LORD CHANCELLOR.—If the interlocutor were simply reversed so far as appealed against, they might set up the rest of the plea. It should be without prejudice to the disputed question.

Sir F. Kelly.—I hope your Lordships will think that we are entitled to the costs below, especially considering that this is a public body with public funds.

Solicitor-General.—They gave no costs below in our favour, by reason of the great diversity of opinion among the Judges.

LORD CHANCELLOR.—Both of you are public bodies. There was a very great difference of opinion below. I think there ought to be no costs given.

The judgment was as follows:—"It is ordered and adjudged, by the Lords spiritual and temporal in parliament assembled, that the said interlocutor, in so far as complained of in the said appeal, be, and the same is hereby, *reversed:* And it is hereby declared, that this judgment of reversal is not to prejudice or affect any question which shall hereafter arise as to the liability of the said Commissioners to be assessed for the poor, by virtue of the Act 8 and 9 Vict. c. 83, for the harbour, docks, and subjects vested in them as owners, tenants, or occupiers, as in the pleadings is mentioned: And it is further ordered, that, with this declaration, the cause be remitted back to the Court of Session in Scotland, to do therein as shall be just and consistent with this declaration and judgment."

Appellants' Agent, John Phin, S.S.C.—*Respondent's Agent*, W. Lorimer, S.S.C.[1]

MARCH 8, 1855.

ALEXANDER DREW, *Appellant*, *v.* PETER DREW and THOMAS LEBURN, *Respondents.*

Arbitration—Submission—Summons—Relevancy—Misconduct—Stopping the Arbitration—*An arbiter, at the suggestion of one of the parties to the submission, examined witnesses behind the back of A and P, the two parties; but afterwards told what he had done, and offered to examine the witnesses again more formally, and no objection was made, and further meetings were held. Before the award was made, A raised an action to put a stop to the submission on the ground of misconduct in so examining witnesses.*

HELD (affirming judgment), *This was no relevant ground to stop the submission, for the award could not be reduced on any such ground.*

HELD FURTHER, *It is no objection that one of the parties examined was not sworn, if the objection was not made at the time.*

Question whether, if fraud or corruption were alleged, it would be a ground for stopping a submission.[2]

The late William Drew, coppersmith, Glasgow, left his business and property to three sons, who, on certain disputes arising, referred these to the arbitration of Thomas Leburn. The arbiter heard parties, and made orders, and the regularity of the proceedings was challenged by Alexander Drew, one of the brothers.

He raised an action of declarator and count and reckoning, and he stated as follows his grounds of complaint:—That subsequent to the execution of the submission, his brothers entered into legal proceedings against him in reference to the management and disposal of the heritable property left by their father. That in the course of the submission, the defender Leburn had "in various

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[1] It will be seen that the above judgment did not purport to decide whether the Dock Commissioners were or were not really liable to be assessed to the poor rate in respect of their docks and harbours as owners and occupiers of lands. At that time the general question as to the supposed exemption of public trustees from liability to the poor rate had not been thoroughly discussed; but it was discussed and settled soon afterwards. And the House decided, in the leading case of *The Mersey Docks* v. *Jones*, 11 H.L.C. 443, that the old decisions were based on a misconception, and that trustees of public works such as harbours, railways, schools, and hospitals were not exempted from liability, and that the sole exemption was in the case of buildings and lands occupied by the government, strictly so described, whether imperial or local government. That rule was acted on in subsequent appeals. See *Clyde Trustees* v. *Adamson*, 4 Macq. Ap. 931, and *post*; *Leith Harbour Comrs.* v. *Inspector*, L. R. 1 Sc. Ap. 17. *Greig* v. *University of Edinburgh*, L. R. 1 Sc. Ap. 348.

[2] See previous reports 14 D. 564; 24 Sc. Jur. 97; 268. S. C. 2 Macq. Ap. 1: 27 Sc. Jur. 273.

instances acted corruptly, and with undue partiality towards" the defender, Peter Drew. And, in particular, with regard to the claim No. 1, "although it was not denied that no rent had ever been paid to the pursuer for his premises, but that the same had been paid into the partnership funds in common with the rents of the other heritable property, the said Thomas Leburn entertained the said claim, and proceeded to hold certain private examinations of William Drew, Janet Drew, and Donald Ferguson, a servant of Peter Drew, on the subject thereof. At this time, William Drew and Janet Drew were engaged, in conjunction with Peter Drew, in the hostile proceedings before specified, against the pursuer; and no intimation was given to him of any such examinations being about to take place, nor was he present at any of them, nor aware of what passed, nor that such proceedings were in contemplation; and no opportunity was offered him of hearing the statements of the said persons, or putting any questions to them on the subject. But the said Thomas Leburn, in respect of what passed at such private interviews, of which no record or evidence exists, corruptly, illegally, partially, and contrary to the facts and evidence, found, by an interlocutor in the said submission, that there never was any agreement" to the effect alleged by the pursuer, "and repelled the pursuer's allegation on that head." No. 2. That the bill was for the price of partnership goods sold by Peter Drew, in face of the pursuer's remonstrances, to Eccles, Burnley and Company, who were "then in labouring circumstances, and Peter Drew took their bill directly contrary to the pursuer's opinion and representations, who refused to recognize the transaction, or to give credit to them for any sums whatever; and Peter Drew gave further credit upon an open account to the said company, which soon after became bankrupt, was sequestrated, and have not as yet even paid a dividend to their creditors. When these facts were represented by the pursuer to the said Thomas Leburn, instead of sustaining the claim of the pursuer, or appointing Peter Drew to establish his demand by legal proof, he proceeded to take what he called the solemn declaration of Mr. Peter Drew on the subject; and thereupon, and in respect of such declaration, being the mere assertion of Peter Drew, corruptly, illegally, partially, and contrary to the express terms of the said submission, decided that the pursuer's claim could not be sustained." No. 3. The speculation entered into with Reid "was improperly and fraudulently carried on by Peter Drew in the name of the partnership, whose name was used by him without the knowledge of the pursuer, while the transaction was wholly foreign to the proper business of the partnership; but the said Thomas Leburn, in place of investigating that transaction, or bringing it to the test of legal proof, by writ, witnesses, or oath of party, as the submission requires, proceeded to hold a private meeting with Reid, the party who had the deepest interest to establish his claim as a company debt, and examined him on the subject outwith the presence of the pursuer, or even his knowledge, or any intimation to him that such a proceeding was to take place, or affording him an opportunity of either examining Reid himself, or hearing what he might say when under examination by the said Thomas Leburn; and afterwards, because, as is stated in his notes, Reid said that he thought, or supposed, that when dealing with the said Peter Drew he was dealing with the company, therefore the said Thomas Leburn corruptly, illegally, partially, and contrary to the terms of the said submission, held that the claim of the said Peter Drew was proved, and that the said sum of £1000 ought to be sustained as a just charge against the partnership." No. 4. The arbiter did not investigate the pursuer's "claim by any legal proof or inquiry into the facts, but proceeded to hold a private conversation with William Drew, who at the time was engaged jointly with Peter Drew in the above mentioned hostile proceedings against the pursuer. This interview with William Drew took place without the knowledge of the pursuer, no intimation thereof having been given to him, nor any opportunity afforded him of examining his brother upon material facts and circumstances applicable to the claim. No record of any kind was kept of what may have passed between the parties on the above occasion; but, in respect thereof, the said Thomas Leburn corruptly, illegally, partially, and contrary to the terms of the said submission, found that the said claim of the pursuer must be disallowed."

In these circumstances, the pursuer concluded to have it declared that the defender Leburn was legally disqualified from farther continuing in the office of arbiter,—and for a count and reckoning between the pursuer and the other defender in regard to the matters in dispute between them.

Defences were lodged for Peter Drew, who pleaded, that, 1. The action being one for putting a stop to a pending submission, without reduction of any of the proceedings, was incompetent, at least on the grounds set forth. 2. It was irrelevant as laid. 3. On the merits, it was groundless both in fact and law.

Leburn lodged defences, in which he stated, that the legal proceedings referred to by the pursuer consisted of a suspension at the pursuer's instance, against the other members of the family, of a projected sale of William's share of the heritage. With this dispute the arbiter was not in any way connected. And he stated further, in regard to the claim—

No. 1. "That it was in consequence of the request of the pursuer himself that the examinations now objected to by him (which were truly mere conversational inquiries, of which the arbiter took notes) were, in the first instance, taken by the arbiter outwith the presence of the

parties, the pursuer having referred with confidence to the information which might be so obtained, particularly from his sister Miss Janet Drew." No. 2. "All that was done by the deliverance of 7th July 1848 was to allow the bills for which the firm was apparently liable, and which were lying over dishonoured at the Western Bank, to be taken up in the mean time from the company funds. The pursuer had admitted that he had no evidence to shew that the bill to Eccles, Burnley and Company, was anything else than a company obligation, as it purported to be, and he proposed to take Mr. Peter Drew's oath on the subject. The arbiter suggested that a solemn declaration might equally serve the purpose, and this was acceded to by the pursuer and his agent, and the declaration was accordingly taken in their presence. If an oath had been insisted on, it would have been administered, and may be so still, if the pursuer desires it." No. 3. "The examination of Reid took place outwith the presence of the parties, at the suggestion of the pursuer himself. The arbiter did not, however, proceed mainly on that examination, but on the entries in the books, including those in the pursuer's handwriting, as will be seen from the deliverance of 7th July 1848 and 13th July 1849." No. 4. This "was a random claim of £10,000, not supported by any entries in the books, and in support of which the pursuer admitted he could produce no evidence; nor did he condescend on any cash sale which had not been accounted for, but he referred the arbiter to William Drew for information on the subject, and both he and his agent Mr. Kerr agreed that the inquiry at William Drew should proceed outwith the presence of the parties." But none of the arbiter's deliverances with reference to these claims were final. On the contrary, they contained nothing more than expressions of opinion. Accordingly, a representation had been lodged against the deliverance of 12th July 1849, which was still n dependence.

He pleaded, that the summons did not set forth facts or allegations which either relevantly or competently supported the conclusion.

The Court of Session held that the pursuer had not set forth any relevant grounds for calling on the Court to interrupt or interfere with the proceedings before the arbiter.

The pursuer appealed against the interlocutor of the Court of Session of 24th February 1852, on the following grounds:—"1. The action at the appellant's instance was, in the circumstances, competent, and the interlocutor of the Lord Ordinary to that effect was well founded.—*Fraser* v. *Gordon*, 12 S. 887; 16 S. 1380. 2. The plea or defence of irrelevancy was not properly before their Lordships of the First Division of the Court, by whom the judgment appealed against was pronounced; and that judgment was therefore incompetent. 3. Even had it been competent for the Judges of the Court below to take up the question of relevancy, and to find that no relevant ground of action was put forward by the appellant, the judgment to that effect, now appealed against, was erroneous on its merits.—*Heggie* v. *Stark and Selkrig*, 3 S. 488; *Dunmore* v. *M'Inturner*, 13 S. 356; *Harvey* v. *Skelton*, 7 Beav. 455; *re Plews*, 6 Q.B. 845; *Dobson and Groves*, and the *Queen* v. *Dobson*, 6 Q.B. 637.

The respondents supported the interlocutor, maintaining that—"1. No relevant allegation had been made by the appellant of corruption, or other disqualification, unfitting the arbiter for the discharge of his office,—it not being sufficient to aver, generally, corruption or disqualification, without precise and specific allegations relevant to infer it. 2. No averment had been made of errors or irregularities on the part of the arbiter, sufficient to affect his proceedings; and, at all events, nothing relevant had been stated to put a period to the proceedings in a pending submission, in which any errors or irregularities which may have occurred are open to be corrected and redressed. 3. The appellant had not set forth any relevant ground for calling on the Court to interrupt or interfere with the proceedings before the arbiter."

Sir F. Kelly and *Hodgson* for appellant.—We have a preliminary objection. The House has no jurisdiction to decide the question of relevancy, for the Inner House had none under 13 and 14 Vict. c. 36, § 38. They ought to have confined their judgment to the competency. The proper course for them was to have remitted to the Lord Ordinary, that he might decide the point of relevancy, and then the whole question would have been before the Inner House.—*Campbell* v. *Kennedy*, 24 Sc. Jur. 307. We say either the Inner House should have remitted to the Lord Ordinary to decide the point of relevancy, or the Lord Ordinary himself by his interlocutor decided the point; in which latter view, there being no reclaiming note against that part of the interlocutor, but merely against the part deciding the competency, the decision is final, and cannot now be opened up.

[LORD CHANCELLOR.—Surely the question of relevancy includes the question of competency. If the summons was not relevant, the action was not competent in this particular case. We think there is nothing in your objection, and you may go on to the merits.]

[LORD BROUGHAM.—That is to say, we merely hold at present that we do not go the length of saying, that in no case whatever is an action like this, to stop a submission, competent.]

The summons contained sufficient allegations to warrant the Court in sending issues to a jury. We alleged that the arbiter was an interested party, but we do not now insist on that objection. Our main allegation was, that he examined witnesses behind our back, and did so corruptly and illegally; and, moreover, that he took the solemn declaration of Peter Drew as evidence. These

proceedings constituted an incurable defect in the submission, and vitiated it *in toto*. It is absurd to say, when an incurable vice is discovered, we cannot bring our action at once, and stop the submission, for we could clearly set aside the decreet arbitral when it came to be pronounced; and why should we be compelled to wait until that time, when already enough has been done to justify us in putting an end to that which must at last be declared void? In *Fraser* v. *Gordon*, 12 S. 887, where the arbiters had required the parties to sign an obligation for their remuneration, the Court never doubted an action to declare the proceedings null was competent before the decree arbitral was pronounced. So in England, in *Dobson* v. *Groves*, 6 Q.B. 637, a case very much like the present, the Court at once set aside the award. So in *re Plews and Middleton*, 6 Q.B. 845, the award was set aside, because it was inconsistent with natural justice for an arbiter to examine witnesses in the absence of the parties. So in *Harvey* v. *Skelton*, 7 Beav. 455, where an interview had taken place between the arbiter and one party, in the absence of the other. So in *Walker* v. *Forbisher*, 6 Ves. 70, where the arbiter had received evidence after he had given notice that he would receive no more. Here the arbiter had come to a final decision on the matter in respect of which he had corruptly conducted himself, and we ought to be able to put an end at once to his going further.

R. Palmer Q.C., *Anderson* Q.C., *Rolt* Q.C., for respondents.—It is quite incompetent, in general, for a party to a deed of submission in Scotland to interrupt the proceedings before a decree arbitral has been made. The only exception, perhaps, that has been admitted is, where there has been gross and manifest corruption in the arbiter; but even that must be relevantly alleged—*Fraser* v. *Wright*, 16 S. 1047. Yet that case went too far; and, at all events, here there was no allegation or pretence of corruption. The arbiter may have committed irregularities, but these did not amount to anything like corruption. It would be most mischievous to allow the proceedings of a pending submission to be interrupted at any point on a mere allegation of one of the parties, for there would be no means of testing the truth of such allegation but by the medium of a jury trial, which would be a most dilatory and expensive process. In England there was no example of such a course, and Lord Truro enlarged on the inconveniences of such interruptions, in an analogous case under the Lands Clauses Act, and his observations apply *mutatis mutandis* here.—*East and West India Docks* v. *Gattke*, 3 Mac. & G. 155. If a party thinks the arbiter has done something which will render the award incurably bad, let him retire from the proceedings under protest. In that way he will be able to avail himself at the right time of the defect. But if he continue to attend the proceedings without any such protest or dissent, as was actually the case here, he waives the irregularity.

[LORD CHANCELLOR.—Then you must contend the case of *Fraser* v. *Wright* was wrongly decided?]

So we do. That was the only case in which the Court in Scotland ever interrupted a going submission. The law of Scotland depends on the act 1695, c. 34, and the Act of Sederunt, which show that corruption, bribery, and falsehood, were the only grounds for reducing a decree arbitral. But whatever may be the abstract principle, there was at least, in the present case, nothing alleged which could be construed into corruption. It was said the arbiter took evidence in private, but it was well known he may take it in what mode he thinks fit, provided he do it fairly.—*Kirkaldy* v. *Dalgairn*, 16th June 1809, F. C.; *Johnstone* v. *Cheape*, 5 Dow, 247; *Mowbry* v. *Dickson*, 10 D. 1102; *Alstin* v. *Chappell*, 2 D. 248; *Macdonald* v. *Macdonald*, 6 D. 186. Thus he may take evidence not upon oath.—*Flounders*, 4 S. 459. Besides, the allegations in the summons are not inconsistent with the fact that the arbiter excluded both parties alike, and therefore showed no partiality.

[LORD CHANCELLOR.—The allegation is very vague, and certainly does not negative what you say.]

We allege in our answers, that it was with the consent of the appellant himself that this was done. Moreover, the arbiter may yet correct any defect in his proceedings, for he has come to no final decision. All the cases cited on the other side were cases where the arbitration had been concluded. All that has been done yet by the arbiter has been to issue interim notes, which are quite different from a decreet arbitral.—*Halley* v. *Gowans*, 11 S. 942; *Gray* v. *Macnair*, 5 W. S. 305. If, therefore, the appellant has been prejudiced, the arbiter may yet remove the source of complaint.

Sir F. Kelly replied.—Nothing has been advanced by the other side to show, that where an incurable vice attaches to the submission, we must wait for years till the decreet arbitral is pronounced, before we can bring an action and stop the proceedings. The case of *Fraser* v. *Wright* settles the question in our favour. The sole point here is, whether the vice is curable—whether it is a nullity or a mere irregularity. We say it is a nullity, which cannot be waived, as an irregularity can. It might be that the effect produced on the mind of the arbiter was not great either way; still we cannot speculate on that.

[LORD BROUGHAM.—Just as in moving for a new trial for the improper rejection of evidence, you are not required to show how much or how little it would have affected the verdict.]

Just so, as it was said in *Dobson* v. *Groves*. We totally deny that the arbiter excluded both parties alike from hearing the evidence; we say he excluded us only.

LORD CHANCELLOR CRANWORTH.—My Lords, this is a case in which a gentleman of the name of William Drew died some years ago, leaving several children. Two of them, Alexander Drew, the appellant at your Lordships' bar, and Peter Drew, one of the respondents, had some disputes as to the right to property under the father's will. In order to avoid litigation Alexander Drew and Peter Drew, by an instrument drawn up in proper form, agreed to submit those disputes to the decision of Mr. Leburn, who was a gentleman skilled in the law, and a person of respectability. They agreed to refer to him all matters of dispute; and an instrument was drawn up, giving to that submission all the effect of a submission according to the law of Scotland; and, according to the law, as it has been stated at the bar on both sides, an award is an instrument of a somewhat more formal character, or more effectual character, than an award upon a submission in this country, because it is a document upon which diligence may immediately issue. However, the principles upon which the arbitrator is to proceed must be the same both in that country and in this. He is bound to proceed fairly and honestly, and to conduct himself without bias or partiality towards either side; and, undoubtedly, he subjects himself to the gravest censure and to legal proceedings if he acts otherwise.

The date of the submission being in June 1848, the arbitration proceeded through that year, and the following year, 1849, and it was broken off in the month of January 1850 by the present proceedings, instituted by Alexander Drew, one of the children, alleging that the Court ought to stop any further proceedings under the arbitration, by reason either of corrupt conduct or misconduct on the part of the arbitrator, Mr. Leburn. The case came before the Lord Ordinary, and from him, upon a reclaiming note, to the Lords of Session, and the Lords of Session were unanimously of opinion that there was no ground for their so interfering. The pleas of the defenders were separate. The first plea for Mr. Peter Drew, substantially the defender, was, that "the present action, for putting a stop to a pending submission without reduction of any of the proceedings, is incompetent, at least is incompetent on the grounds set forth." *Secondly*, "the action is irrelevant as laid." The first plea for the defender Mr. Leburn, who was the arbitrator, is, that "the summons does not set forth facts or allegations which either relevantly or competently support and infer its conclusions." The Lord Ordinary having heard the parties upon the first and second pleas in law stated for the defender Peter Drew, and on the first plea stated for the defender Thomas Leburn, and having considered the terms of the proposed issue lodged by the pursuer, and the record and whole process, repels the first plea stated for the defender Peter Drew, namely, that the action was incompetent upon the grounds set forth—he repelled that, and thought that the action was competent upon that ground; and with regard to the last, he submitted it to the Court.

Now, with regard to submitting the first plea to the Court, it was said that was a proceeding he was not warranted to take under the New Procedure Act. I very much doubt that; but, for reasons which will be apparent, I do not think it is necessary for your Lordships to decide that question now. I cannot however think it was meant, by a sort of side wind, that a power which has been exercised immemorially should be taken away, being proper and necessary for the administration of justice. I, however, will consider it merely now with reference to the first plea of the defender Peter Drew—which the Lord Ordinary by this interlocutor repelled—stating the action to be incompetent upon the grounds set forth. That being taken to the Inner House, their Lordships were unanimously of opinion with the defender Peter Drew, that an action putting a stop to a pending submission was, on the grounds set forth, incompetent.

Now, my Lords, against that decision Alexander Drew, the other party to the submission, has appealed to your Lordships' House, contending that they were competent grounds for putting a stop to the pending arbitration. My Lords, upon the question of putting a stop to a pending arbitration, the law of England and the law of Scotland materially differ. As the law of England stood before the recent alterations, commencing, I think, with the statute moved by my noble and learned friend who held the Great Seal in 1833, followed by several subsequent statutes amending and extending the provisions then introduced, if parties submitted a matter for arbitration to a private tribunal, to be decided by a selected person, either of them might at any time, without assigning any ground, revoke that submission. That was an inconvenient, and, I think I may be allowed to say, an irrational state of the law. If parties choose to select their own judge, they ought to be bound to submit to his decision, and not to let it proceed to a certain point, and then, if they could extract from any opinion or any look of the arbitrator that he was hostile to them, revoke the submission. I say that was an absurd state of the law, which has since been rectified, and now the law may be represented as being, that neither party to a submission can stop an arbitration pending its proceedings without first obtaining the sanction of some Court of Westminster Hall, or one of the Judges of a Court, for so doing. It was very reasonable that there should be still reserved the power of stopping it upon reference to a Judge, because the proceeding before a Judge or a Court for that purpose would be a very short and summary proceeding; and it might be that the party to the litigation might say—"Things are

in such a state, that if it goes on the only result will be that more expense will be incurred, and the award must inevitably be set aside. I will not take any further part in it. I have found out that the arbitrator is corrupt. He has done something which he has no right to do, and I will not waive the evil consequences resulting to me from the course he has pursued, and therefore when the award is made it will be a nullity; and it may be just as well stopped *in limine*." Upon that ground the legislature has still reserved the power enabling a party to a litigation to apply, in a summary manner, to a Court or to a Judge, in order that he may, with the assent of that Court or Judge, put an end to the litigation. That, in the Courts in England, is a very short and summary proceeding. The person applying states upon affidavit the ground upon which he says the award must be set aside, whatever is the result of the award. If that statement upon affidavit be answered, then the Court does not interfere, but says—"Let it go on till the award is made." If it is not answered by affidavit, then it is dealt with as a sort of admitted case, and the Court interferes and suffers the litigant party to stop the arbitration.

Now the law of Scotland is different. When a party has submitted himself to arbitration by a proper submission he cannot revoke it; it must go on; and there are no means of interfering analogous to the proceeding by application to a Court or a Judge in this country. There is no similar proceeding, or any mode of finding fault with the arbitration by affidavit, but there are occasions in which proceedings for that purpose are extremely convenient, and this is one of those cases in which, I venture to think, the law of England affords greater facility and convenience than the law of Scotland. But there being no means of stopping a pending proceeding, still the Courts have said (at least it is supposed that the Courts have said)—You may even, pending a proceeding, come with an action before the Court, and show, in the same way as you may in England upon your affidavit, that there has been corruption, or something relevant to it. And the Courts have said, at least in one case—It may be competent, upon alleging corruption, for instance, or something which will render the award necessarily bad, to come before the Court of Session and have a declarator, or a process of some sort or other, to stop any further proceedings under that submission. The exact form of the proceeding in Scotland it is not necessary to inquire into.

Now, my Lords, that has been so decided in the case which has been referred to of *Fraser* v. *Wright*, or it seems to have been so decided; but it is not necessary for your Lordships to give any opinion upon the question of whether that was a correct or an incorrect decision. All I should wish to say upon that decision is, that I trust, so far as I am concerned, I may not be supposed, by anything I now say, either as assenting to or dissenting from that decision. I wish to leave it perfectly open. There may be cases in which a proceeding similar to that which is now before your Lordships may be properly sustained; but I will just, in passing, remark, that I think many of the difficulties which I should have felt if we had sustained the appellant's case here, would apply equally to the case of *Fraser* v. *Wright*. If corruption could be proved, or there could be any short way of seeing whether there was a *primâ facie* case of corruption or not, then I think there might be very good ground for interfering to stop the proceedings; but inasmuch as it is just as easy to allege corruption, if it is falsely alleged, as it is to allege anything else, I think I see some difficulties in the way of the decision of *Fraser* v. *Wright*. That, however, is not the case here, because the grounds upon which Alexander Drew seeks to stop the proceedings here are not, that there has been anything properly called corruption on the part of Mr. Leburn—the whole of the evidence shows that there has not,—but he has placed his case upon three grounds:—*First*, He says that Mr. Leburn has an interest in sustaining the views of Peter Drew against Alexander Drew, which were not fully understood by him when he consented to the submission. *Secondly*, That he has proceeded in a mode which, if not strictly partaking of corruption, involves yet an irregularity of so grave a nature, that if we were now proceeding to set aside the award, it would be beset with the same difficulties, and it must be treated as corruption under the statute, namely, examining witnesses behind the backs of parties who were interested in seeing that they were properly examined, and that the truth was properly brought out. *Thirdly*, That Peter Drew, one of the parties, was examined, not upon oath, as he ought to have been, but that his examination was taken upon his solemn declaration.

My Lords, upon the first ground, that Mr. Leburn, the arbitrator, was interested in sustaining the case of Peter Drew, one of the parties, against Alexander Drew, we intimated, after the appellant had closed his case, that we did not call upon the respondents to give any answer to that allegation, because it appeared to all of us that there was not the slightest ground for any such suggestion. The interest which was alleged, the existence of which, even supposing it was not known, though it does not appear to be at all clear that it was not known to everybody from the beginning—indeed the circumstances seem to show that it must have been known;—but whether known or not, the interest is next to nothing. It was, as I observed in the course of the proceedings, an interest existing in the same way as in the case of an old writ of *quo minus* in the Exchequer, where anybody was interested, because, as it is said, Mr. Peter Drew has certain trust monies in his hands of which Mr. Leburn, the arbitrator, is one of the trustees, and Mr. Peter Drew, if this award goes against him, will be less solvent, or more insolvent, than if it

goes in his favour. If it goes in his favour it will be more likely that he will be able to pay Mr. Leburn, the arbitrator, his debt, than if it goes against him. My Lords, I do not hesitate to say that that is a sort of interest, if you call it interest, with which it is quite impossible for your Lordships to deal. If parties choose to appoint a person arbitrator without making inquiry into those minute circumstances, they must abide by the result. It is not suggested that there was any fraud in concealing from the parties any existence of interest. The interest, therefore, seems to be a question entirely out of the case; indeed, it was not the point mainly relied upon.

The point mainly relied upon was the next, namely, that Mr. Leburn, the arbitrator, had, upon several occasions, (one is as good as a hundred,) privately examined witnesses behind the back of Mr. Alexander Drew, one of the litigant parties. Now the answer that is given is this —why, it is perfectly true they were examined behind the back of Mr. Alexander Drew, and so they were behind the back of Mr. Peter Drew; and the reason they were examined was, that Alexander Drew desired it to be done. However, I quite admit the force of what was said by Sir Fitzroy Kelly, that we cannot look at that as a question to be inquired into. If, therefore, the examination of these parties behind the back of Mr. Alexander Drew was, upon the whole of the proceedings that are before us, legitimately shown to be a circumstance that would render this award void, then, I think, the appellant would have made considerable progress in his case, because I wish to be understood as not in the slightest degree questioning or insinuating a doubt against the authorities which have been referred to, laying down that an arbitrator must entirely misconceive his duty if he in any way, in the minutest respect, takes upon himself to listen to evidence behind the back of a party who is interested in controverting, or is entitled to controvert it. Several cases have been referred to, but if there had been none, I quite agree with Lord Eldon, that the principles of universal justice require that the person who is to be prejudiced by the evidence ought to be present to hear it taken, to suggest cross-examination, or himself to cross-examine, and to be able to find evidence, if he can, that shall meet and answer it; in short, to deal with it as in the ordinary course of legal proceedings. But I, for the moment, suppose that there is no such answer, indeed I am bound to do so—we are now dealing with the questions of relevancy and competency—we are now to consider that the allegation is this, that he proceeded to hold certain private examinations and communications on the subject thereof behind the back of Alexander Drew. Is that a ground upon which the award could be set aside, or would be set aside, so that your Lordships ought to reverse the decision of the Court of Session, saying they will not stop the proceedings under the arbitration?

My Lords, agreeing, as I do most fully, in the doctrine of all these cases, that the arbitrator entirely misconceives his duty in so examining witnesses, nevertheless, if, from any reason whatsoever, (and here the reason suggested is the consent of the parties,) the arbitrator has examined a witness behind the back of the parties, and afterwards tells the parties—I have examined so and so behind your back; do you wish that I should re-examine them? and they say —No, we do not—proceed nevertheless, then that is an error that may be waived. It is not enough that he should tell them—I have examined A B behind your back; now, come and let me examine them in your presence. I think, in that case, the party might very fairly say—You have examined them behind my back, therefore I beg leave to say that I shall double up my papers and walk away. In this country we should say—I will proceed now to a Judge to have this arbitration stopped, because I cannot tell what impression the witness may have made upon your mind behind my back, and I will not attempt to remove that impression afterwards by having him examined in my presence. I will not submit to the decision of a Judge who has so far forgotten his duty as to listen to anything to my prejudice behind my back, which I have not had the opportunity of contradicting. But if, being aware that the examination has taken place behind his back, being apprized of it, and being asked—Do you wish to have him examined in your presence? he says—No, I do not—proceed with the arbitration, it is evident that is a waiver of the objection. Indeed, though it might have been a sort of misconduct, yet it might be the most venial; and if the reasons were such as are here suggested, it might have been a most laudable act, but certainly venial, which is all we have to deal with. Therefore the only question is this—whether, upon those proceedings legitimately before us, it does appear that Mr. Alexander Drew, knowing of the examination of these parties behind his back, nevertheless did not wish further to examine them, but did wish the proceedings, in spite of all that, to go on?

Now, my Lords, upon that matter I wish to call your attention to what I find in the case. This arbitrator, as I think the Judges truly say, acted with more candour than perhaps was necessary, because, from time to time, at every meeting he made notes of everything that passed, and a sort of summary of what had gone on before. I do not know the date when these parties were examined, but some time previous to the 12th of July 1849, it appears Mr. Leburn, the arbitrator, did examine three witnesses behind the backs of both parties, and therefore behind the back of Mr. Alexander Drew, as Mr. Leburn says, because Mr. Alexander Drew desired it. I will suppose that not to be legitimately before us; however, this is certainly before us, because this is put in by Mr. Alexander Drew himself, that at the meeting of the 12th of July 1849 this is the minute:—"The arbitrator having met with the parties and their agents at Glasgow on the 2d

instant, and having heard them fully in support of their respective claims, examined Mr. William Drew, Miss Drew, and Donald Ferguson, upon a certain point. Well, Alexander Drew, being informed that he had examined those parties, must of course know that it was behind his back, because he complains that he was not there. Then, what takes place? Why, at the same meeting, I think, but if not then, at a subsequent meeting on the 8th of October, at page 106 of the *printed cases*, I find this at letter E—"And further," the arbitrator "appoints Mr. Alexander Drew to state whether he wishes Miss Drew, Mr. William Drew, and Donald Ferguson, to undergo a more formal examination by him before the arbiter, in regard to the alleged arrangement as to the rents"—that was the point upon which they had been examined. He asks him if he wishes it, and I must infer he does not, because they never are examined. It is not suggested that he expressed any wish that was refused; but no less than ten meetings take place afterwards, to which letters are sent by Mr. Alexander Drew, he being fully apprized of all this, and he makes no objection at all to the fact that they had been examined in private, and never asks the arbitrator to do what the arbitrator offered to do, namely, to have them examined in his presence, but lets the arbitration proceed.

My Lords, upon all principles of common sense, as well as of authority, perhaps, even if there had not been that which the arbitrator says there was, a previous direction to him to do it behind Alexander Drew's back, which clearly disqualified him from complaining of the award, when the award was made, upon any such ground, surely, exactly the same observation applies to his having examined Peter Drew upon solemn declaration. It is said by the same note of the 12th of July, at page 100—"The arbitrator having heard the parties and their agents on this claim, and having in their presence taken the solemn declaration of Mr. Peter Drew on this subject, is of opinion that this claim cannot be sustained." We are told that that is a very common way of taking evidence; and that having been done in his presence, and no objection made to it at the time, it is preposterous to think, after the arbitrator has been proceeding in that way for months afterwards, and having had considerably more than ten meetings, that any objection could be raised upon any such grounds as that.

My Lords, it therefore appears to me to be perfectly clear that nothing is stated here upon either of the grounds suggested: first, that the arbitrator has examined witnesses behind the back of the parties, or as to taking the examination of Peter Drew, one of the parties, upon solemn declaration, that would, in this country, enable a Court to stop the arbitration from proceeding, and *a multo fortiori* will not enable the Court of Session, by a proceeding of this sort, to prevent the arbitration from proceeding.

I cannot but observe the great force of what was pressed upon us by the counsel for Mr. Peter Drew, that the consequences of such an interference as this must be most mischievous to the parties. We are now in the year 1855. This arbitration was going on, and apparently coming close to a termination at the end of 1849, or in January 1850, and this proceeding is instituted, the result of which is only to see whether there are grounds for preventing the arbitrator from making his award. If the arbitrator had been allowed to proceed to make his award, all that would have been over; and if further litigation was necessary, the consequences of that would have been a litigation of a final character; but this litigation is absolutely in its nature interminable, for the moment it has been decided, if it should be decided, that none of these grounds, upon the issue being directed, are made out, and that the arbitrator is to proceed, what is to prevent the parties the next day from instituting another proceeding, there being no mode of testing the truth of that except by a course of proceeding similar to this?

My Lords, I am very happy to think that we so entirely concur with the Court of Session in the decision to which they have come, that real justice will be done, and that litigation will be stopped. I trust this will be a precedent to prevent similar proceedings for the future.

I will conclude the few observations I have made by moving your Lordships to dismiss this appeal, and to affirm the judgment of the Court of Session; and I repeat an observation which I made before, that I trust nothing that has passed will be taken as indicating an entire or an unequivocal assent on the part of your Lordships, that even if fraud had been alleged, that would have been a good ground for such a proceeding as this.

LORD BROUGHAM.—My Lords, I entirely agree with my noble and learned friend in the view which he has taken of this case. I entirely agree with him also in desiring to exclude the inference, that we either give any opinion in favour of the case of *Fraser* v. *Wright*, or against it. We leave that decision entirely untouched, as not at all necessary to be approved of or disapproved of at this time. I do not at all contend that there may not be cases in which it would be justifiable in the Court to stop what is called a "going submission," and to interfere upon an application, unfortunately, not as our more convenient course sanctions, by a summary application, but by an action of declarator *ad interim*, as in the present case. I do not take upon myself to say, that I may not imagine cases which would justify the Court, in respect of the incurable nature of a flaw in the proceedings suggested by such a suit, sanctioning the suit and stopping a going submission. Such cases may arise. I can imagine one very easily of gross corruption on the part of the arbitrator. If one party chooses to insist upon going on, and the

other party says—What is the use of going on now, when the result can only be that the award or decree of the arbitrator must from its nature be set aside? I can well imagine that the Court of Session would be justified in sustaining the reasons of a declarator *ad interim*, and stopping a going submission. For the present case, however, suffice it to say that no such instance arises here. I do not, even looking most strictly at the allegations before us, think that the relevancy set forth is sufficient to justify the Court in so doing.

Interlocutors affirmed, and appeal dismissed with costs.

Appellants' Agent, Thomas Ranken, S.S.C.—*Respondent's Agent*, James Peddie, W.S.

MARCH 13, 1855.

Mrs. MARGARET BRYDON or MARSHALL, &c., *Appellants*, *v.* ROBERT STEWART, *Respondent.*

Master and Servant—Colliery—Culpa—Reparation—Damages—*M, a coalminer, while in the pit at work, having certain grievances against the masters, after consulting his fellow workmen, resolved to leave the pit in order to represent his demands to the master and leave the service if these were not complied with, and in coming up the shaft was killed by a stone falling, and which fell by the negligence of the master.*

HELD (reversing judgment), *That M, being still in the master's service, and the master being bound to provide for the servant's safety in coming up the shaft, the master was liable for compensation to M's widow.*[1]

This was an action of damages at the instance of the widow and children of the late James Marshall, against "The Omoa and Cleland Iron and Coal Company, and Robert Stewart" the only individual partner, "or otherwise against the said Robert Stewart as proprietor and in the occupation of the Cleland Colliery and the Omoa Iron Works."

The pursuers averred in the condescendence—"On the morning of the 11th January 1849, the said James Marshall, while in the performance of his duty as a miner, in the employment of the defenders or defender, in the said Bellside Pit, and while ascending the shank in the cage provided for the use of the miners, was struck on the head by a lump of coal, ironstone, or other hard substance, falling on him from above, in consequence of which he fell from the said cage to the bottom of the said pit, and died shortly afterwards from the injuries then received."

The defender stated—That at the time of Marshall's death, there was, so far as the defender was concerned, (2) "nothing wanting to make the pit in all respects proper and safe for working in; and, so far as he knows or has been able to learn, it was, at the time referred to, in a safe and proper condition. (3) At the time referred to, as well as for a considerable time previous thereto, the defender had contracted with John Craig, a person of sufficient skill and capacity, to maintain the pit in question, including the underground roads and works, in a proper condition, as also to draw the minerals and other materials which required to be taken to the surface, from the places at which they were wrought to the pit bottom, and put them on the ascending hatches. Craig was such contractor on the 11th of January 1849. (4) On the occasion of the deceased falling down the pit, he was in the act of leaving his work when he had no right to do so. The defender, from all he can learn, believes that the death of James Marshall is attributable either to his own carelessness, or was the result of an inevitable accident."

The defender pleaded, *inter alia*—4. That, in the circumstances, he was not responsible for the negligence of the contractor Craig, supposing the accident attributable to him. 5. The defender was not answerable for an accident which could not have been foreseen or provided against. 6. The pursuers' allegations being ill founded, the defender was entitled to absolvitor.

The case went to trial on the following issue:—"Whether the death of James Marshall, miner at Bellside, in the parish of Shotts and county of Lanark, while working in a coal pit belonging to and in the occupation of the defender, was occasioned by injuries arising from the shaft of the said pit being in an unsafe state, from causes for which the defender, as the employer of the said James Marshall, is responsible?"

The pursuers led evidence from which it appeared, that on the day in question, the miners went down into the pit at the usual hour in the morning; that instead of proceeding to work, they

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[1] See previous reports 14 D. 266, 596; 24 Sc. Jur. 94, 298. S. C. 2 Macq. Ap. 30; 27 Sc. Jur. 321.