

MONDAY, 25TH NOVEMBER, 1895.

The Court sat at 10 a.m.

[Messrs. E. J. LeGrove and J. H. Macalister were sworn in as reporters.]

*Sir R. Stout*: I understand that there has been an affidavit filed by my friend, Mr. Gully, in reference to the point of jurisdiction. I understand three copies have been filed setting out certain facts. I do not propose to read the affidavit.

*Sir C. LILLEY*: You think it may be taken as read?

*Sir R. Stout*: Yes. I understand that it was stated by my friend, Mr. Gully, that this point of jurisdiction would be raised this morning.

*Sir B. BURNSIDE*: I have no objection to taking the affidavit as read, but it must not be understood that I admit it as evidence.

*Sir R. Stout*: It is really setting out a document. The facts are stated in the affidavit, and if the affidavit is not accepted we shall have to prove what we want otherwise.

*Sir B. BURNSIDE*: There is not an admission that it is evidence.

*Sir C. LILLEY*: It must be understood that any observation made by one of the arbitrators does not bind the two.

*Sir R. Stout*: The only point I wish to raise is as to the question of jurisdiction as set out in the affidavit. It has been decided by English cases that the mere fact of an award being given in an arbitration does not necessarily waive the right of jurisdiction. There are several cases which I may cite. There is the case of Davis and Price (34, Law Journal, Q.B., page 8, New Series). The head-note is, "If a party to a reference objects that the arbitrators are entering upon the consideration of a matter not referred to them, and protests against it, and the arbitrators nevertheless go into the question and receive evidence on it, and the party, still under protest, continues to attend before the arbitrators and cross-examine the witnesses on the point objected to, he does not thereby waive his objection, nor is he estopped from saying that the arbitrators have exceeded their authority on the matter." There is also a case to the same effect—*Ringlands v. Lowndes* (17, Common Bench, New Series, page 514).

*Sir B. BURNSIDE*: Did not that case apply to a case before the arbitrators? Was it subsequent or after the award?

*Sir R. Stout*: I only cite it to show that we have a right to raise this question of jurisdiction under protest. We do it to show hereafter that we have not waived that point. The same point was also tested before the Full Court in Victoria, and with the same effect: *Higgins and Wright v. the Victorian Railway Commissioners* (11, Vic. Law Reports, page 140): "We have, in appointing our arbitrators, stated that we do so under protest."

*Sir B. BURNSIDE*: Does the case of Davis and Price, cited by you, refer to proceedings taken to invalidate the award after the award has been given, and not to proceedings *in limine*?

*Sir R. Stout*: The reason I mention it now is this: Suppose we can show the arbitrators that we have no jurisdiction, will the arbitrators proceed? That is for them to consider, and I intend to mention circumstances that will affect the question.

*Sir C. LILLEY*: Would it be right to object that the Court had no jurisdiction? It would be the foundation in all Courts and all inquiries.

*Sir R. Stout*: No doubt. The point of view we take is that in this matter power to refer to arbitration is given in the contract itself. I presume copies of the contract have been served—the contract of 1888.

*Sir B. BURNSIDE*: I understand this to be an argument upon a question of law. They are not admitted facts, and I want to know how we are to apply the law to a set of facts when there are no facts before us?

*Sir R. Stout*: There is only the contract asked to be admitted. [Contract put in.]

*Sir C. LILLEY* (to Mr. Hutchison): You admit the Government Printer's copy of the contract?

*Mr. Hutchison*: Yes.

*Sir C. LILLEY*: Is this contract to be allowed to be put in for all purposes?

*Sir R. Stout*: Yes; for all purposes. It is only by virtue of the contract that the arbitration can be called into existence; it is not by virtue of any statute. Of course, the contract had to be approved by statute, to which I shall refer hereafter. We say the contract has come to an end, and if the contract has come to an end the power to arbitrate has also come to an end. That is the law. I would refer to the case of the *Llanelly Dock Company* against the London and North-Western Railway Company (Law Reports, 8 Chancery Appeals, page 948). The case begins at page 942: "When the case was before the Vice-Chancellor"—and this is the point—"his Honour disposed of it upon the ground that the proper tribunal was arbitration, as provided by 'The Railway Companies Arbitration Act, 1859,' there being a clause in the agreement to the effect that any differences arising under this agreement were to be settled by arbitration, as provided by that Act. Neither party has desired to support that view of the case, and both concur in desiring that the matter should be determined by this tribunal; and possibly it would be difficult to say that the real question between the parties could be determined by the arbitrator under that clause, because, if the plaintiffs are right in their contention, they have determined that part of the agreement as well as everything else." The point was that the agreement was determinable by notice, and when the notice was given the agreement was at an end; and the Chief Justice held that when the agreement was at an end the agreement to arbitrate was also at an end. That was also held in the case of *Higgins and Wright* against the Victorian Railway Commissioners. And the principle of the thing is apparent. If there is an agreement existing between two parties and it is part of that agreement that there shall be a reference to arbitration on points in dispute, if the agreement is put at an end to there is no agreement to arbitrate, because that part of the agreement is put at an end to as well as the other. Now, we say that the contract has come to an end on the following grounds. As to these, no doubt, there will have to be evidence, but it will be seen as the evidence proceeds