

*Judgment of the Lords of the Judicial Committee
of the Privy Council on the Appeal of
The Zelma Gold Mining Company, Limited, v.
G. and C. Hoskins, from the Supreme Court of
New South Wales, delivered 18th December
1894.*

Present :

THE LORD CHANCELLOR.

LORD WATSON.

LORD HOBHOUSE.

LORD MACNAGHTEN.

LORD SHAND.

[Delivered by the Lord Chancellor.]

THE Appellants are a Company incorporated under the Companies Act of 1874 (37 Vict. No. 19). On the 14th April 1893 they commenced an action against the Respondents, claiming to recover damages for breach of a contract to supply water-tight pipes to their mine. The action was pending for trial, when on the 13th July 1893 an Order was made by the Chief Justice, under the 12th section of the Arbitration Act of 1892 (55 Vict. No. 32), referring the issues in the action to Mr. Henry Skinner Forsyth as arbitrator. The arbitrator heard the case for several days, and on the 18th August 1893 made his award, whereby he directed the Respondents to pay to the Appellants the sum of 965*l.* The Appellants being about to move to enter judgment, the Respondents on the 26th August obtained from the Court a Rule Nisi calling upon the Appellants to show cause why the award should not be set aside, on the ground that the arbitrator had not, before entering on the reference, made a declaration before a Justice, as required by

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section 113 of the Companies Act of 1874. The rule was argued before Mr. Justice Innes and Mr. Justice Stephens. Mr. Justice Innes was of opinion that the rule should be made absolute. Mr. Justice Stephen concurred, though not without hesitation.

The 12th section of the Arbitration Act, 1892, empowers "the Court or a Judge, in any cause or matter (other than a criminal proceeding by the Crown) . . . to order the whole cause or matter, or any question or issue of fact arising therein, to be tried before an arbitrator agreed upon by the parties, or before a referee appointed by the Court or a Judge for the purpose," in the following cases, "(a) if all the parties interested who are not under disability consent; (b) if the cause or matter requires any prolonged examination of documents or any scientific or local investigation which cannot in the opinion of the Court or a Judge conveniently be made before a jury or conducted by the Court through its ordinary officers; (c) if the question in dispute consists wholly or in part of matters of account." The Order in question was made under the first of those provisions, all the parties interested consenting.

The question to be determined is, whether in such a case as this the provisions of the Companies Act, 1874, are applicable, so as to require that the arbitrator before entering upon his duties should make the declaration prescribed by the 113th section of that Act. The 102nd section of the Act empowers any Company "by writing under its common seal" to agree to refer any difference to arbitration. The 103rd section provides as follows:—"Whenever any dispute authorised by this Act to be referred to arbitration shall have been in manner hereinbefore provided agreed to be so referred, and where-

“ ever any dispute directed by this Act to be so
 “ referred shall have arisen, then except where
 “ and so far as the parties to such reference shall
 “ otherwise agree or provide such arbitration
 “ shall be conducted in the manner, and shall
 “ have the effect hereinafter provided.” The Act
 then prescribes the manner in which the arbitration is to be conducted, provided the parties have not otherwise agreed. Then comes the 113th section, which is in the following terms :-
 “ Before any arbitrator or umpire shall enter
 “ into the consideration of any matters referred
 “ to him, he shall, in the presence of a Justice
 “ make and subscribe the following declaration
 “ (that is to say):—‘ I, A. B. do solemnly and
 “ ‘ sincerely declare that I will faithfully and
 “ ‘ honestly and to the best of my skill and ability
 “ ‘ hear and determine the matters referred to me
 “ ‘ under the provisions of the Companies Act.’ ”
 This is the declaration which, according to the contention of the Respondents, the arbitrator ought to have made in the present case.

But the first observation which arises is, that such a declaration is in terms inapplicable to an arbitration under the 12th section of the Arbitration Act. The arbitration provided for by the Companies Act is a voluntary arbitration, in which, according to the terms of the 102nd section, there is a submission by the Company, by writing under its common seal. In the present case there was no such submission, and the 103rd section, which has reference only to disputes “in manner hereinbefore provided” agreed to be referred, consequently does not apply, with the result that the 113th section is also inapplicable.

The reference in question was a reference of an action, or of issues in an action, then pending in Court. It was really a substitute for the trial of the action. It has been contended by

counsel for the Respondents that sub-section (a) of the 12th section of the Arbitration Act is not applicable to the case of an action where a Company is one of the parties, and that such an action can only be referred if the Company make a submission under their seal. The learned Counsel felt a difficulty in contending that sub-sections (b) and (c) were inapplicable to Companies, and he confined his contention to sub-section (a). But there seems to be no more foundation for the contention that the submission must be under seal in the case of the first provision than in the case of the other two. It has never been regarded as necessary, where the consent of a Company in a legal proceeding, or in a step in a legal proceeding, is necessary, that such consent should be by a document under seal. Those who represent the Company in an action may, for the purpose of a provision of this kind, give the consent as effectually as if it were given by an instrument under seal. The 12th section of the Arbitration Act is, in their Lordships' opinion, as applicable to an action, one of the parties to which is a Company, as it is to any other action. Therefore that point, which was not apparently taken in the Court below, does not appear to their Lordships to have any solid foundation.

Stress was laid by the learned Judges below upon the provisions of the 24th section of the Arbitration Act, which enacts that the Arbitration Act shall apply to every arbitration under any Act passed before or after the commencement of that Act as if the arbitration were pursuant to a submission, "except in so far as this Act is inconsistent with the Act regulating the arbitration, or with any rules or procedure authorised or recognised by that Act." But the only effect of that section is to apply the arbitration provisions to arbitrations under any other Act, as, for example, arbitrations under the Companies Act,

except so far as the arbitrations under those Acts are conducted pursuant to statutory provisions inconsistent with the provisions of the Arbitration Act. Its effect is in no way to introduce into arbitrations under the Arbitration Act any of the provisions for arbitration contained in any of the other Acts, such as the Companies Act.

The only authority referred to, which was one regarded by Mr. Justice Innes as governing this case, was the case of *The Trades and Industrial Institute v. Murray and Lenchan* (11 N.S.W. L.R. 36), decided by the Supreme Court in 1890. That was a case where a Company and two individuals entered into a contract, one of the conditions of which provided for the reference of any difference to arbitration. A dispute having arisen, a submission to arbitration was made and an award followed. The award was set aside by the Court, on the ground that the arbitrator had not subscribed the declaration required by the 113th section of the Companies Act. But the present case seems to their Lordships to be a totally different one, inasmuch as the reference does not depend upon the submission of the Company, but upon the order of the Judge referring the action. Although the consent of the Company may have been a necessary condition to that order being made, when once it was made it was the order of the Judge which was the foundation of the arbitration proceedings, and not the submission by the parties.

For these reasons their Lordships are of opinion that the Rule Absolute should be set aside, and the Rule Nisi discharged, with costs, and they will so advise Her Majesty. The Respondents must pay the costs of this Appeal.

