HOUSE OF LORDS.

Thursday, November 27.

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

ADAMS *v.* GREAT NORTH OF SCOTLAND RAILWAY COMPANY.

(*Ante*, June 21, 1889, vol. xxvi., p. 765. and 16 R. 843.)

Arbiter—Decree-Arbitral—Reduction—Act of Regulations 1695, *sec.* 25—"*Constructive Corruption.*"

While the Act of Regulations 1695 was intended to put an end to the practice of reviewing any decreet-arbitral on the merits, and limits the grounds of reduction to corruption, bribery, or falsehood of the arbiters, the Court can set aside the award of an arbiter who has exceeded the *fines compromissi*, shown misconduct in the course of the case, or disregarded the conditions of the submission expressed in the contract or implied by law, but the word "corruption" must be understood in its ordinary sense, and does not cover any action of the arbiter which is free from corrupt motives.

A contract for the construction of two sections of a railway provided that the second section should be ready by the 30th September 1884, or on or before such respective days thereafter as might be respectively fixed by an arbiter; that the contractors should be liable for damages arising from failure to finish the works, and payment of £20 per day as compensation for loss of profits in case the sections were not open for traffic by the dates stipulated; and that "all disputes and differences which should arise between the parties in reference to the contract or in regard to the construction of it, or of the specifications, conditions, and schedules," should be referred to the arbiter. The specifications and conditions for the second section provided that a certain embanked portion of the line should not be formed until a separate contractor for a certain bridge had finished certain works in connection therewith. The contractors only got access to the ground in February 1886. The line was not finished till May 1, 1886.

In a question between the contractor and the railway company the arbiter found that the contractors were entitled to an extension of six months for the completion of the second section, but that they were liable in penalties for each day's delay from 30th March 1885 to 1st May 1886.

Held (*aff.* the judgment of the First Division) that the award was good, and that there were no facts which suggested that the arbiter had awarded damages in respect of any default caused by the railway company.

This case is reported, *ante*, June 21, 1889, vol. xxvi., p. 765, and 16 R. 927.

The pursuers appealed to the House of Lords.

Counsel for the respondents were not heard.

At delivering judgment—

LORD CHANCELLOR—My Lords, I confess it appears to me that this is a very plain case. I do not at present assent to the view in the direct form in which it has been alleged—Lord Campbell in *Mackenzie* v. *Girvan*, 1843, 2 Bell's App. 55—that the law of Scotland applicable to this case is different from the law of England. There is no doubt that at one time the Courts in both countries treated themselves rather as being in the position of Courts of Appeal, and examined whether or not the conclusion at which an arbitrator had arrived was sound, both in point of law and in point of fact. I think the only learned Judge who ever gave distinct expression to that view was Lord Thurlow, and I am the more desirous of alluding to him and doing him justice, because I think that what Lord Thurlow says in *Knox* v. *Symmonds* (1 Ves. Jun. 369) rather throws some doubt upon the question whether he ever was responsible for the statement put into his mouth in the case which has been quoted at the bar—*Colquhoun* v. *Corbet*, 1784, 2 Paton's App. 626. Lord Thurlow says that it is no ground for setting aside an award that the conclusion was wrong, otherwise it would be a ground for setting aside all awards, but his Lordship then goes on to say that, where certain facts are submitted to an arbitrator by the Court, the arbitrator must be considered to be somewhat in the position of a master, and that the Court when the matter comes back to them have to consider not only whether the master has acted according to law, but whether he has arrived at a sound conclusion. His Lordship goes on to distinguish arbitrations in the more popular sense of the word, and shows that where there are real arbitrations, and where the parties have selected their judge, in such cases you have to show a great deal more than mere error on the part of the arbitrator in the conclusion at which he has arrived before the Court can interfere with his award. And in the Court of Common Pleas forty years ago in a case in which the arbitrator had a question of law submitted to him according to the ordinary forms of pleading, the Court having come to the conclusion that the decision of the arbitrator was, in the sense in which they understood the words, erroneous in deciding upon a question of law on demurrer, nevertheless held that the parties having submitted that question to the arbitrator it was for the arbitrator to determine it, in their own language the parties had agreed to accept the arbitrator's decision upon the question of law, as well as his decision upon

the facts—*Stimpson* v. *Emmerson*, June 5, 1847, 9 L.T. 199. In the Court of Queen's Bench, thirty years ago, that decision was adopted as being the law which would guide the Court in the decision of such questions.

My Lords, upon the facts now before your Lordships everything appears to have been practically abandoned except the third objection, referred to by the Lord Ordinary, and the sixth. Now, with regard to the third objection, the difficulty seems to me to arise upon the perhaps not very well conceived or selected words of the contract. That the parties by that contract intended that the arbitrator should have the power of determining between the parties whether or not liquidated damages (I assume now that what are called the penalties are liquidated damages) should be ascertained by the arbitrator with reference to the conduct of both parties is manifest, and the language which is used undoubtedly *prima facie* (for my own part, I am prepared to admit as much as that) rather looks like an intention by the parties that that determination by the arbitrator should go on during the currency of the contract, that he should be the consulting engineer, that he should be the person to whom application should be made in the event of alleged default on the one side or the other, but I am by no means prepared to assent to the conclusion that that excludes the consideration of such questions afterwards. Having regard to the documents before us it is almost impossible to suppose that the parties did understand that, when the arbitrator was investigating the question what damages were to be reported, he was not to have regard to the conduct of both parties, and that if one party had withheld the possession of the land, that party was not to insist upon the delay consequential upon his action as being one of the elements of the case in respect of which he could claim damages. It is impossible, I think, to read the words of the contract without seeing that that which was in itself a very sensible provision was the intention of both parties. And in truth, my Lords, I cannot entertain a doubt that, whether that provision were held to be there or not, when it was left to the arbitrator to decide in respect of the delay which had taken place, apart from any such provision in the contract at all, it would have been perfectly competent for the arbitrator to say: I shall not allow this or that period of delay to be made the subject of damages against the contractor when it is proved before me, as a matter of fact, that the delay which then existed was caused by the act of the railway company themselves, who were bound to provide either facilities, or material, or land, or what not, and that the delay which had taken place was not the fault of the contractor." That is manifestly the law in this country, and I believe it to be the law also in Scotland. Therefore that part of the award, both upon the construction of the language itself and upon the substance of the matter, apart from the language, seems to me to be free from objection.

My Lords, with reference to that question, which alone appears to have invited comment by the learned Judges, I confess I am a little puzzled. The thing in itself does not speak for itself as though the award shewed that the damages were awarded by reason of the bridge not being completed, and that nevertheless, although the bridge was not completed, the portion, or any particular portion, of the works was not completed by reason of the prohibition contained in the contract to do it until the bridge was completed. In order to make the argument intelligible and sensible, and in order to arrive at the conclusion of repugnancy and unreasonableness insisted upon, I must know what the facts were. I do not know what the facts were; but the arbitrator did. I am not to assume that he was so unreasonable as to award damages in respect of a thing which was caused by the non-completion of the bridge. On the contrary, until I am compelled to come to the opposite conclusion upon the face of the award, or upon some evidence which is legitimately to be brought into the consideration of the matter, so that I can form a judgment upon it, I shall assume that the arbitrator performed his duty; and if he did perform his duty, it would be unreasonable and absurd to give damages for anything in respect of which the company themselves were really responsible. And how does it appear that he has done anything of the sort? I am totally unable to understand that. Some of the learned Judges appear to have adopted the view that the arbitrator must have awarded damages in respect of that which had not been completed by reason of the absence of the bridge. I myself have been looking at these documents carefully, and I am unable to come to any such conclusion. One learned Judge, Lord Shand, says in his judgment—"I should have been clearly of opinion that the meaning of the contract would not justify the award that he has given." If the learned Judge means by that that the contract never intended that damages should be given in respect of the non-completion of that the non-completion of which was due to the conduct of the company, I entirely agree with him; but there, as it appears to me, the fact fails. I can find no such fact as would induce me to come to the conclusion that the arbitrator has ever awarded any damages in respect of any default caused by that. Damages are awarded in respect of the delay in the completion of the whole contract, and it is extremely possible that the mere fact that the bridge was not completed was as irrelevant to the culpability of the party causing that delay as any other fact which can be imagined.

Under these circumstances it appears to me that this award is perfectly good upon the face of it. There is no evidence that I can find leading to the conclusion that the arbitrator has exceeded his jurisdiction, either in the way of leaving out what he was bound to attend to, or of inserting or considering anything which he had no

jurisdiction to adjudicate upon. I am, therefore, of opinion that the award cannot be attacked upon those grounds.

With reference to the other ground, namely, corruption, which is alleged to evade the operation of the statute, corruption, in the ordinary and popular sense of the word, is entirely repudiated by the learned counsel at the bar. It is said that what it does amount to is constructive corruption. Whether there be such a thing or not, I am not at all prepared to say. I can only say with reference to the case which was quoted, the *Bridge of Allan Waterworks* case, 7 Macph. 492, that that case stands by itself. If it ever comes for review before this House, or any case which raises such a question, I shall be prepared to express my opinion upon it. At present I can only say that the facts of that case would have entirely justified the decision, upon the ground that the arbitrator had exceeded his jurisdiction, and therefore was not exercising the function which had been given to him by statute. If it is placed upon the other ground (and I am bound to say that the interlocutor pronounced does in fact expressly refer to legal corruption), it is possible that a case raising the point may come for review before this House. All I can say at present is, that I am certainly not prepared to assent to that view when the decision itself is, upon the grounds which I have indicated, perfectly sound.

My Lords, under these circumstances, considering that the case rests on familiar principles with which we are well acquainted, and that the points are really simple ones when the matter has been explained, I am only surprised that your Lordships' time should have been occupied at any length in dealing with it; and I move your Lordships that this appeal be dismissed with costs.

LORD WATSON—My Lords, I am of the same opinion. The points raised by the appellants in this case have all been decided against them by the unanimous judgment of five learned Judges in the Court below for reasons some of which at least appear to me not to admit of serious controversy. The parties committed to the arbiter whom they selected the right to construe the contract between them, the right to determine all questions of fact arising between them in relation to the contract, and the right to determine the application of the law to these matters of fact.

The two points insisted on at the bar of the House were the third and the sixth objections. Now, as regards these matters, they both appear to me to involve the construction of the contract, that being a matter specially committed to the arbiter by the express terms of the submission. I do not think that any good cause has been shewn against the finding of the arbiter under the third head. On the contrary, my present impression is that the arbiter determined according to the true meaning of the contract between the parties.

Then, as regards the sixth objection, I do not concur in the expression of opinion which fell from two learned members of the Court below upon the character of the finding pronounced by the arbiter. It does not appear how the arbiter construed that particular clause of the contract which the sixth objection involves; but assuming that he construed it in favour of the appellants in this case, the question is not, in my opinion, one of construction merely; it is a question arising upon the facts of the case, and these facts have not been fully brought before the House. I do not complain of that, because I doubt the competency of submitting them to the House; but the conclusion to which I have come is, that there are many possible states of fact in regard to the completion of these works, and want of energy shewn by the contractors in pushing them to completion, which would warrant the finding of the arbiter upon a construction of the contract favourable to the appellants.

These are sufficient grounds for disposing of the argument which we have heard; but I may be permitted to make a single observation upon that clause of the regulations of 1695 which was referred to in argument. I need scarcely remind the House that these regulations are of statutory force. They were enacted by Commissioners under the special sanction of an Act of Parliament. They have sometimes been referred to as an Act of Sederunt, because under the King's Royal Warrant they were directed to be engrossed in the Sederunt Book of the Court of Session at the time. The object, as I take it, of the regulation made by the Commissioners was this—to put an end to the practice, which until that date had obtained in the Court of Session, of treating the awards of arbiters as reviewable decisions, and of setting them aside whenever, in the opinion of the Court, upon an examination of the evidence and the proceedings before the arbiter, the conclusion at which the chosen judge of the parties had arrived was either contrary to law or contrary to fact. The rule laid down is in these terms—"That in time coming the Lords of Session sustain no reduction of any decreet-arbitral that shall be pronounced hereafter upon a prescribed submission at the instance of either of the parties submitters upon any cause or reason whatsoever, unless that of corruption, bribery, or falsehood, to be alleged against the judges arbitrators who pronounced the same." The three grounds are "corruption," "bribery," and "falsehood"—not "corruption in the decreet-arbitral"—the expression which I find in the closed record, but "corruption," "bribery," or "falsehood" brought home to the individual judge.

It has been recognised by the Court of Session, and also by noble Lords in this House, that the regulation was never intended to go beyond the point of putting an end to the practice of review upon the merits, and of placing the award of an arbiter selected by the parties for the determination of all questions between them on precisely the same footing as the

decree of a Judge Ordinary, to whose decisions finality has been attached by statute. Accordingly, both in this House and in the Court of Session, awards have been set aside upon other grounds which did not necessarily involve an investigation of the merits of the case. Want of jurisdiction is not covered by it—it is not one of the pleas which are forbidden, and an award may still be set aside on that account. Misconduct in the course of the case, whether in the proceedings which led to the award or in the award itself, is another ground with which this regulation was never intended to deal. I think I state the law correctly when I say that it will be a good ground of reduction at the instance of either party if he is able to show independently of the regulation either that the arbiter has exceeded what are called in Scotland the *fines compromissi*, or that in the course of the arbitration he has disregarded any one of the express conditions contained in the contract of submission, or any one of those important conditions which the law implies in every submission. The case of *Sharpe* in 1817 (3 Dow, 102), to which I alluded in the course of the argument, is a good illustration of that. Lord Eldon there refused to recognise an award as valid where the arbiter was perfectly honest—free from corruption, free from bribery, and free from falsehood—but had proceeded upon an honest error believing that he had a joint representation from both the parties to the submission, whereas it was a representation from one only. And so in those cases where an act innocently committed by the arbiter amounts to misconduct which, in the opinion of the Court, would naturally imply that justice had not been done between the parties, the award must be set aside, not according to the regulation, but according to those principles of law which existed before the regulation, and which were not in the least affected by it.

I feel bound to protest against the view expressed by some of the Scottish Judges in the cases to which we have been referred at the bar with regard to what they call "constructive corruption." I suppose that as well as "constructive corruption" you may have "constructive bribery" and "constructive falsehood." The meaning of it appears to be this—That in order to satisfy the ends of justice in dealing with the validity of an award, it is necessary to invoke this constructive principle, of which I have under under all circumstances the greatest distrust, and that for the purpose of doing justice it is necessary to call a man "corrupt" who is not corrupt but honest, to call a man "bribed" who never listened to an improper suggestion from any quarter, to call a man "false" who never uttered a falsehood. I do not doubt that corruption might be inferred from the terms of an award, and it is clear that if Lord Thurlow used the expression "constructive corruption" in *Colquhoun* v. *Corbet*, he must have used it in that sense. Even in that case the term is inappropriate, because such corruption is actual and not constructive.

But, my Lords, if you examine those cases to which we have been referred, I think it will be found that in every one of them the ground of reduction which was dignified with the name of "constructive corruption" fell within the category of cases which, as I have already explained, are entirely outside the regulation. Take the case of *Alexander*, 7 Macph. 492, which involved two points, and two points only. The first of these was whether the arbiter had committed an excess of jurisdiction by declining to entertain a claim which was laid before him in a statutory submission under the Lands Clauses Act, and which he had no power to reject. He found that the claimant was not the owner of part of the subject possessed by him and his tenants, and upon that ground alone he, having no competency whatever to deal with questions of property, having only the duty of valuing that which was submitted to him, refused to value it. The second point was that he, mistaking his duty, but in perfect honesty (for nothing else was imputed to him by the learned Judges who decided the case and set aside the award) purposely declined to put into the award a description of the subjects which he had valued, so that the omission which he had made might not appear. He did that because he thought it right; he thought he had valued all he was bound to value, and he said—"I will only put in a general description." The Court held that he had failed to do his duty under the Lands Clauses Act, although there was no imputation upon his honesty. But I see no reason whatever for calling that "constructive corruption."

In many other cases the same thing occurred. In the case of *Mitchell*, 10 D. 1297, which is perhaps the leading case in the Court below upon this branch of the law, the arbiter thought that he was bound to conclude the case without further proof from the parties, the consequence of which was that one of them, who had taken the precaution of obtaining a commission for the purpose of taking evidence abroad, had no evidence to offer, because, from no fault of his, the commission had not been executed. Under these circumstances the arbiter had proceeded upon evidence from one side only. The Court held that it was his clear duty to give an opportunity to the opposite side of bringing evidence before him, and accordingly that he had violated the principles of justice, and that justice could not be done between the parties without setting aside his award.

My Lords, these are all the observations which appear to me to be necessary for the decision of the case. It humbly appears to me that the case stated at the bar for the appellants fails, inasmuch as neither the Act of Regulations, nor any one of the decisions without the Act, entitles them to have the award set aside. I therefore concur in the judgment which has been moved.

LORD BRAMWELL—My Lords, I am entirely of the same opinion, and I desire to express my hearty concurrence in what has

been said by my noble and learned friend opposite (Lord Watson) about "constructive corruption." I think that that and similar expressions are only used by persons who have a desire to bring about a certain result, and do not know how to do so by the use of ordinary and intelligible expressions.

I just wish to make one other remark. I do not believe that this case would have found its way here but for the magnitude of the stake.

LORD HERSCHELL and LORD MORRIS concurred.

Their Lordships affirmed the decision appealed from and dismissed the appeal with costs.

Counsel for the Appellants—Sol.-Gen. Sir C. Pearson, Q.C.—Law. Agent—A. Beveridge, for Alexander Campbell, S.S.C.

Counsel for the Respondents — D.-F. Balfour, Q.C.—Ferguson. Agents—Dyson & Company, for T. J. Gordon & Falconer, W.S.

Monday, December 1.

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

HOGARTH AND OTHERS *v.* MILLER, BROTHER, & COMPANY.

(*Ante*, March 15, 1889, vol. xxvi., p. 459, and 16 R. 599.)

Ship—Charter-Party—Freight—Payment of Hire to Cease if Working of Vessel Stopped until Efficient to Resume Service—General Average.

A charterer undertook to pay a certain hire per month for a steamship, the owners undertook to provide officers, crew, and stores. The charter-party provided—"In the event of loss of time from deficiency of men or stores, breakdown of machinery, want of repairs, or damage, whereby the working of the vessel is stopped for more than 48 consecutive working hours, the payment of hire shall cease until she be again in an efficient state to resume her service."

On the voyage the high-pressure engine broke down, and the vessel put into Las Palmas, where she was pronounced unseaworthy. As the port afforded no means of repair the owners and charterers agreed to send a tug from England to bring her to her destination at Harburg, and to regard the cost as general average. The vessel made that port with the aid of the tug and her low-pressure engine. The charterer paid £867 as his share of general average.

The shipowner sued the charterer for hire from the time the vessel left Las Palmas with the tug till she was discharged of her cargo at Harburg. The Second Division *held* (*rev.* Lord Trayner) that while the owners were not entitled to hire from Las Palmas to Harburg, they were entitled to payment while the ship was necessarily engaged in discharging cargo—four days or £60 being taken as a reasonable view.

Held (*per* the Lord Chancellor (Halsbury) and Lords Watson and Herschell) that no hire was due from Las Palmas to Harburg, but that the full ten days actually occupied in discharge of cargo should be paid for.

Lord Bramwell concurred in the latter but not in the former view.

Lord Morris was of opinion that no hire at all should be paid.

This case is reported *ante*, March 15, 1889, vol. xxvi., p. 459, and 16 R. 599.

The pursuers Hogarth and others appealed to the House of Lords.

At delivering judgment—

LORD CHANCELLOR — My Lords, the whole of this case, as it appears to me, turns upon the true construction of the contract which regulates the relations between the parties, and there are two very diverse views which have been presented to your Lordships upon the true construction of the language of that instrument. I think that each part of the contract must be looked at with care, and that it must be remembered that in the construction of the contract we are not bound simply by the exact words. We must remember that it is a mercantile contract, and we must remember the nature of the subject-matter with respect to which each of the parties was contracting.

Now, the contract is for the hire of a ship, and each of the parties must be taken to know what are, in the ordinary course, the duties to be performed by a ship, and it must be taken that each party is contemplating the possibility of the benefit which he is contracting to obtain being interrupted by various causes. That clause of the contract which has to be interpreted is in these terms, and each part of it, I should say, ought to be looked at with care and with reference to the words which are found associated with it in the particular instrument which we have to construe. It is, "That in the event of loss of time." That is the leading and guiding principle by which we are to ascertain what it is with reference to which the succeeding words are used. What the hirer of the ship is guarding against by this contract with the owner of the ship is, that he is not to pay during such period of time as he shall lose (that is, lose time) in the use of the ship by reason of any of the contingencies which this particular clause contemplates—"That in the event of loss of time from deficiency of men or stores, breakdown of machinery, want of repairs or damage, whereby the working of the vessel is stopped for more than forty-eight consecutive working hours." The language is consonant with what I have indicated to be the general intention of the parties in