

Div. Ct.]

NOTT V. GORDON ET AL.—RECENT ENGLISH PRACTICE CASES

tract on behalf of an arbitrator that his award should hold water—the action is really for damages, for neglect in making such an award as could be enforced. If the defendants are liable to repay these fees they are also liable for the costs the plaintiff has been put to in endeavouring to enforce the award—and what he now sues for is only part of his damages.

I can find no authority which would make an arbitrator liable in such an action. If an arbitrator fraudulently, or corruptly, or collusively, or dishonestly took a course which he ought not to have taken, no doubt an action would lie against him (*per DENMAN, J., Stevenson v. Watson*, 4 L. R., C. P. D, 161). But nothing of the kind is alleged against these defendants. I have never heard of a case where, when an award has been set aside for the misconduct of an arbitrator, the latter was held liable to refund the fees paid to him: much less where he honestly exercised his judgment, and endeavoured to embody such judgment in a document which unfortunately was invalid by reason of a technical defect.

In the case cited above, Lord Coleridge says (page 159):—"Where the exercise of judgment or opinion on the part of a third person is necessary between two persons, such as a buyer and seller, and, in the opinion of the seller, that judgment has been exercised wrongly, or improperly, or ignorantly, or negligently, an action will not lie against the person put in that position when such judgment has been wrongly or improperly, or ignorantly, or negligently exercised."

Now, the most that can be said against these defendants is that they ignorantly or negligently omitted a formality necessary to give effect to the award they intended to make. I think the authority I have cited is conclusive against the plaintiff's right to recover.

It seems to me also, that, on grounds of public policy, an action like this should be discouraged. Arbitrators are a *forum*, a tribunal erected or created by the parties themselves, and the functions performed by an arbitrator become thereby judicial. In such case no suit would lie against him for acts of omission or commission. The Courts have always encouraged resort to such tribunals; and, if it were established that an arbitrator, after devoting his time, thought, skill and judgment in respect of the matters referred to him, was liable to refund the *honorarium* he had earned, because, through some error of form, his award could not be enforced, it would be difficult indeed to persuade any one to accept the position with such a liability attached. The defendants here were laymen, and the award was drawn up by the present

plaintiff's solicitor. It seems to me that it was his duty to see that it was correctly executed. The decision in *Nott v. Nott* was somewhat of a surprise to the profession, and the Court reluctantly held against the validity of the award.

There is another ground which I think disentitles the plaintiff to recover in this action, namely, that having voluntarily and without compulsion paid these fees to the defendants, he cannot now recover them back. Moneys paid under a mistake of fact can be recovered back; not so when paid under a mistake of law. The plaintiff believed the award to have been properly executed, the best evidence of which is that he brought an action to enforce it after he had become aware of the mode of its execution or publishing.

For all these reasons, I think the action should be dismissed.

RECENT ENGLISH PRACTICE CASES.

DAVIS V. JAMES.

Imp. 1883, r. 200, 309—*Ont. r.* 128, 178.

Pleading—Action on covenants in lease—Embarrassment.

In an action on the covenants in a lease, the plaintiff alleged in his claim that he was entitled to the immediate reversion in the demised premises, and that he was entitled to enforce the covenants as against the defendant who was assignee of the term, and liable to perform the lessee's covenants.

Held, on motion to strike out as embarrassing, that such pleading was insufficient, and that the plaintiff ought also to have shown what the reversion was which the lessor had, and how the plaintiff derived his title to that particular reversion.

[L. R. 26 Ch. D. 778.]

KAY, J.—In a case of this kind, in which the plaintiff can only sue as the assign of the reversion, by virtue of the statute of Henry VIII., and the other statutes which relate to the matter, the proper mode of pleading would be to state that A. B., being seized in fee, or having whatever estate he had, demised by a certain lease something less than his entire interest, and to state distinctly the mode in which the plaintiff had become entitled to that reversion, in such manner as to show that he had a right to sue upon the covenants. Take this case: a plaintiff alleges that he is entitled to the estate of some one who died, we will say, in 1792. He is out of occupation, but he says that that estate belongs to him. Is it enough for him to plead, "The estate is mine; it belongs to me; I am entitled to possession, and I therefore sue?" The question came before the Court of Appeal in *Philipps v. Philipps*, 4 Q. B. D. 127, and that was very much the case I have just referred to. It was