dismissed.

(1) (1924) 34 C.L.R. 234.
(2) (1920) 28 C.L.R., at pp. 326-328; and (1922) 2 A.C. 541; 31 C.L.R. 27 (P.C.).

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RICH J. The relevant portions of the submission to arbitration have already been set out, and I need not restate them.

The learned arbitrator decided that the omission directed by the notice of 30th June 1925 was not such as could properly be made under the contract the subject of the award. This decision, it is said, was wrong in law because the learned arbitrator had wrongly construed clause 13 of the contract and applied thereto wrong principles of construction. I cannot accede to this argument. Clause 13 in terms refers to an omission from the works, not from the contract—an omission of some physical thing. In my opinion a fundamental alteration, such as this was, is not within the clause. An alteration which wholly changes the character of the work is not an omission.

In any event I think that the parties by the submission intended to oust the jurisdiction of the Courts. They submitted the specific question which was in controversy between them to the arbitrator as one containing matters of law and interpretation. Their agreement to abide by his decision on such question was intended to commit finally to him the ascertainment and interpretation of the contract (cf. *Kelantan Government* v. *Duff Development Co.* (1)).

The award was also attacked on the ground of uncertainty and want of finality. I do not so regard it. The award of £3,000 was based upon a condition which was not fulfilled and is, therefore, otiose.

The further objection that the suspension of work was not ordered in writing also fails. The arbitrator was empowered to determine and did determine that the appellants had waived this condition or were by their conduct prevented from taking advantage of the absence of writing.

Lastly, I agree that there is no justification for the attack on the award on the ground of misconduct.

For these reasons I agree that the appeal should be dismissed.

STARKE J. "If a specific question of law is submitted to an arbitrator for his decision, and he does decide it, the fact that the decision is erroneous does not make the award bad on its face so

(1) (1923) A.C. 395.

as to permit of its being set aside." Both the House of Lords and the Judicial Committee of the Privy Council have approved of this proposition (*Kelantan Government* v. *Duff Development Co.* (1); *Attorney-General for Manitoba* v. *Kelly* (2)). The question may be found in the submission itself, as in *Adams* v. *Great North of Scotland Railway Co.* (3), or the course of the arbitration may show that some question of law was committed to the arbitrator for decision as in the *Kelantan Case*. A passage in the speech of Lord *Trevethin* in that case (4) throws a good deal of light upon the views of the other noble and learned Lords on this aspect of the case. The proposition, however, is not absolute, for the Lord Chancellor (5) added the qualifying words, unless "it appears on the face of the award that he has proceeded on evidence which was inadmissible or on wrong principles of construction, or has otherwise been guilty of some error in law." This passage is somewhat difficult of application. What, asks *Irvine* C.J., is the meaning of the phrase "proceeded on wrong principles of construction"? and what, may I ask, is covered by the words "otherwise been guilty of some error in law"? Some day, no doubt, the passage will be elucidated, but a decision can be reached in this case without endeavouring to expound the qualification made by their Lordships.

The question submitted to the arbitrator in the case before us was whether certain omissions from the work prescribed by a contract made between the appellants, the Melbourne Harbour Trust Commissioners, and the respondent, Hancock, a contractor, could properly be made—which, I agree, means in this contract, could lawfully be made upon the true construction of the contract. That is as clearly a question of law as were the matters submitted to the arbitrator in the *Adams* and *Kelantan Cases*. "The parties committed to the arbiter, whom they selected, the right to construe the contract between them," and they are bound by his decision unless he proceeded on wrong principles of construction or was otherwise guilty of some error in law.

The arbitrator found that the work remaining, after the omissions were ordered, was wholly different "from what any person reckoned

(1) (1923) A.C. 395.
(2) (1922) 1 A.C. 268.
(3) (1891) A.C., at p. 33.
(4) (1923) A.C., at p. 421.
(5) (1923) A.C., at p. 411.

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or calculated upon" (cf. *Thorn* v. *Mayor of London* (1)). He then applied his mind to the construction of clause 13. It did not, on its face, authorize the omission of the whole of the work the subject of the contract; in other words, the destruction of the contract. Now, fundamentally to alter the character of the contract by the omission of work is to destroy it as a business or commercial proposition. Consequently the arbitrator held that the proper construction of clause 13 of the contract did not warrant omissions that fundamentally altered its character.

I cannot see that he proceeded upon any wrong principle of construction or that he was guilty of any error in law, for I agree with his construction. If, however, it were wrong, then it seems to me that the arbitrator was guilty of some error in law apparent on the face of the award, for he has set out in a document accompanying and forming part of the award, namely, his reasons, the contract and all facts relevant to its construction. It would then appear that the award is based upon a legal proposition which is erroneous, to use the words of Lord *Dunedin* in *Champsey Bhara & Co.* v. *Jivraj Balloo Spinning and Weaving Co.* (2). It is true that the arbitrator adverts, in the course of his reasons, to several irrelevant considerations for the purpose of the construction of clause 13, such as the unfairness of the clause if interpreted unfavourably to the contractor, the case of *New Zealand Shipping Co.* v. *Société des Ateliers et Chantiers de France* (3), and the form of the notice of omissions which was actually given, but in the end the arbitrator found the right test and based his decision fairly and squarely upon the view that clause 13 of the contract did not authorize omissions fundamentally altering and practically destroying the character of the contract between the parties. Whether the omissions did so change the character of the contract was, of course, for the arbitrator to say, and his decision upon the question of fact is admittedly final and binding upon the parties.

The contractor claimed for loss occasioned by performing the remainder of the contract £9,185, by reason of the omission of 256,776 cubic yards from excavations required by the contract

(1) (1875) 1 App. Cas. 120, at p. 127. (2) (1923) A.C., at p. 487.
(3) (1919) A.C. 1.

and the consequent increase in the cost per cubic yard for the reduced excavations; this claim was referred to the arbitrator. The quantum of damage is a question of fact and, if in ascertaining those damages an error of law appears on the face of the award or in some document so closely connected with it that it must be regarded as part of the award, the error can be reviewed and the award set aside or remitted to the arbitrator (*British Westinghouse Electric and Manufacturing Co.* v. *Underground Electric Railways Co. of London* (1); *Champsey Bhara & Co.* v. *Jivraj Balloo Spinning and Weaving Co.* (2)). The claim is based, I think, upon some misapprehension of the proper measure of the damages arising from the omission of work from the contract which could not properly be omitted according to its terms. It is clear enough, however, that the arbitrator's calculation is erroneous and the Supreme Court was right in remitting this part of the award to him. The meaning of the claim requires consideration by the arbitrator. It may be capable of the interpretation suggested by *Irvine* C.J., but otherwise I do not follow the legal basis of the claim.

I agree that the proper measure of damage for the breach of contract found by the arbitrator is that suggested by *Irvine* C.J.; but that is not the claim made and submitted to the arbitrator. Further, it must be remembered that the contractor was bound to mitigate his loss, and it may be that his loss was reduced or wholly averted by the execution of works substituted for the works omitted from the contract.

Another claim of the contractor submitted to the arbitrator was for £3,000 for loss occasioned by the suspension of portion of the works. Under the contract the engineer might from time to time by notice in writing suspend the whole or any portion of the works. A notice in writing was not given, as the arbitrator finds, in point of fact, and the Trust relies upon the provision of the contract in these words: "None of the clauses or provisions of the specification or of these conditions, or of any other part of this contract, shall be varied, waived, discharged, or released, either in law or in equity, unless by the express consent of the Commissioners under their seal." The arbitrator found that this provision had been waived;

(1) (1912) A.C., at pp. 686-688. (2) (1923) A.C. 480.

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by which he means, I apprehend, that the Trust was precluded, by reason of its acts and conduct from relying on the want of written notice (*Yorkshire Insurance Co.* v. *Craine* (1)). The question is one of fact, and wholly within the jurisdiction of the arbitrator. Nothing appears on the face of the award or in the reasons attached to it which suggests any error in point of law on the part of the arbitrator.

The Trust has also sought to set aside the award on the ground of the misconduct of the arbitrator, but the arbitrator in issuing his award with the reasons accompanying it enabled the Trust to raise the substantial points of law upon which it relied. If not, I assent to the reasoning of *Irvine* C.J. on this branch of the case and have nothing to add (see *In re Olympia Oil & Cake Co. and MacAndrew Moreland & Co.* (2)).

Finally, it was contended that the award was not final and was uncertain. In my opinion, that argument is disposed of by such cases as *Barton* v. *Ranson* (3) ; *In re Wright and Cromford Canal Co.* (4) ; *Olympia Oil Co. Case* (5).

The appeal ought to be dismissed.

Appeal dismissed with costs.

Solicitors for the appellants, *Malleson, Stewart, Stawell & Nankivell.*

Solicitors for the respondent, *Arthur Phillips, Pearce & Just.*

B. L.

(1) (1922) 2 A.C. 541 ; 31 C.L.R. 27.
(2) (1918) 2 K.B., at p. 775.
(3) (1838) 3 M. & W. 322.
(4) (1841) 1 Q.B. 98.
(5) (1918) 2 K.B. 771.