Case No. 5,010.

FOX v. HEMPFIELD R. CO.

{3 Wall. Jr. 243;[1] 14 Leg. Int. 148; 1 Pittsb. Rep. 372; 5 Pittsb. Leg. J. 37.}

Circuit Court, W. D. Pennsylvania. May Term, 1857.

EFFECT OF AGREEMENT TO SUBMIT TO PRIVATE AWARD.

If parties, in making a contract under which disputes are contemplated as possible, agree under seal to submit any such disputes to private arbitration, as e. g., to the award of some third person, so that his decision shall be final and conclusive on them both, it is a bar to any action on the contract that the plaintiff does not either aver and prove such award, nor aver and prove such facts as excuse it

[Cited in Hudson v. McCartney, 33 Wis. 346.]

The plaintiff—a contractor on the Hempfield Railroad—declared in an action of covenant, on an article of agreement made by him with that railroad company, the present defendant, for the construction of a section of the road. He averred that he commenced the work according to contract and continued to prosecute the same, and was ready and willing to have completed it, but was hindered and prevented by the defendant from prosecuting and completing the work, and was thereby deprived of his reasonable gains and profits that would have accrued to him, to the amount of $50,000. He averred also that the defendants have not paid him for work which he did, the sum of $25.000.

The defendants craved oyer of the article of agreement, which on being read showed the following clause in them: "And it is mutually agreed and distinctly understood that the decision of the chief engineer for the time being, shall be final and conclusive in any dispute which may arise between the parties of this agreement relative to or touching the same; and each and every of said parties do hereby waive any right of action, suit or suits, or other remedy in law or otherwise, by virtue of said covenant; so that the decision of the engineer shall, in the nature of an award, be final and conclusive on the right and claims of the said parties; and the said engineer being a stock-holder of this company shall be no, objection to his exercising the trusts and power herein granted to him."

The plea averred that the supposed breaches of covenant, wrongs and injuries of which the plaintiff complained, had not been submitted to the decision of the engineer, and that the defendants have always been and still are ready and willing to submit all controversies and disputes between them and the plaintiff relative to and touching said agreement, to the final and conclusive decision of said engineer.

A demurrer to this plea raised the question, which was now before the court for decision, st., Can the plaintiff sustain this action without averring and proving an award by the engineer on the matters in dispute, between the parties, or excusing the want of it by averment and proof that it was out of his power to obtain such an award?

Mr. Shaler, for plaintiff.

Mr. Hamilton, for defendant

GRIER, Circuit Justice. The meaning of this clause cannot be doubted, notwithstanding its rather awkward expression. The parties agree that in case any matter arise between them concerning any matter connected with their agreement, instead of resorting to the legal tribunals for their settlement, they will submit the same to the decision of the engineer, whose award shall be final and conclusive.

If the plaintiff had averred that the matters in dispute had been submitted to the arbitrator, and that he had awarded the sum of $50,000 as damages, there is no doubt he could support an action on the award, if the defendant had refused to perform it Such contracts to submit anticipated disputes on any subjects to an arbitrator whose award should be conclusive, have sometimes been held void, for the reason (if reason it can be called) that it was an attempt to oust the supreme courts of their jurisdiction. In Scott v. Arery, 8 Exch. 487. the court of exchequer ruled a plea like the present, bad, for this reason. The exchequer chamber reversing this judgment held, that although an agreement which ousts superior courts of their jurisdiction is illegal and void, yet as the contract did not deprive the party of his right to sue, but only rendered it a condition precedent that the amount to be recovered should be first ascertained by the arbitrator, it bound the parties. This latter judgment has now been affirmed by the house of lords on the advice of four to three learned judges, and sanctioned by the recommendation of the lord chancellor, and Lords Campbell and Brougham.

The result appears to be: First, that a condition in a contract that the sum recoverable on a breach shall be ascertained by arbitrators before the parties shall sue, either at law or at equity, is not such an agreement as will be treated as invalid, or

as an attempt to oust the courts of their jurisdiction; and, secondly, that it is even doubtful whether there is any sufficient foundation, either in policy or principle, for the ancient and hitherto undoubted doctrine that parties cannot bind themselves by contract not to resort to the courts of law or equity. Lord Campbell stated thus emphatically his view of the main question in dispute:—"There is an express undertaking that no action shall be brought until the arbitrators have decided. There is abundant consideration for that in the mutual contract into which the parties have entered. Therefore, unless there be some illegality in the contract, the courts are bound to give it effect There is no statute against such a contract Then on what ground is it to be declared illegal? It is contended that it is contrary to public policy. That is rather a dangerous ground to go upon. What pretence can there be for saying that there is anything contrary to public policy in allowing parties to contract that they shall not be liable to any action until their liability has been ascertained by domestic and private tribunal upon which they themselves agree? Can the public be injured by it? It seems to me that it would be a most inexpedient encroachment upon the liberty of the subject if he were not allowed to enter into such a contract." And his lordship subsequently traced with much disapprobation the origin of the opposite principle, which he attributed to the endless competition of the courts, and their desire to absorb litigation into their respective jurisdictions.

This obsolete dogma does not appear to have been received with approbation in Pennsylvania. In the case of Monongahela Nav. Co. v. Fenton, 4 Watts & S. 205, it was decided that "if the parties to an executory contract make a provision in it that any dispute, which shall arise between them on the subject of the contract, shall be determined by an individual named, whose decision shall be final, no action will lie for a breach of the agreement by one against the other, but they must resort to the tribunal appointed by themselves, from whose award there is no appeal." That case governs the present, as to every dispute arising "relative to or touching the agreement" declared on.

Such a clause in contracts like those constantly made by corporations for great public improvements, is absolutely necessary to prevent the corporations from being ruined by endless litigation. It should be liberally construed and not subjected to ingenious criticism in order to support the jurisdiction of courts law and encourage litigation.

The defendant is entitled to judgment on the demurrer. [See same case [Case No. 5,011]; Snodgrass v. Gavit, 4 Casey [28 Pa. St.] 221; Wightman v. Pettis. 5 Casey [29 Pa. St] 283; McCahan v. Remey, 9 Casey [33 Pa. St.] 535; Henderson v. Walker, 2 Grant 36; McAdams' Ex'rs v. Stilwell, 1 Harris [13 Pa. St] 90.][2]

[1] [Reported by John William Wallace, Esq., and here, reprinted by permission.]

[2] [From 1 Pittsb. Rep. 372.]