

depriving the sellers of the right to contend that the question as to damages was not referred, the award must be held to be upon a matter which was outside the scope of the reference.

Parties may, by the use of appropriate language, agree to submit the question whether a particular dispute is within the terms of the submission; and, if they do so agree, they will be bound by the decision of the arbitrators upon that question: *Willesford v. Watson* (1873), L.R. 8 Ch. 473; *Russell on Arbitration and Award*, 10th ed. (1919), p. 94. But, except where such a question is submitted, the arbitrators cannot acquire jurisdiction by erroneously deciding that what they affect to determine is within the submission: *Produce Brokers Co. Limited v. Olympia Oil and Cake Co. Limited*, [1916] 1 A.C. 314, 327, 329; *Re Green and Balfour Arbitration*, *supra*. These cases did not affect the actual decision in *Woodward v. McDonald* (1887), 13 O.R. 671; while a dictum therein may be considered to be overruled by them.

In this case, the evidence seemed to the learned Judge to fail to shew that any controversy had been raised and submitted, other than one as to whether any failure to make deliveries was excused by fires or contingencies beyond the control of the sellers. Therefore, in awarding as to the consequences of such failure as there may have been, the arbitrators travelled beyond the matter in dispute; and the award must be set aside unless there was something which precluded the sellers from questioning it.

Were the sellers precluded from raising the point that the award dealt with a matter that was not submitted? Their mere failure to object to the opening statement of counsel for the buyers as to the matter to be determined was not fatal to their right to raise the question of jurisdiction now.

Reference to *Russell on Arbitration and Award*, 10th ed., pp. 418-424; *Davies v. Price* (1862), 6 L.T.N.S. 713; affirmed (1864), 34 L.J.Q.B. 8; *Ringland v. Lowdes* (1864), 33 L.J.C.P. 337; *Faviell v. Eastern Counties R.W. Co.* (1848), 2 Ex. 344; *Halsbury's Laws of England*, vol. 1, p. 450; *Borough of Thetford v. Norfolk County Council*, [1898] 1 Q.B. 141.

The motion made by the sellers must succeed, the award must be set aside, and the matter must be remitted to the arbitrators so that they may make their award upon the questions submitted to them. The buyers must pay the costs of the motions.