I think the views of your Lordships require any strengthening, but that I might pay due deference to the opinion of my brother on the left and to the importance of the case.

The Court found and declared that the second party, as trustee on the sequestrated estate of Daniel Smith M'Kay, took the subjects in Balfour Street, Edinburgh, which were vested *ex facie* absolutely in the bankrupt, free of the latent trust in favour of the first parties, and that the first parties were entitled only to rank on the sequestrated estate for the value of said subjects, and were not entitled to recover the same from the second party as their own property: Further, found and declared that the surplus price of said subjects belonged to the second party as trustee foresaid, and decerned.

Counsel for the First Parties—H. Johnston—Shennan. Agents—Watt & Anderson, S.S.C.

Counsel for the Second Party—Lorimer—Hunter. Agents—Morton, Smart, & Macdonald, W.S.

HOUSE OF LORDS.

Friday, July 17.

(Before the Lord Chancellor (Halsbury), and Lords Watson, Herschell, and Morris.)

HOLMES OIL COMPANY *v.* PUMPHERSTON OIL COMPANY.

(*Ante*, vol. xxvii. p. 563, and 17 R. 642.)

Contract — Agreement — Arbitration — Award — Corruption — Fraud — Reduction.

By agreement between the parties in 1884 it was provided that the Holmes Oil Company should sell to the Pumpherston Oil Company the whole crude oil distilled by them for a period of three years; that the price to be paid therefor should be the one-half of the average net naked price received by the Pumpherston Oil Company for the products obtained by them from the crude oil; that this average net naked price should be ascertained by an accountant named, acting for and on behalf of both parties, who should be bound to accept the Pumpherston Oil Company's business books "as final and conclusive evidence of the varying prices received by them during the year for the said products;" and that all questions as to the meaning or due implement of the contract should be referred to an arbiter named. One of the products obtained from crude oil is paraffin scale, which itself yields hard scale and soft scale, of which two the former is considerably the more valuable commodity. In 1886 the Holmes Oil Company objected that the accountant had included in his report products not sold by the Pumpherston Oil Company but retained by them in stock. The arbiter sustained the objection and declared as follows:—"In ascertaining the net naked price it is not competent under the agreement to take into account a valuation of unsold stocks or anything else than prices received during the year." The arbiter thereafter refused a motion by the Holmes Oil Company that the accountant should be ordered to furnish the proportions of hard and soft scale sold by the defenders during the past year, and the prices obtained therefor.

The Holmes Oil Company again objected to the report for 1887, and maintained to the arbiter that the Pumpherston Oil Company had only sold the soft scale, and had retained for their own purposes the hard scale, worked it into other products, and sold it beyond the market price of hard scale, and that the hard scale though not sold must be included in fixing the average price. The objectors moved for a proof, but the arbiter disallowed it, and thus disposed of the objection—"The admissibility of taking into consideration the different qualities of scale was decided by me in the negative in a previous stage of the reference. . . . In the absence of any allegation of fraudulent dealing, I think the principle must be followed of estimating the price according to the amount received from the various products during each year."

The Holmes Oil Company sued the Pumpherston Oil Company for reduction of the decree-arbitral and the accountant's reports on the grounds (1) that the arbiter had acted corruptly in not allowing proof, and (2) that the defenders obtained the reports by fraudulently and falsely stating to the accountant that the amount of crude scale actually appearing in the books as sold consisted in fair proportions of hard and soft scale. There was no averment of error either in the accountant's statements or his calculations.

Held (*aff.* the decision of the Court of Session) that the arbiter had pronounced judgment on a question fairly raised by the parties before him, and (2) that the reporter had settled the average price in conformity with the provisions of the contract; that therefore the averments of the pursuers were irrelevant, and the action fell to be *dismissed.*

This case is reported *ante*, vol. xxvii. p. 563, and 17 R. 642.

The Holmes Oil Company appealed.

At delivering judgment—

LORD CHANCELLOR—My Lords, I agree with a remark which was made by the learned counsel as to doing justice in this case, and I have approached the case with the strongest possible desire if I could

to do justice between the parties, which I think ought to be done assuming that the facts suggested are true. But the matter is not here for review; apart from the particular form in which the question arises, this is in substance an attempt to set aside an award. Now, one of the advantages which people are supposed to get by a reference to arbitration is the finality of the proceeding when the arbitrator has once stated his determination. They sacrifice something for that advantage—they sacrifice the power to appeal. If in their judgment the particular judge whom they have selected has gone wrong in point of law or in point of fact they have no longer the same wide power to appeal which an ordinary citizen prosecuting his remedy in the courts of law possesses, but they sacrifice that advantage in order to obtain a final decision between the parties. It is well-settled law, therefore, that when they have agreed to refer their differences to arbitration, as they have here, you cannot set aside the award simply because you think it wrong. The parties have agreed that it shall not be subject to the ordinary modes of appeal, and that it shall be final; and that is, in nine cases out of ten, the very object which they mean to attain by submitting their differences to arbitration.

My Lords, in this case the arbiter has to my mind clearly decided the question in dispute between the parties; and in truth what he has decided—at all events the substance of his decision—is, that there being a dispute as to how much one of the parties shall pay to the other party, he has given the amount in terms and in figures which the one party shall pay to the other. Thereupon one of the parties, the party against whom he has decided, says—"Oh! but you have proceeded upon a wrong principle; you have not allowed the price of the article to be ascertained in the way contemplated by the contract." The arbiter to whom that matter is remitted says—"I have looked at the contract, and I find that the only mode in which the price is to be ascertained is by taking the average during the year of the price received for all these articles. Well, I look at the average of the price received for all these articles, and I arrive at such and such a conclusion upon the figures stated, and for the amount so arrived at I give my award." Upon which the other party says—"But the average was to be an average ascertained by considering all the things which were not only in fact sold, but which ought to have been sold, or considered as sold, or treated as sold, and taking the price of them as received during the period of the year." To that it is replied—"Well, but that is not the contract between the parties; the parties have selected a particular mode of ascertaining the amount, and the arbiter finds that that is the mode."

For myself, my Lords, as I have said during the argument, I am unable to concur with the learned arbiter in the view which he has taken of this matter, but still that is a matter which he has decided, and that is the view which he has taken. He has, as I think, left us in no doubt whatever of the ground on which he had decided before when a dispute took place between the parties in which the question was—Can you consider, for the purpose of ascertaining what is to be paid by the one to the other, the amount of stock which remains over after the year has elapsed and which has not been sold? Upon which the party objecting to this mode of ascertaining the average says—"No, no, we must treat that as unsold, and for this purpose it does not enter into the question of what is to be paid." My Lords, that may have been right or it may have been wrong, but that was their contention, and the arbiter acquiesced with that contention. He said, "That is the view I take of the contract." Time passes on, and then comes the question which has been debated before your Lordships, as to whether, although not remaining in stock, account ought to be taken of the quantity of material consumed by the manufacturing company (because since the beginning of the year they had turned themselves into a manufacturing company) neither sold in the ordinary course of the market, nor, in the language of the contract, any price received for it in that character. The arbiter says (I do not concur in his view)—"I adhere to my former decision; you yourselves say, 'You must strictly abide by the language of the contract;' and I cannot find any average here to be derived from goods sold and the price received, and therefore I must proceed on the former assumption—I must proceed only on the language of the contract."

My Lords, that being the state of facts, it is said now that the arbiter has misconducted himself. I confess I think that the language of the English law is more applicable to the grounds upon which you can set aside an award than the Regulations of 1695, where it is said that misconduct in an arbiter shall include not only the three heads there recited, but all conduct on the part of an arbiter which is inconsistent with natural justice in deciding between man and man. If he declines to hear material evidence his conduct is such that he is obviously not complying with the ordinary principles of judicial proceedings. In our English law we call that misconduct, and an award may be set aside by reason thereof. I doubt very much whether those words of the Regulation of 1695 are applicable to mere misconduct of that kind.

Now, the alleged misconduct here is, that the arbiter has refused not to hear the parties but to hear certain evidence. I cannot help thinking that both Mr Finlay and his learned junior have a little fallaciously used the words "refused to hear." The arbiter has not refused to hear the parties at all; he has heard them, and has considered their arguments. What he has refused to do is to admit a class of evidence which upon his view of the contract would undoubtedly be irrelevant, and Mr Finlay and his learned junior do not contend that if the arbiter's view of the contract was

right that evidence would be relevant at all. To my mind the language of the arbiter unmistakeably points to the fact that he refused to admit that evidence because in his view of the contract he considered that that evidence would be irrelevant, and in his view of the contract that evidence was irrelevant. The result is, that there is no ground or pretence for saying that the arbiter has misconducted himself in that respect. He may have been wrong. I have already indicated my view of what the true interpretation of the contract and the mode in which the price ought to be ascertained is—but that is not the question before your Lordships. The question here is, whether the arbiter has misconducted himself in respect of having refused to hear relevant and proper evidence which was essential to the determination of the question between the parties? In the view which he took of the contract, the construction of which was a question for him, and him alone, that evidence was irrelevant; he rightly rejected the evidence upon that view, and we have no power to review what he has done in that matter. He has determined what the contract rights of the parties were, and we have not to consider his decision as to those rights.

For these reasons, my Lords, it appears to me to be abundantly clear that this appeal must be dismissed and the interlocutors appealed from affirmed, and I move your Lordships accordingly.

LORD WATSON—My Lords, in this case I find myself very much in the same position as the Lord Chancellor, because the facts as alleged, taking them so far as admitted, appear to me to show that the arbiter has put a very singular construction upon the contract between these parties, a construc tion which involves considerable hardship to the appellants, but at the same time I am bound to remember that the merits of this case are not and cannot be com petently drawn under review in this House. The parties have chosen their own judge, and so far as his decision has been honestly given, they must submit to it whether it be according to law or not.

The learned arbiter in this case has determined, under the powers given to him by the contract, the amount or price which was payable during certain years for the crude oil furnished by the appellants to the respondents. In so far as that decision is on the merits, it is protected by the provisions of the Regulation of 1695, and although in the course of the argument some observations were addressed to the House which seemed to point to the decree being in violations of the terms of that Regulation, I think the only serious argument latterly insisted in by the appellants was founded upon the allegation, not that the arbiter had corruptly given a judgment upon the materials before him, but that there had been misconduct on his part in declining to receive evidence which was tendered to him before he proceeded to dispose of the question submitted.

Now, my Lords, I am of opinion that that ground of exception, which may be a good ground of exception to the validity of the award, does not rest at all upon the Regulations of 1695. I think that in so far as regards the conduct of the case, and in so far as regards the jurisdiction of the arbiter to dispose of the case, the Regulations of 1695 make no provision whatever. These rest upon the common law. The arbiter must confine himself to the jurisdiction which the parties have conferred upon him, and in the conduct of the arbitration before it comes to final judgment he is bound to observe any condition which the parties may have chosen to impose upon him by the deed of submission, and he must also conform to all those rules for securing the proper administration of justice which the law implies in the case of every proceeding before an arbiter as well as in the case of every proceeding before a court of justice.

Now, the misconduct complained of in this case would have been quite sufficient and conclusive to vitiate the award if it had been clear upon the averments of the parties that the point to be determined by the arbiter involved nothing more than a pure question of fact. When that is the nature of the issue raised for his determination the principles of natural justice require that before proceeding to decide it the arbiter shall receive from the parties all the evidence of fact which can enable him to arrive at a proper and just conclusion as between them. But that is not the nature of the question which was then submitted. Whether the evidence ought or ought not to have been received, whether this question of fact ever would arise or not, depended upon the construction which the arbiter might put upon the contract; and I need not say that the construction of the contract, either as necessitating or as excluding the necessity for evidence, is a matter entirely committed by the terms of this submission to the arbiter, and accordingly his decision upon that point is protected by the very same sanction which protects his judgment upon the merits of any other question which may be raised before him.

Now, the arbiter's final award has taken the shape of a judgment determining the price payable, and ordaining the appellants to repay a certain amount which had been overpaid to them in the view which the arbiter took of the proper amount. We have, however, set forth in the 14th article of the condescendence the findings upon which that decree-arbitral proceeded, and also the note which the learned arbiter appended to those findings, which were issued for the consideration of the parties about three weeks before the formal decree-arbitral was extended.

My Lords, it has been held by this House that in considering the effect of a decree-arbitral a court of law is bound to take into account and to read along with that decree the findings of the arbiter upon which it proceeds as explanatory of the views to which by his formal judgment

he intended to give effect. Those materials your Lordships have here; and the note appended to these findings is, in my opinion, conclusive upon this point, that the arbiter rejected the evidence not because he was unwilling to hear proof from the parties upon a relevant question of fact, but because, upon the construction of the contract which seemed to him to be the right one, he was of opinion that the facts proposed to be made the subject of inquiry were not relevant. I cannot otherwise construe two sentences in that note. I take the last of these sentences first. He says—"In the absence of an allegation of fraudulent dealing, I think the principle must be followed of estimating the price according to the amount received from the various products during each year." That is a plain affirmance of the correctness of the accountant's report, who had taken from the books of the respondents the amounts received for the various products during each year, and had made these the materials from which he had extracted the average price which under certain deductions was payable to the appellants. Now, if that was the correct principle, to inquire into the amount of hard scale and the amount of soft scale which went to make the particular item of scale in the accountant's report would have been a very idle proceeding, for it would simply have led to this, to extracting and making a second item containing all the materials of the first, and neither the summation nor the average arrived at would have been effective to any extent whatever.

My Lords, the first part of the note, which in logical sequence ought to be the last, is this—"The admissibility of taking into consideration the different qualities of scale was decided by me in the negative in a previous stage of the reference between the parties." It is said that these words do not indicate that the learned arbiter meant to proceed upon any construction of the contract, or to determine that proof upon the subject was inadmissible. I am quite unable to take that view of the language of the arbiter. When it is read in connection with the passage to which I have already referred, its meaning becomes perfectly clear. But even if it were taken by itself the language seems to me to be altogether free from ambiguity. If it were inadmissible, as the arbiter in plain terms says it was, to take into consideration the different qualities of scale, of what relevancy could a proof directed to the different qualities of scale have been? The learned arbiter seems to have thought that he had decided it before. With the ground upon which he came to that conclusion we have no concern. He may have been in error; he may have been mistaken in supposing that his judgment on the former occasion constituted a proceeding directly bearing upon the point which he was deciding. That appears to me not to be of the smallest consequence. His conduct is not said in any way to have been corrupt or to have been in any other way a violation of the Regulations of 1695.

Therefore it seems to me that this portion of the award being entirely within the competency of the arbiter, unless it is successfully assailed upon the ground which I have indicated, the case of the appellants must necessarily fail.

LORD HERSCHELL—My Lords, I entirely agree with what has been said by my noble and learned friends who have preceded me. The view which I take of this case, and the reasons which have led me to the conclusion that it is impossible in any way to interfere with this decree-arbitral, are to my mind completely and satisfactorily set forth in the judgment of Lord Rutherfurd Clark in the Court below.

LORD MORRIS concurred.

Their Lordships dismissed the appeal with costs.

Counsel for the Appellants—Finlay, Q.C. —Dundas. Agents—Loch & Goodhart, for Waddell & M'Intosh, W.S.

Counsel for the Respondents — D.-F. Balfour, Q.C.—Ure. Agents—Wm. Robertson & Company, for Cairns, M'Intosh, & Morton, W.S.

Monday, July 27.

(Before the Earl of Selborne, and Lords Watson, Bramwell, and Morris.)

M'COWAN *v.* BAINE & JOHNSTON.

(*Ante*, vol. xxvii. p. 782, and 17 R. 1016.)

Insurance — Maritime Policy — Construction—Vessel under Tow—Collision with Tug.

A ship was insured "from the Clyde (in tow) to Cardiff" upon a policy which bore that "if the ship hereby insured shall come into collision with any other ship or vessel, and the insured shall in consequence thereof become liable to pay, and shall pay, to the persons interested in such other ship or vessel . . . any sum of money, . . . we (the underwriters) will pay the assured three-fourths of the sum so paid." A tug while towing said ship collided with another vessel and sank it. Both the tug and the tow were by the Admiralty Court in England found liable in damages to the owners of the vessel sunk.

Held (*aff.* the decision of the Second Division—*diss.* Lord Bramwell) that the owners of the tow were entitled to recover under the policy of insurance, although the tow had not itself been directly in collision.

This case is reported *ante*, vol. xxvii. p. 782, and 17 R. 1016.

M'Cowan appealed.

At delivering judgment—

LORD WATSON—In a suit before the Admiralty Court of England it was de-