Mr Macmillan further argued that the conditions of stability in a turret vessel could not be regarded as constituting an unusual danger, in that such a vessel was one of a substantial class of vessels of which the merits and demerits were known, and of which the respondents had had a prolonged experience both before and after the loss of the s.s. "Clan Ranald," a ship of similar construction which had turned turtle and sunk in 1910. Among other passages he referred to the evidence of Captain Ruthven, who was called at the trial on behalf of the appellants. He was asked — "Would you, if you had been in command of this ship when she was two days out from New York, have emptied Nos. 1 and 2 tanks?" His answer is—"I certainly would not have done that; if I had had those instructions I should have filled another one. If I had been long enough on the ship I might have found out for myself what I found out from the builders." It was said that as the captain of the s.s. "Clan Gordon" had been in charge of the vessel for more than a year he might have found out for himself the information contained in the instructions, and that it was more safe to rely on the experience of the captain than to fetter him by issuing special instructions. The fact that the captain of a vessel may find out for himself after a certain period of time a source of unusual danger which was within the knowledge of the shipowners, and might have been communicated directly to him in the first instance, is not sufficient to justify the shipowners in subjecting a cargo to the risk of loss, or to exempt them from liability for not exercising due diligence if such a loss has been incurred. Evidence of a similar character was given by Thomas Barr, who had been the registered manager of the respondents since the s.s. "Clan Gordon" was built in June 1900. He states as follows:—"Well, the builders have not an actual experience of the vessel, and how their figures are arrived at we do not know. We do know that our masters and ourselves have the practical experience of the conditions under which these vessels are sailing, and we are rather inclined to take it that the experience which we have of these types puts us in a position of being better able to judge whether the ships could carry these cargoes or not." It is not possible to accept evidence of this character as an answer to the allegation that instructions based on exact calculations of the stability of the vessel and the accuracy of which is not questioned had not been brought to the notice of the captain.

It was further suggested that the instructions were in themselves ambiguous, and more likely to cause difficulty than to give information which would assist the captain. Mr Camps, a maritime expert, says that he did not have any difficulty in understanding the instructions, and that if you take each paragraph by itself he thinks that the first paragraph is perfectly clear. Evidence of a similar character is given by Captain Ruthven and Captain M'Intosh, and the three experts called for the respondents—Mr Wall, Professor Welch, and Dr Douglas—do not suggest that there is any difficulty in understanding the first paragraph of the instructions. In my opinion the respondents have failed to establish that the instructions were in themselves of an ambiguous character, so that it was prudent not to embarrass their captains by bringing to their notice the information which they contained.

In the result I agree with the conclusions of the Lord Ordinary and Lord Sands that there was a duty on the respondents to bring the instructions to the notice of the captain of the s.s. "Clan Gordon," and that the respondents have failed to prove that they used due diligence. There is no doubt that if there was a duty on the respondents to bring the instructions to the notice of the captain the vessel was not seaworthy, and that the loss resulted from her unseaworthiness.

It was further argued on behalf of the respondents that they were entitled to have their liability limited in accordance with section 503 of the Merchant Shipping Act of 1894, but in my opinion they have failed to show that the said loss occurred without their actual fault or privity.

The appeal should be allowed with costs here and in the Court of Session and the judgment of the Lord Ordinary should be restored.

Their Lordships ordered that the interlocutor appealed from be reversed; that the interlocutor of the Lord Ordinary be restored, and the cause remitted back to the Court of Session with directions to enter decree for the appellants for the sum of £97,892, 17s. 8d., with interest at the rate of 5 per centum per annum from the 13th day of January 1922; and that the respondents do pay to the appellants their costs in this House and in the Court of Session under a reservation of the question of modification, if any, of the expenses in the Inner House as well as before the Lord Ordinary until the lodging of the Auditor's report.

Counsel for Appellants—Dean of Faculty (Condie Sandeman, K.C.) — Normand. Agents—J. & J. Ross, W.S., Edinburgh—W. A. Crump & Son, London.

Counsel for Respondents — Macmillan, K.C. — Mackinnon, K.C. — Douglas Jamieson. Agents—Webster, Will, & Company, W.S., Edinburgh — Coward & Hawksley, Sons, & Chance, London.

Monday, November 26.

(Before Lord Dunedin, Lord Atkinson, Lord Shaw, Lord Phillimore, and Lord Blanesburgh,)

BLACK *v.* JOHN WILLIAMS & COMPANY.

(In the Court of Session, February 22, 1923, S.C. 510, 60 S.L.R. 330.)

Arbitration — Award — Reduction — Irregularity of Procedure — Alleged Failure of Arbiter to Apply his Mind to Question Submitted — Examination of Witnesses Outwith the Presence of Parties.

A plasterer undertook to do the rough casting at certain premises for a certain price. On the completion of the work his employer expressed his dissatisfaction with it, and a submission was made to a master plasterer as arbiter to determine whether the work had been satisfactorily done, and particularly whether it had been executed in a manner recognised by and in accordance with the custom of trade, not only as regards material but also as regards quantities, quality, and solidity of the work done. The arbiter in order to ascertain whether the employer had authorised the use of certain materials questioned two of the contractor's employees outwith the contractor's presence but in the presence of the employer. He then examined the employer's manager outwith the presence of both parties. In his award the arbiter while finding in favour of the contractor as to whether the employer had authorised the use of the materials in question, held that the work had not been properly executed. The contractor thereupon brought an action for the reduction of the award on the ground, *inter alia*, that the evidence in the arbitration proceedings had been taken in the presence of the defenders only and outwith the presence of the pursuers. An additional objection, which, however, in the opinion of the Lord Ordinary was not very clearly if at all raised on record, was also argued, viz., that the arbiter had misconstrued the terms of the submission, inasmuch as he had not applied his mind to the question, "What is the custom of the trade as to the number of coats to be given when there is no specification in the offer?" The Lord Ordinary's decision reducing the award on this ground having been reversed by the First Division and the defenders assoilzied, the pursuers appealed. *Held* (1) that in taking the steps he did to ascertain what was the custom of trade the arbiter had not acted *extra fines compromissi* or failed to apply his mind to the true question submitted to him, and (2) that as regards the other ground of challenge, viz., that a witness had been examined outwith the presence of one of the parties, the procedure followed had not in this instance violated the principles of justice, especially where, as here, the arbiter had decided in favour of the party challenging the award, and appeal *dismissed*.

Arbitration — Award — Reduction — Reduction on Grounds not Specified on Record — Competency — Necessity for Precise Specification of Grounds of Challenge.

Process — Record — Reduction of Arbiter's Award — Reduction on Grounds not Specified on Record but Elicited from Defender in the Course of his Evidence — Necessity for Amendment of Pleadings.

Where a pursuer elicits from a defender in the course of his evidence something which suggests a new cause of action altogether or a different foundation for his action, he should only be allowed to proceed upon averments and pleas properly inserted in the record, and upon payment of the expenses incurred up to that point.

Davidson v. *Logan*, 1908 S.C. 350, 45 S.L.R. 142, *commented on*.

The case is reported *ante ut supra*.

The pursuer appealed to the House of Lords.

At delivering judgment—

LORD DUNEDIN—Mr Wark has set forth very clearly and fairly the points which arise on this appeal, but I cannot say that he has for a moment raised any doubt in my mind that the judgment appealed against is right.

There was a contract in this case for the execution of certain rough castings. It was a simple contract in these terms—"I hereby offer to do all the rough casting pointed out to me" in a certain place for a certain price. That offer was accepted verbally, subject to a certain modification as to the price. After the work was executed, the parties who had got the work done for them complained that it was not in accordance with the contract. This was denied by the contractor, and as they could not come to agreement they referred the matter to a practical plasterer as arbiter. The submission I need not quote at any length; it sets forth the offer and the acceptance; it then says in general terms that the parties are not satisfied with the work done, and then it refers to a third party, a practical plasterer, "as sole arbiter, all claims, disputes, questions, and differences presently existing between them regarding the roughcasting referred to, and particularly whether the roughcasting referred to has been executed by the first party in accordance with the foresaid offer, which is docqueted and signed by the parties as relative hereto, and in a manner recognised by and according to the custom of the trade, not only as regards material, but also as regards quantities, quality, and solidity of the work done, and further, whether the said work has been executed in a satisfactory and tradesmanlike manner."

The arbiter took up the reference, and he gave an award, and in his award he puts this question to himself. He calls attention to the fact that there was not any actual specification, but that the question was left to be determined by the custom of the trade, and he says—"Is the work executed according to the custom of the trade? I say it is not. Roughcasting as it is known to the trade in this district, and as it is specified by architects and measurers, consists of three coats," and then he finds that in this particular case only two coats had been used, and accordingly he says that a certain deduction is to be made from the price. Now this action has been brought to set aside that award. As your Lordships are aware, it is very necessary that the objections to awards should be kept within very closely defined limits, and the

first thing that is necessary in any condescendence annexed to an action for setting aside an award is that there should be a precise specification of the grounds of challenge, and unless there is such precise specification no proof ought to be allowed.

I really cannot look on the record in this case, and the interlocutor that immediately follows thereon, with any pride. It has always been one of the great boasts of the process in Scotland that parties are tied to the record. Here the record is a very rough statement; it has certainly a statement that has now disappeared from the case of actual corruption on the part of the arbiter, as evidenced by certain words spoken by him—but that is gone.

Now I am not throwing any doubt upon the point that if there is a precise specification that the arbiter has gone *ultra fines compromissi* by deciding a question different from that submitted to him, it is possible to go to proof, and it is quite competent to examine the arbiter to find out what he has done. The Canadian case quoted—*Fraser* v. *Fraserville (City of)* [1917] A.C. 187—is a very good instance of that where the reference to the arbiter having been to find the value of certain property compulsorily taken to the man who had to part with it, he decided no such question, but decided what was the value to the man who took it, and the award it was held could not stand. But here, on the point which has really been the principal point argued, it is admitted that there is no record at all, and no amendment was made.

The learned counsel quoted the case of *Davidson* v. *Logan*, which is reported in 1908 Session Cases, p. 350, which I quite admit is very like this case in that particular, but I cannot think that the learned Judges in that case did quite right. I am not saying that they did wrong in deciding the question as they did, but in the matter of amending the record they found that it was unnecessary to amend it. I should have thought it was absolutely necessary to amend it if for no other reason than this, in order to deal with the expenses in the case. I am quite clear that however much it may be said that the matter is not too late at the end of the day, yet if a person comes into court with a set of allegations all of which fail, and then finally by chance gets out of the arbiter something that enables him to make a case which he had not up to that moment made, it may be that he should be allowed to go on with the case, and I think it is in accordance with our Scottish procedure that he ought to be allowed to go on with it, but most indubitably he ought to have paid the whole of the expenses up to that point.

Now we come to what the point is here. It is said that the arbiter did not really direct himself to the true question, and the ground upon which that is put is this, that whereas what he had to inquire into was what was the custom of the trade, he had directed his attention entirely to what was usually put by architects and surveyors into specifications. It must be remembered that this arbiter was a practical plasterer, and I agree with what fell from my noble and learned friend Lord Shaw in the course of the discussion that probably he need not have asked for any evidence at all, but if he was going to hear evidence I cannot think that it was anything but a most sensible procedure to say, "I will find out and consider what is the custom of the trade by considering what are the usual stipulations that are put in by those who deal with this matter of trade, namely, architects and surveyors." Therefore I think that upon the merits the complaint entirely fails.

There was only one other matter that was made a ground of attack. It was said that a witness was examined outwith the presence of one of the parties. There are many cases—the leading case is the case of *Mitchell* v. *Cable*, 10 D. 1297—where it has been held that you must not examine witnesses on one side and not on the other, and that you must not examine witnesses without the parties being properly represented. But after all those cases, one and all of them, are only illustrations of the general principle that the procedure of the arbiter must not violate the principles of essential justice. Now, can it be said in this instance that the principles of essential justice have been violated? The Lord President has given the circumstances. I need not recall them, but as a matter of fact upon this one question whether one material was substituted with the consent of the employers for another, the arbiter decided in favour of the person who is now challenging the award. I think therefore that this matter fails, and I move your Lordships that the appeal be dismissed with costs.

LORD ATKINSON—I concur.

LORD SHAW—It is only fair to the appellant to state that in the Court below there was a clear and perfectly specific set of allegations which were brought to a focus in the first three pleas-in-law. These pleas embodied the well-known grounds of reduction of an award.

One has to bear in mind that the arbitrator here in a dispute over a plasterer's contract was the most practical of all men, namely, he was a plasterer himself. What is the duty of a practical man in view of the points submitted to him under the minute of reference? The duty resting on such a man is brought out clearly by Lord Halsbury, then Lord Chancellor, in the case of *Paterson & Son, Limited* v. *Glasgow Corporation*, 1901, 3 Fraser (H.L.) 36. His Lordship said—"The arbitrator proceeded, I think, substantially in the way that it was intended he should proceed, applying his technical knowledge to technical matters which were within his knowledge, and applying his local knowledge of the particular place where this work was to be done."

This practical arbitrator, vested with that local and practical knowledge to which I have referred, had before him a very simple minute of agreement and reference. He was to settle the difference between the parties "regarding the roughcasting referred to, and particularly whether the rough-

casting referred to has been executed by the first party in accordance with the foresaid offer, and in a manner recognised by and according to the custom of the trade; . . . and further, whether the said work had been executed in a satisfactory and tradesmanlike manner." All these things are matters eminently within his own local and practical knowledge. It was entirely for him to say whether anything further beyond that was required in the shape of evidence to satisfy his own mind. It was in these circumstances that I made the observation that this man was excessively cautious in having allowed any proof at all. I think he was.

Upon the record the arbitrator is charged (1) with having been corrupt, (2) with having gone beyond the boundaries of the submission, and (3) with having based his award on a question not in issue between the parties. A proof was allowed of these averments. The proof having been led in the Court of Session, when this arbitrator was in the witness-box a certain other fact was elicited not on record and not pleaded to, and on that the Lord Ordinary thought fit to give judgment — a judgment which has been reversed.

I am of opinion that arbitrators, or indeed any defenders, in Scotland ought not to be put into that situation. They are put into the witness-box because of averments and pleas which are according to the well-known grounds of reduction, and, as in this case, involve serious charges upon their capacity and their integrity. Having been subjected to examination and cross-examination, something is elicited from such defenders which suggests a new cause of action altogether, or different foundation for the action. In such circumstances my view of the law (and I gather it is the view of your Lordships) is that when that situation arises the new front thus disclosed must be a front which cannot be presented to the Court except upon averments and pleas properly inserted in the record, and upon strict, and it may be severe, conditions as to expenses. Fortunately the terms of arbitration here are wide enough to cover all that was done. No harm was done that I can see by the procedure adopted by the arbiter.

So far for the first ground of appeal. The second ground is this — The appellant on one point of the case obtained the award of the arbitrator in his favour. But he is not satisfied. He says—"I am a legal purist. My grievance is that I got my favour accorded to me by ways which were not in accordance with my ideas of legal purism." No court of justice can entertain arguments of that kind; it would upset the whole foundation of legal remedy. There is nothing to remedy on the concession of the argument.

Had it not been for the admirable address of Mr Wark I should have said that the case was too clear for argument. Reverting to the point of procedure, I desire to say that I do not commit myself to the doctrine in *Davidson* v. *Logan*. I question whether it can be squared with that now laid down in this House. I do not commit myself further than to repeat those views as to correct pleading which your Lordship has announced from the Woolsack. I wish to add respectfully that I do not think it would be possible to improve upon the patient and accurate summation of the legal position of this case by the Lord President of the Court of Session.

LORD PHILLIMORE — I concur with the motion which is proposed by my Lord on the Woolsack, and with the observations which have fallen from the noble and learned Lords who have addressed your Lordships' House.

LORD BLANESBURGH—I concur.

Their Lordships ordered that the interlocutors appealed against be affirmed and the appeal dismissed with costs.

Counsel for Appellants—Wark, K.C. — M. J. King. Agents — Dove, Lockhart, & Smart, S.S.C., Edinburgh— Ince, Cope, Ince, & Roscoe, London.

Counsel for Respondents — MacRobert, K.C. — Black. Agents — Macpherson & Mackay, W.S., Edinburgh—John Kennedy & Company, Westminster.

COURT OF SESSION.

Saturday, October 27.

SECOND DIVISION.

LORD INVERCLYDE'S TRUSTEES *v.* INLAND REVENUE.

Revenue — Income Tax — Income for Purposes of Assessment under Schedule D — Deductions — Whether Interest Paid on Outstanding Estate Duty a Legitimate Deduction—Income Tax Act 1918 (8 *and* 9 *Geo. V, cap.* 40), *Schedule D, Case iii.*

The income of a trust estate included untaxed interest on Government securities. *Held* that in estimating the income liable to assessment under Schedule D of the Income Tax Act 1918 for the year in question the trustees were not entitled to deduct from the untaxed interest on Government securities a sum equal to the amount of the interest paid by them during the year on estate duty which was still outstanding.

The trustees of the late Right Honourable James Cleland, third Baron Inverclyde of Castle Wemyss, *appellants*, being dissatisfied with the determination of the Commissioners for the General Purposes of the Income Tax Acts at Glasgow refusing an appeal against and confirming an additional assessment to income tax for the year to 5th April 1922 made by J. W. Millar, H. M. Inspector of Taxes, Glasgow, *respondent*, appealed by way of Stated Case.

The Case stated, *inter alia*—"At a meeting of the Commissioners for the General Purposes of the Income Tax Acts, and for executing the Acts relating to the inhabited house duties for the Division of the City