

**VOL. IX. PART I; REPORTS OF
CASES DECIDED IN THE
EASTERN DISTRICT COURT OF THE
COLONY OF THE CAPE OF GOOD
HOPE**

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Vol. IX. Part I; Reports of Cases Decided in the Eastern District Court of the Colony of the Cape Of Good Hope by Robert M. King

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ROBERT M. KING

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VOL. IX.]

[PART I.

REPORTS OF CASES

DECIDED IN

THE EASTERN DISTRICT COURT

OF THE COLONY OF THE

CAPE OF GOOD HOPE, *Court of the*
Eastern District,
Cape Colony see reports C 7

REPORTED BY

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EASTERN DISTRICTS' COURT
REPORTS.

VOL. IX.

PART I.

MELVIN vs. BUILDING COMMITTEE OF ST. CYPRIAN'S
SOCIETY.

*Building Contract—Architect's Certificate—Dismissal of
Architect—Arbitration.*

A building contract provided that the defendants, for whom certain work was being done, should appoint an architect, on whose certificate payments should be made and to whom all disputes should be referred. An architect whose name was submitted to the contractor and approved of by him was appointed, various sums were paid under his certificate, but before the completion of the work he was dismissed by the employer without the consent of the contractor. On the completion of the work the contractor obtained this architect's certificate for balance due under the contract for work and extras and sued on it, the defendants tendering a quantum meruit. Held, that defendants could not withdraw their submission to this architect's award, and were liable for amount as certified by him.

The evidence in this case was taken before JONES, J., at
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the Circuit Court at Port Elizabeth, and the case reserved for argument before the full Court.

The summons in the Circuit Court claimed £147 1s. 9d. balance due to plaintiff under a contract entered into by him with defendant committee for the execution of certain builder's and carpenter's work on St. Cyprian's Hall, Port Elizabeth. The contract provided that the work should be done to the satisfaction of the Committee or of an agent to be appointed by them; that payments should be made from time to time upon this agent's certificate; and "that all disputes connected with this contract as to materials, values, extents, or meaning of plans and specifications, or in any way arising out of this contract, shall be decided by the agent appointed by the Building Committee, whose decision shall be binding." In terms of this contract Mr. Peek, with plaintiff's concurrence, was appointed by the defendants as their architect and agent, and during the progress of the work £361 19s. was paid to the plaintiff upon certificates granted by him. In August, 1893, before the completion of the work, defendants dismissed Mr. Peek, without the consent of the plaintiff. The plaintiff, on completion of the work, got a certificate from Mr. Peek to the effect that the work under the contract and certain extras authorised by the committee had been completed to his satisfaction, and that after deducting the £361 19s. paid, the sum of £147 1s. 9d. was due to the plaintiff. This sum the plaintiff now claimed.

The defendants in their plea set forth that they had dismissed Mr. Peek in August, 1893, and had made no new appointment of architect in consequence of the plaintiff's refusal to recognise any one in his stead. They submitted that they were not bound by any certificate of Mr. Peek for work done after he had ceased to be their architect, and tendered £98 14s. 5d., which they alleged to be the full value of such work done, as a full settlement of the plaintiff's claim.

The plaintiff denied the defendants' right to dismiss the architect appointed under the contract, and maintained that defendants were still bound by his certificate.

King (for *Sampson*) on behalf of plaintiff. When it is agreed that payments are to be made upon an architect's

certificate, the granting of such certificate is a condition precedent of any litigation. Except in the case of fraud or collusion (neither of which is suggested here) the contractor could not recover in any action without first obtaining this certificate, and, though the point never seems to have been judicially decided, the converse must hold, that once it is granted defendant is bound by it (*Scott vs. Corporation of Liverpool*, 3 De G. & J., 334; *Hansen & Schræder vs. Deare*, 3 E. D. C., 36; *Wilson vs. Holt*, 4 G., 220; *Scott vs. Sytner*, 9 Jur. 50).

The agreement to refer all disputes to the arbitration of the architect is binding equally on plaintiff and defendant; under the contract this reference to arbitration is clearly a condition precedent to litigation and not merely a collateral agreement to refer matters to arbitration; and it is settled law that though the latter is revocable, the former is irrevocable (*Scott vs. Avery*, 5 H. C. 811; *Davies vs. South Brit. Insurance Co.*, 3 Jur. 416); consequently defendant could not revoke agreement by merely saying, "I dismiss my architect." If building owner can dismiss architect at will, while contractor cannot, architects would be coerced into giving certificates favourable to owner. An architect is really in the position of an arbitrator, and the English decisions shew that an arbitrator once appointed is irremovable except in case of fraud, collusion, or refusal to act (*Stevenson vs. Watson*, 4 C. P. Div. 159; *Sudbrooke vs. Barrett*, 36 L. T. (N.S.) 616).

The same rule follows from the Roman-Dutch text-writers (*Voet*, 19, II. 36).

Blains (for defendants). There seems to be no decided case exactly in point, so the whole tenour of the contract must be considered. When plaintiff tendered for contract he made no mention of architect, or of work being paid under his certificate. This proviso was inserted in the contract as a safeguard for defendants, and the architect was solely their agent. The work was to be done to the satisfaction of the committee or their agent; so they need not have appointed one at all, and when they did they could dismiss him at will. *Kemp vs. Rose*, 1 Giff. 258, cited in *Scott vs. Avery* (*supra*), shews that arbitrator's decision not always final; where bias is suspected, even without fraud, either party may refuse to be bound by it. In *Lock vs.*

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Claridge (1 Jut. 356) COURT had held architect's certificate not final with regard to certain extras outside the contract.

Cur. adv. vult.

Postea (May 31st).

JONES, J., delivered the judgment of the Court.

In this case the plaintiff and the defendant society agreed in writing that plaintiff should erect certain buildings for a price named, and contracted to pay the contractor as the work progressed according to certificates from a person who is called their agent. The defendant committee reserved to themselves the right to alter, omit, or add to any of the work without in any way departing from the contract, and contracted that any additions or deductions should be measured and valued by the Building Committee's supervisor, whose decision should be binding. The work, it was further agreed, should be carried out under the supervision of an agent appointed by the Building Committee, who was to have full power to condemn any material or work which he might consider not consistent. Payments were to be made monthly to the extent of 35 per cent. of the work done, the balance to remain in the hands of the Building Committee for one month after completion, at which date if the work is in good order the Building Committee may reduce it to 5 per cent. for further three months as a maintenance security. All disputes connected with this contract as to the materials, values, extents, and meaning of plans, specifications, &c., in any way arising out of this contract, shall be decided by an agent to be appointed by the Building Committee, whose decision shall be binding.

Now it appears that before signing this contract tenders had to be called for, and the plaintiff's tender had been accepted by the defendants in a letter written on the 24th of September, 1892, by Charles Edenberry on their behalf. In this letter a blank had been left when it was sent to the plaintiff. This was in the postscript which read at first, "You will have to look to Mr. — for instructions, he having full power over the works." The plaintiff thereupon refused to sign the written contract in accordance with his

tender before he knew how the blank was to be filled in. Subsequently the name of Dix Peek was put in, and later on after having been informed of the name which had been inserted, he signed the contract and specifications, and performed the work stipulated for receiving payments until August under the certificates of Mr. Dix Peek. In August the defendants dismissed Peek from his office for some cause which is not pleaded. It is not said that he was guilty of conduct which would render him incompetent to perform the duties of arbitrator between the parties; nothing in the shape of fraud or collusion or incompetency through adverse interests is suggested. The work continued, and at its completion Dix Peek gave his certificate shewing that the sum of £147 1s. 9d. was due by the defendants.

When this case was heard at Port Elizabeth Mr. Sampson objected to any evidence being given which tended to vary the result of the architect's certificate, as neither fraud nor collusion had been alleged, and no ground had been set up by the defendant for dismissing the arbitrator or referee selected by the parties to determine the actual value of the work or materials, and he relied upon the case of *Hansen & Schröder vs. Deare*, 3 E. D. C. 36. On the other hand Mr. Blaine contended that before the agent had actually pronounced his award the defendants had dismissed him and given the plaintiff notice of this fact; and further, even if the person named as supervisor was an arbitrator, he could be dismissed or his powers could be revoked before he had actually exercised his powers, and he referred to Russell on Arbitration, p. 146. He contended that any award made after the cancellation of the appointment of arbitrator was absolutely void.

This question was reserved for further argument before the Eastern Districts Court. It has now been argued. Upon reference to the authorities it does not appear that our law is precisely in accord with that which is laid down in the passage cited as the Common Law of England. The position of Mr. Peek was that of a person agreed upon between the parties to fix and determine the price or value of certain labour to be performed and materials to be provided by the plaintiff. Such a contract, I take it, would be good and valid, as soon as the parties had agreed upon their referee, unless there were some valid grounds shewn

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