

ARBITRATION—AWARD BASED ON SUPPOSED EXISTENCE OF TRADE
CUSTOM—CUSTOM IN FACT NON-EXISTENT—SETTING ASIDE
AWARD.

In re Arbitration, North-Western Rubber Co. and Huttenbach (1908) 2 K.B. 907. This was an application to set aside an award made in the following circumstances. By a contract in writing Huttenbach agreed to sell to the North Western Rubber Co. 300 tons of rubber of fair usual quality, at £18 15s. per ton c.i.f. Liverpool, for direct shipment from the East or Straits Settlements to Liverpool. The contract provided that any dispute arising out of the contract was to be settled by arbitration. On arrival of the rubber in Liverpool the buyers found it not in accordance with the contract and refused to accept it. The dispute was accordingly referred to arbitration. The arbitrators' award was based on the alleged existence of a custom applicable to all contracts for raw materials shipped to England to the effect that the buyers were bound to accept goods with an allowance for inferiority of quality, where the inferiority was in the opinion of arbitrators not excessive or unreasonable. They, therefore, awarded that the buyers were bound to accept the rubber subject to an abatement in the price of 10s. per ton. On the motion an issue was directed by the Divisional Court (Phillimore and Walton, J.J.), to determine whether the alleged custom in fact existed, and it was found that it did not, and Walton, J., who tried the issue, set aside the award. The Court of Appeal (Williams, Moulton and Buckley, L.J.J.) affirmed this decision and held that the award could not be maintained. It was argued in appeal that the issue ought not to have been directed, but the Court of Appeal came to the conclusion that as the appellants though objecting to the order, had, nevertheless, accepted the issue, and not appealed from the order, that objection was too late. No objection was taken on the ground that the award had been set aside by Walton, J., and not the Divisional Court and the Court of Appeal treated this as a mere irregularity which had been waived. The ground taken by the Court of Appeal was, first, that the arbitrators had no power conclusively to determine the existence of a custom; (2) that by the terms of the contract the goods were to be "of fair, usual quality," and the arbitrators had no right to convert what was only a condition into a warranty; and (3) that the appellants having accepted an issue as to the custom were bound by the result.