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AND

PEERAGE CASES.

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BRITISH WESTINGHOUSE ELECTRIC AND MANUFACTURING COMPANY, LIMITED . APPELLANTS;

AND

UNDERGROUND ELECTRIC RAILWAYS COMPANY OF LONDON, LIMITED . . . RESPONDENTS.

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Damages—Breach of Contract—Sale of Goods—Goods not according to Contract—Measure of Damages—Profit accruing from Act done in mitigation of Damages—Relevancy—Arbitration—Appeal—Jurisdiction—Consultative Opinion of High Court on Special Case—Award incorporating Opinion—Setting aside—Error on Face of Award.

Although the opinion of the High Court upon a special case stated by an arbitrator under the Arbitration Act, 1889, with regard to a question of law arising in the course of the reference cannot be the subject of an appeal, yet, if that opinion is erroneous, an award expressed to be founded on that opinion can be set aside as containing an error of law apparent on the face of the award.

Turbines supplied under a contract to a railway company were deficient in power and in economy of working and were not in accordance with the contract. The railway company, whilst reserving their right to damages for breach of contract, used the turbines for a time, but ultimately replaced them by other turbines of a different make and design. In the course of an arbitration between the contractors and the railway company as to the measure of damages in respect of the breach of contract the arbitrator found (1.) that the purchase of the substituted turbines by the railway company was a reasonable and prudent course for the purpose of mitigating the damages; (2.) that, even if the original turbines had complied with the contract, it would still have been to the pecuniary advantage of the railway company at their own cost to have replaced them by the other turbines owing to their greater efficiency; and he stated a special case for the opinion of the Court whether in the circumstances the cost of the substituted turbines was recoverable by the railway company as part of their damages. The Court answered this question in the affirmative, and the arbitrator made an award expressed to be made on the footing of this answer. A motion to set aside the award as containing an error of law on the face of it was refused, and this refusal was affirmed by the Court of Appeal:—

Held, (1.) that the Court had jurisdiction to set aside the award;

* *Present:* VISCOUNT HALDANE L.C., LORD ASHBOURNE, LORD MACNAGHTEN, and LORD ATKINSON.

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(2.) that the pecuniary advantage which the railway company derived from the superiority of the substituted turbines was relevant matter for the consideration of the arbitrator in assessing the damages, and that the award ought to be remitted to him with a declaration to that effect.

Decision of the Court of Appeal [1912] 3 K. B. 128, reversed.

APPEAL from an order of the Court of Appeal affirming an order of the King's Bench Division. (1)

By a contract under seal dated March 12, 1902, and made between the Metropolitan District Electric Traction Company, Limited, of the one part and the appellants of the other part, the appellants agreed to provide, deliver, and erect in accordance with the specification annexed to the contract eight steam turbines and eight turbo alternators combined at the price of 250,000*l.* payable in instalments as therein provided. By a subsequent agreement another specification was substituted for the specification originally annexed to the contract. As from April 25, 1902, the respondents became entitled to the benefit and subject to the liabilities of the contract, and the appellants accepted the respondents in substitution for the Metropolitan District Electric Traction Company.

Clause 20 of the contract provided that every difference or dispute as to the meaning or effect of the contract and specification or in any way arising out of the same should be referred to arbitration under the provisions of the Arbitration Act, 1889.

At various dates during the years 1904, 1905, and 1906 the appellants provided, delivered, and erected the eight machines mentioned in the contract. These machines were defective in design and efficiency, and, in particular, they failed to satisfy the provisions of the contract with respect to economy, and their steam consumption was extravagant and materially exceeded that which the appellants guaranteed by the contract. The respondents nevertheless accepted the machines and used them for the purposes of their railway, reserving always their right to damages in respect of the said breaches on the part of the appellants of the terms of the contract. In the year 1907 the appellants, with the respondents' consent, removed one of the machines from the respondents' premises and endeavoured by making alterations

(1) [1912] 3 K. B. 128.

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and improvements therein to bring it into conformity with the terms of the contract, and if their endeavours had proved successful they intended to effect similar alterations and improvements in the other seven machines. The respondents, always reserving their rights as aforesaid, acquiesced in the appellants making experiments on the said machine. After experiments extending over many months the appellants failed to bring the machine into conformity with the contract. The respondents thereupon determined to replace the machines provided by the appellants by others, and they purchased machines of a different design and manufacture, hereinafter called Parsons machines, and substituted them for the machines provided by the appellants. The Parsons machines had a greater capacity and a much smaller steam consumption than the appellants' machines, even supposing that the latter had been in conformity with the contract. Disputes having arisen under the contract of March 12, 1902, these disputes were by an agreement dated November 21, 1908, referred to the final determination of a sole arbitrator. In the arbitration the appellants claimed the sum of 83,293*l.*, the balance of the contract price of the machines supplied by them. The respondents counterclaimed for 280,987*l.* odd, the estimated loss caused by the excess in coal consumption for a period of twenty years, the estimated life of the appellants' machines, and alternatively for 78,186*l.*, the cost of installing the Parsons machines, and for a sum of approximately 42,000*l.*, the estimated loss caused by the excess in coal consumption during the time the appellants' machines were working. The first alternative was not pressed at the hearing. The arbitrator, before making his award, stated a special case for the opinion of the Court under s. 19 of the Arbitration Act. After finding that the appellants' machines were defective in the particulars above stated, he stated, as a matter about which there was no serious controversy, that the damages flowing from the said breaches of the contract appeared to be measurable in the first instance by a sum representing the cost of the extra consumption of coal and the extra expense of labour and of the disposal of ashes respectively caused by the defects existing in the appellants' machines, but subject to a deduction of the extra cost incurred

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under each of those heads by reason of certain defects in the condensing apparatus which the respondents were bound under the contract to provide. He then stated that it was contended by the respondents that they were further entitled to recover from the appellants the cost of the purchase and installation of the Parsons machines.

He then found the facts relative to this issue. He found as a fact that the purchase of the Parsons machines by the respondents was a reasonable and prudent course, and that it mitigated or prevented the loss and damage which would have been recoverable from the appellants if the respondents had continued to use the defective machines in the future. He further found that the purchase of the Parsons machines was to the pecuniary advantage of the respondents, and that the superiority of the Parsons machines in efficiency and economy over those supplied by the appellants was so great that even if the appellants had delivered to the respondents machines in all respects complying with the conditions of the contract it would yet have been to the pecuniary advantage of the respondents at their own cost to have replaced the machines supplied by the appellants by Parsons machines so soon as the latter were to be obtained.

He then set out the contentions of the parties as follows :—

Paragraph 17. "The contention of the claimants" (the appellants) "in substance was that having regard to the above facts I was entitled to draw the inference that the 'commercial life' of the claimants' machines had expired at the date of the purchase by the respondents of the Parsons machines, and that the said facts were therefore relevant to the question of the amount of damages recoverable on the counter-claim and that accordingly no further damages of any kind were recoverable from them by the respondents after the date when Parsons machines were procurable by the latter ; and further that the cost of procuring and installing Parsons machines was not recoverable by the respondents from the claimants."

Paragraph 18. "The respondents on the other hand contended that the cost of the purchase and installation of the Parsons machines is recoverable by them from the claimants as being the necessary cost and expense incurred by the respondents in

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mitigating or preventing (as from the respective dates when a Parsons machine was substituted for each of the claimants' machines) the damages which they would otherwise have been entitled to recover from the claimants."

The questions of law submitted for the opinion of the Court were :—

1. Whether the contention of the appellants above set forth in paragraph 17 of the case was well founded.

2. If not, whether the respondents were right in their contention that the cost to them of the purchase and installation of the Parsons machines was recoverable by them from the appellants as part of the respondents' damages.

The questions raised by the special case were argued before a Divisional Court consisting of the Lord Chief Justice and Hamilton and Avory JJ. (1) The Court adjudged that the contention of the appellants was not well founded and that the contention of the respondents on the facts as stated was correct. The arbitrator made his award whereby, after stating that he had adopted and acted upon the answers given by the Court to the questions submitted in the special case, he awarded that the appellants were not entitled to recover anything from the respondents in respect of their claim, and that the respondents were entitled to recover the sum of 15,394*l.* in respect of their counter-claim. A copy of the special case and the answers of the Court was annexed to the award and made to form part thereof. The appellants then applied to a Divisional Court consisting of Pickford and Lush JJ. to set aside the award or remit it back to the arbitrator for reconsideration upon the ground that the answers given by the Divisional Court to the questions submitted by the special case were wrong in law and constituted a misdirection to the arbitrator, and there was therefore an error of law on the face of the award. The Court, considering itself bound by the opinions given by the Divisional Court, dismissed the application without argument. The appellants appealed to the Court of Appeal (Vaughan Williams, Buckley, and Kennedy L.JJ.). (2) The Court held, first, (Vaughan Williams L.J. dissenting) that it was competent for them to entertain the appeal, and, secondly,

(1) [1911] 1 K. B. 575. (2) [1912] 3 K. B. 128.

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(Buckley L.J. dissenting) that the appeal failed on the merits. Buckley L.J. differed upon the construction of the special case. As he read the findings of the arbitrator they amounted to a statement that the reasonableness and prudence of the course taken by the respondents were attributable not only to the position in which they found themselves by the breach of contract, but also to a regard for their own pecuniary advantage, and he thought that the appellants were entitled to a decision of the arbitrator upon the first point apart from the second; but except upon the question of construction he did not differ from the conclusions of the other members of the Court.

June 21, 25, 27, 28; July 1. *Sir Alfred Cripps, K.C.*, and *W. J. Disturnal* (with them *R. T. Tangye*), for the appellants. The appellants having failed to supply machines in conformity with the contract, the question is how are the damages for the breach of contract to be ascertained. The appellants' machines have been rejected and scrapped because they became obsolete, and they have been replaced by the Parsons machines. The arbitrator has found that, assuming that the appellants' machines had been according to contract, it would still have paid the respondents to have scrapped them and to have put the Parsons machines in their place. In ascertaining the measure of damages the true principle is that the person suffering from the breach of contract is to be placed in the same position as if there had been no breach. It may be that he has suffered no material loss. It is said by the respondents that, supposing it was a prudent thing to have purchased the substituted machines, they are entitled as part of the damages to the whole cost of those machines irrespective of the advantage which they have derived from them. But the money spent in purchasing the Parsons machines must have been spent if the appellants' machines had been absolutely in accordance with the contract, and the result of the award is that the appellants have paid for the Parsons machines. The appellants contend, first, that they are not liable for the cost of the Parsons machines because the purchase of those machines was not the consequence of any defect in the appellants' machines, but arose from other considerations; secondly, that,

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assuming that the purchase of these machines is to be attributed to the appellants' breach of contract, the Court will consider the true cost to the respondents in connection with that purchase, which is not merely the purchase price, but is the cost with all the counterbalancing advantages derived from those machines—greater power and greater economy. The respondents are entitled to an indemnity against loss in respect of the breach complained of, but they are not entitled to make a profit out of the transaction: *Erie County Natural Gas and Fuel Co.* v. *Carroll* (1); *Wertheim* v. *Chicoutimi Pulp Co.* (2); *Wigsell* v. *School for Indigent Blind* (3); *Hochster* v. *De la Tour* (4); *Brace* v. *Calder* (5); *Oldershaw* v. *Holt.* (6) In *Joyner* v. *Weeks* (7), which was an action for damages for breach of a repairing covenant, the same principle was stated by Wright J., but his decision was reversed by the Court of Appeal on grounds of convenience. But that case is distinguishable. When once the Court has arrived at the conclusion that the measure of damages is x, which in that particular class of case was the cost of putting the premises into repair, no outside circumstances will be taken into consideration for the purpose of reducing x to $x - a$. But here the measure of damages never was x, but was $x - a$, that is to say, the price of the new machines less the value of the additional advantages derived from their use. Upon the question of jurisdiction it is true that the opinion of the Divisional Court is not directly appealable because it is a mere direction, but where there is an error of law on the face of an award the award is appealable, and not the less because the error of law is founded upon the opinion of the Divisional Court.

The Hon. J. D. Fitzgerald, K.C., and *Roskill, K.C.* (with them *Lynden Macassey*), for the respondents. 1. The opinion given by the Divisional Court upon the special case was right. It is the duty of a person suffering from a breach of contract to minimize the loss, and if that can be effected by the expenditure of a smaller sum of money that expenditure is the measure of

(1) [1911] A. C. 105.
(2) [1911] A. C. 301, at p. 308.
(3) (1882) 8 Q. B. D. 357, at p. 364.
(4) (1853) 2 E. & B. 678; 22 L. J. (Q.B.) 455.
(5) [1895] 2 Q. B. 253, at p. 261.
(6) (1840) 12 Ad. & E. 590.
(7) [1891] 2 Q. B. 31.

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damages. There is no finding that the appellants' machines were obsolescent. Prima facie the amount of the continuing damage during the life of the inefficient machines is the measure of damage, or such smaller sum as by the purchase of other machines is necessary to bring that damage to an end. The respondents admit their duty to mitigate, and their contention is that the smallest expenditure necessarily incurred for that purpose plus the damage which had already accrued by the user of the defective machines is the measure of damages. The arbitrator has found that the expenditure on the new machines was reasonable and prudent, and, when money has been properly spent in mitigation of damages, any ancillary or incidental advantage arising from that expenditure does not come into account at all. It is said that the appellants' machines ought to have been scrapped in any event, and that consequently it is immaterial whether they were in accordance with the contract or not, because after the Parsons machines came into vogue they became commercially valueless. That argument would lead to this startling result, that the appellants could get payment in full for defective machines. The respondents' position is that being defective the machines are worth so much less than the contract price, and that that is a proper consideration for the arbitrator: *Mondel* v. *Steel.* (1) Upon the authorities, the respondents having adopted a prudent and reasonable course in purchasing the Parsons machines, they are entitled to recover the full cost of those machines without regard to any incidental advantages to be derived from their use: *Le Blanche* v. *London and North Western Ry. Co.* (2); *Joyner* v. *Weeks* (3); *Bradburn* v. *Great Western Ry. Co.* (4); *Jebsen* v. *East and West India Dock Co.* (5); *Rodocanachi* v. *Milburn.* (6) The measure of damages is the money which the person suffering from the breach has to pay to put an end to the damage. No case can be found in which the value of extraneous or incidental advantages arising from the proper expenditure of money in minimizing the loss in respect of a

(1) (1841) 8 M. & W. 858, at p. 871.
(2) (1876) 1 C. P. D. 286, at pp. 302, 313.
(3) [1891] 2 Q. B. 31.
(4) (1874) L. R. 10 Ex. 1.
(5) (1875) L. R. 10 C. P. 300.
(6) (1886) 18 Q. B. D. 67.

breach of contract has been brought in in reduction of damages, and it is difficult to see on what principle the deduction is to be made. [They also referred to *Hinde* v. *Liddell* (1); *The Mediana* (2); *Staniforth* v. *Lyall* (3); *Cobb* v. *Great Western Ry. Co.* (4); *The Greta Holme* (5); *Perrott* v. *Shearer* (6); *Norristown* v. *Moyer* (7); Sedgwick on Damages, p. 117.]

2. An opinion given by the Court in its consultative capacity to an arbitrator cannot be the subject of an appeal directly or indirectly; and if the arbitrator has acted on that opinion and it is wrong, that does not constitute an error of law on the face of the award which will justify the setting aside of the award: *In re Knight and Tabernacle Permanent Building Society.* (8)

[VISCOUNT HALDANE L.C. *Hodgkinson* v. *Fernie* (9) shews that an award can be set aside where there is a mistake of law apparent on the face of the award.]

The decision in that case was that the award was final. In *Adams* v. *Great North of Scotland Ry. Co.* (10) Lord Halsbury quoted with approval the decision of the Court of Common Pleas in *Emmerson* v. *Stimpson* (11) that the decision of an arbitrator was final on a question of law as well as on a question of fact, and in *Great Western Ry. Co.* v. *S. Pearson & Son, Ld.* (12) he threw doubt on the proposition of law stated in *Hodgkinson* v. *Fernie* (9) if it meant that any error of law apparent on the face of the award was a sufficient ground for setting it aside, although the decision in that case was that there was not in fact any error of law apparent on the face of the award. It is suggested that the general understanding of the profession on this point is erroneous and that an award is not appealable for any error of law except where the final award is stated in the form of a special case. There is no case which says an award is appealable where the only error of law apparent on the face of the award consists in following an erroneous opinion of the Court given in

(1) (1875) L. R. 10 Q. B. 265, at p. 270.
(2) [1900] A. C. 113, at p. 117.
(3) (1830) 7 Bing. 169.
(4) [1893] 1 Q. B. 459.
(5) [1897] A. C. 596.
(6) (1868) 17 Mich. 48.
(7) (1871) 67 Pa. 355.
(8) [1892] 2 Q. B. 613.
(9) (1857) 3 C. B. (N.S.) 189.
(10) [1891] A. C. 31.
(11) (1847) 9 L. T. (O.S.) 199.
(12) (H. L.) October 29, 1907. Unreported.

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answer to a question submitted by the arbitrator in the course of the arbitration. [They also cited on this point *S. Pearson & Son, Ld.* v. *Great Western Ry. Co.* (1)]

Disturnal in reply. *Hodgkinson* v. *Fernie* (2) was recognized and acted upon in *Landauer* v. *Asser* (3) and it follows *Kent* v. *Elstob.* (4)

The House took time for consideration.

July 19. Viscount Haldane L.C. My Lords, the question raised in this appeal relates to the measure of damages payable by the appellants to the respondents on account of a breach of contract by the appellants. The contract, which was made in 1902, bound the appellants to deliver and erect within a period and in accordance with a specification eight steam turbines of 5500 kilowatt capacity and eight turbo alternators. Some alterations were afterwards by agreement made in the specification, but it is not necessary to refer to these. The price was to be 250,000*l.* payable in instalments. The contract provided for reference of disputes as to its meaning or effect to arbitration, and, in the events which happened, the Right Hon. Alfred Lyttelton was appointed arbitrator. The Arbitration Act of 1889 applied to the reference.

Differences arose between the parties. The appellants at various dates during the years 1904, 1905, and 1906 provided the machines, but the respondents alleged that the machines provided failed to satisfy the provisions of the contract with respect to economy and steam consumption. They claimed damages for the breach of contract to the extent of 280,000*l.* and upwards, which they said was their estimate of the loss caused by the excessive coal consumption for a period of twenty years at which they estimated the life of the machines. Alternatively they claimed the cost of installing eight new Parsons turbines, being machines of an improved order and of 6000 instead of 5500 kilowatt capacity, which they had purchased elsewhere when the

(1) (H. L.) July 3, 1907. Unreported.
(2) 3 C. B. (N.S.) 189.
(3) [1905] 2 K. B. 184.
(4) (1802) 3 East, 18.

appellants' machines proved insufficient. The cost of these machines they estimated at 78,186*l.* 4*s.*, and they claimed in addition 42,000*l.* for the estimated loss caused by the excess of coal consumption during the time in which the appellants' machines were working and before the Parsons machines could be installed.

It appeared that after the appellants' machines were installed they supplied power for several years, but in a manner which was defective. The respondents, however, used them, and allowed the appellants to remove one temporarily, in order to endeavour to improve it, but the respondents always reserved their right to damages on account of breach of contract. It was not until 1908 that the respondents came to the conclusion that they would replace the appellants' machines with the Parsons machines.

The arbitrator heard the parties on the dispute which had arisen between them, and on June 14, 1910, stated a special case. He set out that the claim of the appellants was in substance for the unpaid balance of the price of their machines and that as against this claim the respondents counterclaimed the larger sums to which I have already referred, as damages. The counter-claim, he said, was made originally in alternative ways. First, upon the footing of the loss and damage already caused to the respondents, and of the loss which would afterwards have been caused to them by reason of the appellants' breach of contract on the assumption that the respondents had continued to make use of the appellants' machines. Alternatively the respondents had claimed a smaller sum, composed of the damages already caused to them plus the cost to them of the installation of the Parsons machines. He stated that the damages flowing from the breaches of the contract by the appellants appeared to be measurable in the first instance by a sum representing the cost of the extra consumption of coal and the extra expenses of labour, and arising in connection with the disposal of ashes caused by the defects in the machines delivered, but subject to certain deductions by reason of defects in the condensing apparatus which the respondents themselves had undertaken to provide. He stated that in addition to this head of claim, about which there was no serious controversy, the respondents further contended that they were entitled to recover

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the cost of putting in the Parsons machines, alleging that by so doing further loss had been prevented which must otherwise have fallen on the appellants in respect of the prospective loss from extra consumption of coal and other matters, to be caused by the use of the defective machines. He then found as a fact that the purchase of the Parsons machines by the respondents was a reasonable and prudent course, and that it mitigated or prevented the loss and damage which would have been recoverable from the appellants if the respondents had continued to use the appellants' defective machines in the future.

He found further that the purchase of the Parsons machines was to the pecuniary advantage of the respondents and that the superiority of Parsons machines in efficiency and economy over those supplied by the appellants was so great that, even if the appellants had delivered to the respondents machines in all respects complying with the conditions of the said contract, it would yet have been to the pecuniary advantage of the respondents at their own cost to have replaced the machines supplied to the respondents by Parsons machines so soon as the latter could be obtained.

Having found these facts, he set out the contentions of the parties. The case of the appellants was in substance that on the facts as stated he was entitled to draw the inference that the "commercial life" of these machines had expired at the date of the purchase by the respondents of Parsons machines, that these facts were therefore relevant to the question of the amount of damages recoverable on the counter-claim, and that accordingly no further damages of any kind were recoverable by the respondents after the date when they could procure Parsons machines, and, further, that the cost of procuring and installing Parsons machines was not recoverable by the respondents.

The contention of the respondents on the other hand was that the cost of the purchase and installation of the Parsons machines was recoverable by them from the appellants as being the necessary cost and expense incurred by the respondents in mitigating, as from the respective dates when a Parsons machine was substituted for each of the appellants' machines,

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the damages which they would have been entitled to recover from the appellants.

The arbitrator then stated, under the powers conferred by the Arbitration Act, 1889, two questions of law for the opinion of the Court. The first was whether the contention of the appellants as above set out was well founded, and the second was whether, if that was not so, the respondents were right in their contention that the cost to them of the purchase and installation of the Parsons machines was recoverable by them from the appellants as part of their damages.

These facts came before the Lord Chief Justice and Hamilton and Avory JJ. sitting as a Divisional Court, and judgment was given to the effect that the contention of the appellants referred to in question 1 was not well founded, and that the contention of the respondents referred to in question 2 was right.

The judgments proceeded on the footing that advantages had accrued to the respondents from the superiority of the Parsons machines and the economy resulting thereby, but that the appellants were not entitled to have the pecuniary advantages so arising taken into account. The cost of purchasing the Parsons machines was properly incurred, and was the best course the respondents could take in the interest of the appellants as well as of themselves, and they were entitled to recover it. But what profit they had made by their subsequent use related to transactions unconnected with the contract, and the respondents could not be called upon to bring this profit into account.

On these answers by the Court to the questions submitted to them being brought before the arbitrator, he made his award on February 23, 1911, and, acting on the answers, awarded that the appellants were not entitled to recover anything from the respondents, but that the respondents, on the other hand, were entitled to succeed in their counter-claim to the extent of a sum which he ascertained, on the basis of the decision of the Court, at 15,394*l*. He arrived at this balance by allowing the respondents certain sums which they had to pay, during the time when they used the appellants' machines, for extra coal consumption and labour due to the defects in these machines, which sums are not

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in dispute, and by crediting the respondents with the cost of obtaining and installing the Parsons machines.

The appellants made a motion in the King's Bench Division to set aside the award on the ground that it was bad as containing an error in law on the face of it. But the Court, considering that it was bound by the opinions previously given by the Divisional Court, dismissed the motion.

Against this order the appellants appealed to the Court of Appeal. Two questions arose. One of these was whether it was competent to the Court of Appeal to review the opinions given by the Divisional Court to the arbitrator. It was argued for the respondents that, as the opinions given under the Arbitration Act by the Divisional Court were not and could not be appealed, the Court of Appeal could not review them and was bound by the law as so stated.

On this point Vaughan Williams L.J. considered that the respondents were right. Buckley and Kennedy L.JJ. took a different view.

My Lords, I cannot say that I entertain any doubt that the view taken by the majority in the Court of Appeal on this question was the correct one. No doubt an opinion given by the Court under the provisions of the Arbitration Act is not a judgment or order, and is, therefore, not susceptible of being the subject of an appeal. But, in my opinion, that is the only reason why it cannot be appealed, and if the law embodied in it is afterwards set out on the face of a final award, I see no reason for thinking with Vaughan Williams L.J. that the Act intended to make the statement of the law appearing on the face of the award binding on a higher tribunal before which the award might come for review.

It was further argued before your Lordships that the arbitrator was in reality made judge of law as well as of fact, and that the well-known case of *Hodgkinson* v. *Fernie* (1) was wrongly decided. I see no ground for this contention, and I am of opinion that the doctrine of *Hodgkinson* v. *Fernie* (1), to the effect that where an error of law appears on the face of the award the error can be reviewed, is a well-established part of the law of the land. I do

(1) 3 C. B. (N.S.) 189.

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not think that the Arbitration Act intended to make any modification of the existing rule in this respect, or that the decision in *In re Knight and The Tabernacle Permanent Building Society* (1) is an authority for the proposition that it did. It is, therefore, competent for this House to review the law which the arbitrator, as he was bound to do, adopted from the Divisional Court and set out in his award.

The question thus arising was decided by the majority in the Court of Appeal in favour of the respondents. They held that the law as to the measure of damages had been rightly laid down by the Divisional Court. They thought that the purchase of the Parsons machines must be taken to have been merely for the purpose of mitigating the damages, and that the appellants were not entitled to have the pecuniary advantages arising from the subsequent use of these much superior machines, and the saving of working expenses which would have been incurred even had the appellants' machines been up to the standard of efficiency contracted for, brought into account.

Vaughan Williams and Kennedy L.JJ. held that the action of the respondents in purchasing the new machines had given them advantages in the conduct of their business subsequent to the breach of which the appellants were not entitled to claim the benefit. Buckley L.J. on the other hand thought that the appellants were entitled to have a decision from the arbitrator as to whether the purchase of the new machines was reasonable and prudent for the purpose of mitigating the damages, apart from its prudence for their own pecuniary advantage, and, if so whether it was the only reasonable and prudent course which they could take to mitigate the damages, or whether, for instance, they could have bought Parsons machines, not of 6000 kilowatts as in fact they did, but of 5500 kilowatts, which was the standard of efficiency under the contract, with a length of life no greater than that of the discarded machines. On this point Buckley L.J. considered that the appellants had had no decision from the arbitrator and were entitled to it.

Upon the question which I have stated I am unable to agree with the majority of the Court of Appeal. For reasons which will

(1) [1892] 2 Q. B. 613.

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appear I do not wholly agree with the view taken by Buckley L.J. Dissenting from the majority, he still thought that the first question raised by the special case could not be answered in the appellants' favour unless the arbitrator should first find that the purchase of the new machines was reasonable and prudent for the purpose of mitigating the damages, apart from its prudence for their own pecuniary advantage. I think that the sequence of events and the facts actually found by the arbitrator obviate the necessity of his separately deciding this point. It was, in my opinion, really disposed of by his finding.

The arbitrator appears to me to have found clearly that the effect of the superiority of the Parsons machines and of their efficiency in reducing working expenses was in point of fact such that all loss was extinguished, and that actually the respondents made a profit by the course they took. They were doubtless not bound to purchase machines of a greater kilowatt power than those originally contracted for, but they in fact took the wise course in the circumstances of doing so, with pecuniary advantage to themselves. They had, moreover, used the appellants' machines for several years, and had recovered compensation for the loss incurred by reason of these machines not being during these years up to the standard required by the contract. After that period the arbitrator found that it was reasonable and prudent to take the course they actually did in purchasing the more powerful machines, and that all the remaining loss and damages was thereby wiped out.

In order to come to a conclusion on the question as to damages thus raised, it is essential to bear in mind certain propositions which I think are well established. In some of the cases there are expressions as to the principles governing the measure of general damages which at first sight seem difficult to harmonize. The apparent discrepancies are, however, mainly due to the varying nature of the particular questions submitted for decision. The quantum of damage is a question of fact, and the only guidance the law can give is to lay down general principles which afford at times but scanty assistance in dealing with particular cases. The judges who give guidance to juries in these cases have necessarily to look at their special character,

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and to mould, for the purposes of different kinds of claim, the expression of the general principles which apply to them, and this is apt to give rise to an appearance of ambiguity.

Subject to these observations I think that there are certain broad principles which are quite well settled. The first is that, as far as possible, he who has proved a breach of a bargain to supply what he contracted to get is to be placed, as far as money can do it, in as good a situation as if the contract had been performed.

The fundamental basis is thus compensation for pecuniary loss naturally flowing from the breach; but this first principle is qualified by a second, which imposes on a plaintiff the duty of taking all reasonable steps to mitigate the loss consequent on the breach, and debars him from claiming any part of the damage which is due to his neglect to take such steps. In the words of James L.J. in *Dunkirk Colliery Co.* v. *Lever* (1), "The person who has broken the contract is not to be exposed to additional cost by reason of the plaintiffs not doing what they ought to have done as reasonable men, and the plaintiffs not being under any obligation to do anything otherwise than in the ordinary course of business."

As James L.J. indicates, this second principle does not impose on the plaintiff an obligation to take any step which a reasonable and prudent man would not ordinarily take in the course of his business. But when in the course of his business he has taken action arising out of the transaction, which action has diminished his loss, the effect in actual diminution of the loss he has suffered may be taken into account even though there was no duty on him to act.

Staniforth v. *Lyall* (2) illustrates this rule. In that case the defendants had chartered a ship to New Zealand, where they were to load her, or by an agent there to give the plaintiff, the owner, notice that they abandoned the adventure, in which case they were to pay 500*l.* The ship went to New Zealand, but found neither agent nor cargo there, and the captain chose to make a circuitous voyage home by way of Batavia. This voyage, after making every allowance for increased expense and loss of

(1) (1878) 9 Ch. D. 20, at p. 25. (2) 7 Bing. 169.

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time, was more profitable than the original venture to New Zealand would have been. The Court of Common Pleas decided that the action was to be viewed as one for a breach of contract to put the cargo on board the plaintiff's vessel for which the plaintiff was entitled to recover all the damages he had incurred, but that he was bound to bring into account, in ascertaining the damages arising from the breach, the advantages which had accrued to him because of the course which he had chosen to adopt.

I think that this decision illustrates a principle which has been recognized in other cases, that, provided the course taken to protect himself by the plaintiff in such an action was one which a reasonable and prudent person might in the ordinary conduct of business properly have taken, and in fact did take whether bound to or not, a jury or an arbitrator may properly look at the whole of the facts and ascertain the result in estimating the quantum of damage.

Recent illustrations of the way in which this principle has been applied, and the facts have been allowed to speak for themselves, are to be found in the decisions of the Judicial Committee of the Privy Council in *Erie County Natural Gas and Fuel Co.* v. *Carroll* (1) and *Wertheim* v. *Chicoutimi Pulp Co.* (2) The subsequent transaction, if to be taken into account, must be one arising out of the consequences of the breach and in the ordinary course of business. This distinguishes such cases from a quite different class illustrated by *Bradburn* v. *Great Western Ry. Co.* (3), where it was held that, in an action for injuries caused by the defendants' negligence, a sum received by the plaintiff on a policy for insurance against accident could not be taken into account in reduction of damages. The reason of the decision was that it was not the accident, but a contract wholly independent of the relation between the plaintiff and the defendant, which gave the plaintiff his advantage. Again, it has been held that, in an action for delay in discharging a ship of the plaintiffs' whereby they lost their passengers whom they had contracted to carry, the damages ought not to be reduced by reason of the

(1) [1911] A. C. 105. (2) [1911] A. C. 301.
(3) L. R. 10 Ex. 1.

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same persons taking passage in another vessel belonging to the plaintiffs: *Jebsen* v. *East and West India Dock Co.* (1), a case in which what was relied on as mitigation did not arise out of the transactions the subject-matter of the contract.

The cases as to the measure of damages for breach of a covenant by a lessee to deliver up the demised premises in repair illustrate yet another class of authorities in which the qualifying rule has been excluded. In *Joyner* v. *Weeks* (2) the lessor had made a lease to another lessee by way of anticipation, to commence from the expiration of the term of this lease, and the new lessee had made no claim to be reimbursed the cost which he had incurred in repairing after the expiration of the demised lease. Wright J. held that the true test was the amount of diminution in value to the lessor, not exceeding the cost of doing the repairs. The Court of Appeal, including Lord Esher and Fry L.J., took a different view. They thought that there had been a constant practice of laying down the measure of damages as being the cost of putting into repair, and that in the particular class of cases with which they were dealing it was a highly convenient rule which ought not to be disturbed. Any other measure appeared to involve complicated inquiries. Moreover, the arrangement between the lessor and the new lessee was res inter alios acta with which the original lessee had nothing to do and which he was not entitled to set up.

I think the principle which applies here is that which makes it right for the jury or arbitrator to look at what actually happened, and to balance loss and gain. The transaction was not res inter alios acta, but one in which the person whose contract was broken took a reasonable and prudent course quite naturally arising out of the circumstances in which he was placed by the breach. Apart from the breach of contract, the lapse of time had rendered the appellants' machines obsolete, and men of business would be doing the only thing they could properly do in replacing them with new and up-to-date machines.

The arbitrator does not in his finding of fact lay any stress on the increase in kilowatt power of the new machines, and I think that the proper inference is that such increase was regarded by

(1) L. R. 10 C. P. 300. (2) [1891] 2 Q. B. 31.

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him as a natural and prudent course followed by those whose object was to avoid further loss, and that it formed part of a continuous dealing with the situation in which they found themselves, and was not an independent or disconnected transaction.

For the reasons I have given I think that the questions of law stated by the arbitrator in the special case have been wrongly answered by the Courts below. The result is that the award cannot stand and must be sent back to the arbitrator, with a declaration that the contention of the appellants on the first question so far, but only so far, as they contended that the several facts relied upon by them were relevant matter to be considered by the arbitrator in assessing the damages was right, and that of the respondents on the second question was wrong. The appellants are entitled to their costs here and in the Court of Appeal, and of the proceedings in the Divisional Court on the motion to set aside the award.

I move accordingly.

LORD ASHBOURNE. My Lords, I agree.

LORD MACNAGHTEN. My Lords, I agree.

LORD ATKINSON. My Lords, I concur.

Order of the Court of Appeal reversed and award remitted to the arbitrator, with a declaration that the contention of the appellants on the first question so far, but only so far, as they contended that the several facts relied upon by them were relevant matter to be considered by the arbitrator in assessing the damages was right, and that the contention of the respondents on the second question was wrong. The respondents to pay the costs in the Court of Appeal and of the appeal to this House and of the motion in the King's Bench Division to set aside the award.

Lords' Journals, July 19, 1912.

Solicitors for appellants: *Faithfull & Owen.*
Solicitors for respondents: *Bircham & Co.*

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