by him, amounted to £13, and his debts to £39, 2s. The rent of his holding due at Martinmas 1889, amounting to £3, was also unpaid. It had been offered to the respondent by the complainer, but refused by her. The complainer also deponed that he had about fifteen months before built a substantial cottage on his holding at a cost of £62, 10s. in money, and eleven weeks labour of himself and his nephew. The money had been borrowed from his sister, and was still due. He also produced a bond of caution by Hugh Lemard, fisherman, Tobermory, and deponed that he was the best cautioner he could find, but that he did not know what means he had. He believed he had not much; he did not know that he had any at all.

By the Act of Sederunt 14th December 1756, sec. 6, it is provided with regard to a bill of advocation or suspension of a decree or process of removing, that upon passing such bill, or at least within ten days after the date of the deliverance thereon, the complainer should find "sufficient caution, not only for implement of what shall be decerned as the advocation or suspension," but also for damage and expense in case the same should be found due. If the complainer failed to find such caution the bill of advocation or suspension should be held as refused.

The respondent reclaimed, and argued that the note could only be passed on sufficient caution being found. Juratory caution was here the same as no caution at all. The Court always went on the principle that juratory caution must not be illusory—A.S., December 14, 1756; *Marshall* v. *Gartshore*, May 28, 1850, 12 D. 946; *Logan* v. *Weir*, July 16, 1870, 8 Macph. 1009.

At advising—

LORD PRESIDENT—It is quite impossible to assume that this case falls under the Act of Sederunt of 1756, because to assume that is to assume the whole merits of the case, and if we are not bound by the provisions of that Act, it seems to be a question for the discretion of the Court whether in the circumstances they will allow a suspension to be brought on juratory caution, which apparently is in this case the same as no caution at all. But still that is a question for the discretion of the Court, and on consideration I am led to agree with the Lord Ordinary. I think that it is plain enough that questions are raised as to the construction of the Crofters Act, which is a recent statute, and has not been made the subject of much criticism, at least in this Court, and also as to the matter of fact how far the suspender was resident on his holding. I am not sure that the mere fact of residence or non-residence at the time the Act passed will be altogether conclusive. I therefore have an impression that if we refused to allow the case to be tried, we might be doing an injustice to the defender, and be shutting out from the consideration of this Court questions of great importance under the Crofters Act.

LORD SHAND—I am of the same opinion. Removings of the class we are here dealing with can be readily distinguished from the case of ordinary tenants' removings, where the right of the party against whom decree is sought is merely temporary. The right claimed here is a permanent right subject to certain conditions, and therefore is out of the class of case to which I have just referred.

The Lord Ordinary has stated two grounds for passing the note:—First, that novel questions are raised under the Crofters Holdings Act, and second, that injustice might be done if the defender were not allowed to submit these questions to the Court of Session. My own impression is that the second ground is quite sufficient, but it is certainly an additional reason of some moment that there are matters of some importance to be decided.

LORD ADAM—I am of the same opinion. I do not doubt that difficult questions may be raised under the suspension, and certainly the Sheriff-Substitute first decided the case one way without requiring proof, and when proof was taken, decided the case directly the other way. Altogether, I am of opinion that we should pass the note and allow the case to be tried.

LORD M'LAREN—I concur, and I think that where a question of the character of a tenant is to be tried, it must be a matter for the discretion of the Court on what grounds the tenant is entitled to have the question submitted to this Court. That is, I think, a purely discretionary matter, not capable of being reduced to fixed rules, and therefore unless it were shown that there were clear grounds for holding the Lord Ordinary's decision to be wrong, I should be for adhering.

The Court adhered.

Counsel for the Respondent and Reclaimer—Guthrie—Macfarlane. Agents—John C. Brodie & Sons, W.S.

Counsel for the Suspender and Respondent—G. W. Burnet. Agent—D. Maclachlan, S.S.C.

Thursday, March 13.

SECOND DIVISION.

(Before Seven Judges.)

[Lord Trayner, Ordinary.

THE HOLMES OIL COMPANY (LIMITED) *v.* THE PUMPHERSTON OIL COMPANY (LIMITED).

Contract—Agreement—Decree-Arbitral—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 (*diss.* Lord Shand, Lord Young, and Lord Lee) (1) 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 was an action at the instance of the Holmes Oil Company (Limited), Uphall, Linlithgowshire, against the Pumpherston Oil Company (Limited), St Vincent Place, Glasgow, for the reduction of two reports, by Alex. Moore, C.A., Glasgow, dated respectively 27th April 1887 and 16th April 1888, and a decree-arbitral dated 1st June 1888, by Robert Berry, Esq., advocate, Sheriff of Lanarkshire.

The pursuers possessed works for the purpose of distilling crude oil from shale. This crude oil is, after distillation, so treated as to extract from it certain refined products. Under treatment it first gives off the water it contains, then the following products in the order named, namely, a kind of naphtha spirit, burning oil, lubricating oil, and finally what is known in the trade as crude paraffin scale, the balance being residuum, which is at present of little or no value. The crude paraffin scale is of a compound nature, and after it has been extracted from the crude oil it is subjected to further processes for the purpose and with the effect of separating it into what are known in the trade as soft scale, the average melting-point of which is from 95° to 102°, and hard scale, the average melting-point of which is 118°; of these two the latter is the more valuable commodity. The pursuers had no works for the treatment of crude oil, but the defenders had, and therefore by minute of agreement dated 20th November 1884 the pursuers agreed to sell to the defenders the whole crude oil distilled by them for a period of three years. The agreement further provided—"*Sixth.* Both parties have agreed, and hereby agree, that the total average percentage of refined products to be taken and extracted by the second party" [the defenders] "from the crude oil to be delivered to them by the first party" [the pursuers] "during the subsistence of this agreement shall be seventy-two per cent. per gallon of crude oil, and whether the actual percentage of refined products obtained be under or exceed seventy-two per cent, the first party will be entitled to receive payment on said seventy-two per cent, and neither more nor less, irrespective of what the actual result may be. *Seventh.* The price to be paid by the second party to the first party for the said crude oil shall be ascertained in manner following, *videlicet*—the average net naked price, as in stock tanks at the works of the second party (*i.e.*, after deducting from the gross price obtained the cost for casks, carriages and discounts, and a fixed sum of £750 per annum to cover the cost of selling and commission, the refined products obtained by the second party from the crude oil sold to them by the first party), received by the second party during each year of the currency hereof for the

products obtained by them from each gallon of Holmes crude oil, or other crude oil of equal quality manufactured during the year (*i.e.*, for the crude paraffin scale, lubricating and burning oils, spirit, and any other products presently unknown), shall be ascertained at the end of the second party's financial year, or immediately thereafter, by Alexander Moore, C.A., Glasgow, whom failing by William Brown, C.A., Glasgow, as acting for and on behalf of both parties, who shall be bound to accept the second party's business books as final and conclusive evidence of the varying prices received by them during the year for the said products; providing always that the said Alexander Moore, whom failing, the said William Brown, in ascertaining the said naked price, shall give effect to the stipulation contained in the sixth article hereof; and on the average net naked price being so ascertained, the second party shall pay to the first party, for every gallon of crude oil delivered to them, a sum equal to one-half of the said average net naked price. . . . *Lastly.* In the event of any questions, disputes, or difference arising as to the true intent and meaning of these presents, or the due implement thereof, the same are hereby referred to the amicable decision, final sentence, and decree or decrees-arbitral of the said Robert Berry, whom failing the said James Robertson, as sole arbiter mutually chosen by the parties; and both parties consent to registration hereof, and of any decree or decrees-arbitral interim or final, to follow hereon, for preservation and execution."

Mr Moore accordingly issued reports for the years 1885-1886, 1886-1887, and 1887-1888 In estimating the sum to be paid by the defenders to the pursuers for crude oil supplied during the year 1885-1886, Mr Moore took into account the value of unsold stock. To his report the pursuers lodged objections, in which they stated, *inter alia*—"(*Third*) That the reporter has wrongly taken into account the total crude oil which passed into the refinery during the period; and further, the oils in process of refining and in stock. With these the Holmes Company has nothing whatever to do. (*Fourth*) That Mr Moore has simply to inquire as to the refined products obtained from the Holmes crude oil as sold, in order to strike the nett naked price, giving effect to article 6th of the minute of agreement as regards the 72 per cent." The questions thus raised by the pursuers were referred to the decision of the arbiter, who, after certain procedure, issued notes of proposed findings on 7th June 1886. In his note of proposed findings the arbiter gave effect to the pursuers' third objection above mentioned. The note bears as follows—"In ascertaining the nett 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;" and on 8th July 1886 the arbiter remitted to Mr Moore to prepare an amended report in accordance with the said proposed findings, "it being understood that the 'products obtained,' occurring in the first head of the proposed findings, are, in the words of the agreement, the crude paraffin scale, lubricating and burning oils, spirit, and any other products presently (*i.e.*, at the date of the agreement) unknown." Thereafter on the 8th September 1886 the pursuers lodged a motion in the reference asking the arbiter to pronounce an order on Mr Moore to furnish the proportions of hard and soft scale sold by the defenders during the past year, and the prices obtained therefor. This motion the arbiter refused, and on 30th September 1886 issued an award, finding, *inter alia*, that there was due from the pursuers to the defenders the sum of £3533, 17s. 11d. as at 30th April 1886, and he ordained the pursuers to pay that sum, with interest, to the defenders. The pursuers obtempered this award.

In April 1888 the pursuers again objected to Moore's reports for the year ending November 1887, and also to his two previous reports, that the average nett naked price had not been got, as he had only taken into account the soft scale sold by the defenders, and had left out of calculation the hard scale which they had retained, worked up into other products, and sold at prices exceeding the market price of hard scale. The objections contained this passage—"Of the 430,767 gallons of crude paraffin scale manufactured during the year (ending November 1887), only 96,725 gallons were sold by the Pumpherston Oil Company, the remainder being retained by them and utilised within their own works. It is of the greatest importance therefore that the reporter should state clearly how much of the 96,725 gallons was 'hard' and how much 'soft' scale. If the proportion of the one kind and the other was not as eight of 'hard' scale is to two of 'soft' scale, any attempt at striking an 'average nett naked price' would be altogether futile. On the other hand, if the sales represented only 'soft scale' (as the report seems to indicate), the greatest injustice would result to the Holmes Company were the settlement to take place on the present report."

The pursuers further lodged this minute —"J. T. T. Brown, for the Holmes Oil Company (Limited), stated that the Holmes Oil Company objected to the results brought out in Mr Moore's report of 16th April 1888, as well as to those in his two former reports, as regards the average nett naked price obtained for refined products, in respect that those results were arrived at by Mr Moore through incorrect, imperfect, and misleading information and *data* furnished to him by the Pumpherston Oil Company (Limited), and also in consequence of unfair dealing on the part of the Pumpherston Oil Company towards the Holmes Company during the period of the contract. Brown further stated that the Holmes Oil Company, considering that the Pumpherston Oil Company claimed payment of the sum of £8350, 14s. 6d. as the balance due by the Holmes Oil Company to them as at 30th November 1887, on the basis of Mr Moore's report, offered to con-

sign said sum of £8350, 14s. 6d. in bank, to await the result of the proceedings the Holmes Oil Company intended to take to have the correct average nett naked price and the true state of accounts betwixt the parties ascertained."

"The defenders, on the other hand, claimed that they should be found entitled to payment of £8350, 14s. 6d., being the difference between £15,649 (which is the amount which they paid to account to the pursuers, in terms of article 7 of the agreement, being at the rate of 3d. per gallon on 1,251,820 gallons) and said sum of £7298, 5s. 6d., brought out by Mr Moore in his report."

On 3rd May 1888 the arbiter, Mr Berry, issued the following interlocutor and note: —'*Glasgow, 3rd May* 1888.—Finds that there is due by the Holmes Company the sum of £8350, 14s. 6d. as at 30th April last: Ordains the said Holmes Company to make payment to the Pumpherston Company of said sum of £8350, 14s. 6d., with interest, thereon at 5 per cent. per annum from said 30th day of April till payment: Further, finds the Holmes Company liable in the expenses of the reference and incident thereto, including the clerk's professional charges, reserving power to issue a formal decree-arbitral should such be found necessary.—ROBERT BERRY.' '*Note.*—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; any difficulty as to an alleged hardship owing to the Pumpherston Company having sold, as is said, mainly 'soft scale,' and retained hard scale in their own hands, might have been avoided if the Holmes Company had accepted as a basis of calculation the principle of allowing a valuation of the scale unsold to be taken into consideration. That principle the Holmes Company repudiated in reference to Mr Moore's first report, and 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.—R. B.' Thereafter he issued a decree-arbitral, ordaining the pursuers to pay to the defenders said sums of £8350, 14s. 6d., and £10, 14s. 6d. and £10, 19s. 6d., being half of the clerk's account of expenses, with interest. Said decree-arbitral is dated 1st June 1888."

The pursuers accordingly raised this action for reduction of Moore's reports of 1886 and 1887, and the decree-arbitral.

They averred—"(Cond. 6) When the said agreement was entered into, the defenders had no works or apparatus for refining hard scale as aforesaid, and the parties understood and intended that the defenders would sell the whole of said crude paraffin scale, hard and soft alike, and that the price which the defenders were to pay the pursuers would be fixed on the basis, *inter alia*, of the average price of hard scale as well as of the average price of soft scale. In or about 1886, however, the defenders began to refine hard scale in their own works, and in anticipation of their so doing, for some considerable time before they so began to refine, and also from and after their so beginning, they ceased altogether to sell hard scale, or at least sold only a very small quantity of it, while they continued to sell the whole of the soft scale as before. (Cond. 15) It was alleged, and offered to be proved, on behalf of the pursuers, both to Mr Moore and to Mr Berry, and it is now averred, that the said 96,725 gallons referred to in condescendence 10, consisted entirely, or almost entirely, of soft scale, and did not at all represent the total crude paraffin scale produced by the defenders, the price of which fell to be averaged for the purposes of the contract. In point of fact the total quantity of crude paraffin scale produced and sold, or refined, or otherwise manufactured by the defenders for the year ending 30th November 1887, was 430,767 gallons, and the average price realised therefor, or which would have been realised by the defenders, and could have been so realised if the defenders had sold the same in the market instead of refining it themselves, was upwards of 2d. per lb., in place of 1·2d. per lb. realised for the 96,725 gallons. The said 96,725 gallons consisted simply of the soft or inferior scale, which had been extracted by the defenders from the crude oil, and the residue, consisting of 334,042 gallons of hard or superior scale, was taken over by the defenders themselves, and worked up into other products, and sold at prices largely exceeding the market prices of hard scale." [The said 96,725 gallons the defenders fraudulently represented to Mr Moore consisted in fair proportions of hard and soft scale respectively, so that the price of 1·2d. per lb. was a fair average price for crude paraffin scale including both hard and soft scale.] "The pursuers contended, and now aver, that in these circumstances the hard scale fell to be included in the average, the defenders being debited with the market price of such hard scale in respect of its being sold to or utilised by themselves. Into this matter, however, Mr Moore refused, or at least omitted, to inquire, and upon the question being brought before the arbiter, the arbiter refused to go behind the figures in Mr Moore's report, or to inquire or allow inquiry into the facts above averred. In so acting the arbiter refused or failed to exercise the jurisdiction which he was bound to exercise under the reference, and the award pronounced by him is not an award which disposes, or professes to dispose, of the true questions between the parties. (Cond. 16) The pursuers have also now learned, and they aver, that the 127,690 gallons of crude paraffin scale represented in Mr Moore's report for the year ending 30th November 1886 as the total amount sold in that year, consisted entirely, or almost entirely, of soft scale, and did not at all represent the total crude paraffin scale produced by the defenders in that year. In fact the total crude paraffin scale produced by the defenders during said year was 450,058 gallons, and the average price realised therefor, or which would and could have been realised

therefor as aforesaid, being the market price thereof in terms of said agreement, was over 2d. per lb., instead of 1·6d. per lb. The said 127,690 gallons consisted entirely or almost entirely of soft scale, and the balance, consisting of 322,368 gallons of hard scale, could and should have been sold by the defenders during the year ending 30th November 1886 at a price exceeding 2d. per lb. if they had wished. The defenders did not sell the said hard scale, but accumulated the same till they had their refining works ready, and they then themselves used up the said hard scale in their own works, so as to realise for it a much higher price than 2d. per lb. They, however, concealed this from the pursuers and Mr Moore, and [fraudulently]* represented that the said 127,690 gallons consisted in fair proportions of hard and soft scale respectively, so that the price, 1·6d. per lb., was a fair average price for crude paraffin scale [including both hard and soft scale].* Further, according to Mr Moore's report for the year to 30th November 1886, it appeared that the defenders had in stock on 30th November 1886 322,368 gallons of crude paraffin scale, and according to his report for the year to 30th November 1887 it appeared that the defenders had in stock on 30th November 1887 334,042 gallons of crude paraffin scale. In point of fact, the defenders did not have at these dates the said quantities of crude paraffin scale in stock, but had used in further refining operations and disposed of the said quantities. (Cond. 17) The said reports and decree-arbitral were obtained most wrongfully, illegally, and unjustly as aforesaid, so as greatly to prejudice the pursuers and benefit the defenders. The arbiter, in refusing to give effect to the said minute for the pursuers, and also in refusing to inquire, as he was specially and frequently asked by the pursuers to do, into the quantity of hard scale taken over by the defenders themselves in 1886-7, and worked up by them into other products, and to rectify the sum brought out in Mr Moore's reports, in accordance with the true average price of crude paraffin scale, having regard to the different values and prices of hard and soft scale respectively, acted illegally and corruptly in the sense of the Act of Regulations, 1695."

The pursuers pleaded—"(1) [as amended] The said reports for the years ending 30th November 1886, and 30th November 1887 having been procured from Mr Moore through errors caused by the defenders' fraudulent misrepresentation, to the pursuers' prejudice, the same ought to be reduced. (3) The said decree-arbitral having been granted corruptly in the sense of the Act of Regulations, 1695, and in particular the arbiter having refused or failed to exercise the jurisdiction vested in him in the premises, the same ought to be reduced."

The defenders pleaded—"(3) In respect that the dispute between the parties related to the true intent and meaning of the said minute of agreement, and the proper implement thereof, and that the decree-arbitral expresses the arbiter's decision upon that dispute, decree of reduction ought not to be pronounced. (4) The pursuers are barred by their actings condescended on from challenging the said reports and the arbiter's award on the question in dispute."

Upon 21st December 1888 the Lord Ordinary (TRAYNER) sustained the defences, assoilzied the defenders, and decerned, and found the pursuers liable in expenses.

"*Opinion.*—By the agreement entered into between the parties in November 1884, it was *inter alia* provided that the pursuers should sell to the defenders the whole crude oil distilled by them for a period of three years; that the price to be paid by the defenders for the crude oil delivered to them should be the one-half of the average net naked price received by the defenders for the products obtained by them from the said crude oil, or other crude oil of equal quality manufactured during the year; and that this average net naked price should be ascertained by Mr Moore, C.A., Glasgow, 'acting for and on behalf of both parties, who shall be bound to accept the second party's' (the defenders') 'business books as final and conclusive evidence of the varying prices received by them during the year for the said products.' The parties also agreed that all questions arising as to the true intent and meaning of their agreement, or the due implement thereof, should be referred to the final decision of Mr Berry.

"It appears that after certain products are obtained from the crude oil there remains what is known in the trade as crude paraffin scale, which again yields hard scale and soft scale, the hardness or softness depending upon the degree of temperature at which it melts, and the hard scale being of considerably greater mercantile value than the soft.

"The present action is brought to set aside (1) the reports made by Mr Moore in reference to the years 1886 and 1887, in which he ascertains the amount due by the defenders to the pursuers; and (2) a decree-arbitral by Mr Berry, by which he gives effect to Mr Moore's report for the year 1887.

"The grounds of reduction, shortly stated are these—that the defenders sold the soft scale in the market, and retained the hard scale for their own purposes; that Mr Moore in making his reports took the price of the soft scale appearing in the defenders' books as the standard price of the whole scale, whereas that did not represent the price of the scale, the most valuable part of it not having been sold; and that this fact having been brought to the knowledge of Mr Berry, he refused to go behind Mr Moore's figures, and in that respect refused or failed to exercise the jurisdiction conferred on him by the reference.

"It appears to me to be established by the proceedings in the submission as set forth on record without dispute, that instead of refusing or failing to deal with the question submitted to him, Mr Berry considered and decided that question at least twice. He did so in the year 1886,

* The words within brackets were added on amendment.

when the pursuers objected to Mr Moore's report for the year ending November 1885. The objection then stated was that Mr Moore, in making his report, had taken into account products (including scale) which had not been sold by the defenders, but retained by them in stock. This objection the arbiter sustained, holding that Mr Moore was not entitled to take into account 'a valuation of unsold stock, or anything else than prices received during the year.' The report thus objected to was sent back to Mr Moore, in order that he might give effect to the arbiter's decision. Thereafter the pursuers moved the arbiter to pronounce an order on Mr Moore to furnish a statement of the proportions of hard and soft scale sold by the defenders during the year, and the prices obtained therefor, which motion the arbiter refused. Again, in 1888 the pursuers objected to the report of Mr Moore for the year ending November 1887, as well as to his two former reports, the objection again being that the average net naked price had not been got, because the defenders had held back, and not sold, the hard scale. Mr Berry deals directly with this matter in a note appended to his judgment, which is now sought to be reduced. He says—'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.' It is said that this is not a decision of the question, but merely a reference to a previous interlocutory judgment. But I think that is not a reasonable view of Mr Berry's statement. The decision to which that 'note' was appended was a decision against the pursuers on the question now raised, and the reference to the former interlocutor is made as affording the reason why, in the judgment complained of, the arbiter had decided as he had done. The facts as averred, that the defenders were retaining for their own purposes the hard scale, with the effect of reducing the amount of average net naked price due to the pursuers, were undoubtedly before Mr Berry; and that the facts so alleged were not to be taken into account by Mr Moore in making his report was undoubtedly decided by Mr Berry. Whether Mr Berry's decision was right or wrong it is not *hujus loci* to inquire. I think, therefore, there is no ground for saying that the arbiter refused or failed to exercise his jurisdiction on the question now raised.

"If the decree-arbitral is not set aside, it does not appear to be of any practical moment whether Mr Moore's reports are reduced or not. I see no benefit to be derived by the pursuers from the reduction of the reports if the decree-arbitral stands. But I may notice that the pursuers aver that the defenders concealed from Mr Moore that they were selling only soft scale, and were retaining the hard scale for their own purposes, and further, that they represented themselves as having in stock crude scale, which in point of fact they had refined and disposed of. The allegations of concealment seem to me to be negatived by the pursuers' own averments. What they say was concealed from Mr Moore was known to them, for they averred it before the arbiter and urged it upon Mr Moore's consideration, as Mr Moore's report shows. The allegation of false representation is too vague to be relevant. It is not said that the entries in the defenders' books were false, or that those books represented scale in stock which had been sold. If the pursuers had alleged that goods had been sold by the defenders and not entered in their books, or had been entered at prices different from those received, the case would have presented a different complexion. That would have been fraud on the defenders' part, and would have afforded a relevant ground for the reduction of any report or decree-arbitral proceeding upon or induced by the fraud. No such case, however, is averred."

The pursuers reclaimed.

After hearing counsel the Second Division ordered the case to be argued before Seven Judges.

The reclaimers argued—The decree-arbitral ought to be reduced, as the arbiter had acted corruptly within the meaning of the Act of Regulations. The price of the hard scale did not appear in the defenders' books. Moore in making his report was misled by the prices in the defenders' books, which were only for soft scale, and gave a wrong value for the crude oil, so that the defenders paid a great deal less for their crude oil, and did not pay at all for the substance of which they made a profitable use. That was the state of the case submitted to the arbiter, and the pursuers averred both to him and in the present action, that they were willing to prove these facts, but the arbiter had declined to hear proof, and therein had acted corruptly. The whole matter was a fraud upon the pursuers, and they ought to have been allowed to lead proof. Although an arbiter was the judge of how much proof should be allowed, and might even decide without witnesses being called, if the party who suffered by the decree could show that the case could not be intelligently understood without proof, the arbiter in disallowing proof would act corruptly in the sense of the Act of Regulations—*Alexander* v. *Bridge of Allan Water Company*, February 5, 1869, 7 Macph. 492 (Lord Deas, 498). Even if the arbiter was to be the judge of how much evidence was necessary, he must still have some proof as to the facts, but here that was not allowed—*Adams* v. *Great North of Scotland Railway Company*, June 21, 1889, 16 R. 843. Although the decree-arbitral was not reduced in that case, the question was one of the construction of the contract and not of proof—*Mitchell* v. *Cable*, June 17, 1848, 10 D. 1297. The arbiter was wrong in thinking that he had already decided the point of the case. The question in the first instance was whether the defenders were entitled to keep back some of the hard scale they had obtained from the crude oil during the first year, although with the object of ultimately placing it upon the market, and so not

paying to the pursuers the price of all the oil delivered to them during that year. But in this instance the question was whether the defenders were to take the pursuers' crude oil, extract a valuable product from it, and then refuse contrary to the agreement to take the market price of this valuable product into account in fixing the price of the crude oil. These two things were quite distinct, and the arbiter had only decided the first. He ought therefore to be made to take evidence as to the second question. If the defenders' books were false and fraudulently false as the pursuers averred, they must have misled both the reporter and the arbiter, and proof ought to be allowed in that question also.

The respondents argued—The question raised before the arbiter, and upon which he had issued his decree-arbitral, was simply whether any of the products obtained from the crude oil, which remained in the possession of the defenders, and were not sold, should enter into consideration in fixing the price of the crude oil to be paid to the pursuers. At the end of the first year the pursuers had raised this question, and had had the question decided in their favour, but at the end of the third year they found that they had made a bad bargain, so came to the arbiter and asked him to go back on his former judgment. The arbiter had decided the case quite rightly, but even if he had not, his decision was that of an arbiter who had taken the whole matter into consideration, and even if he had acted wrongly he had not acted corruptly in the meaning of the Act of Regulations. It was agreed that the market price of the products sold by the defenders should be taken into account in estimating the price to be paid for the crude oil. That had been done; the arbiter found that the reporter had taken into account the sums received for the various products as they appeared in the defenders' books. That was the means provided in the agreement, and the arbiter could not take proof that was meant to alter the conditions of the agreement. The decree could not be disturbed. In order to entitle the Court to interfere with a decree-arbitral there must be such an amount of injustice done to one or other of the parties as to amount to corruption. The usual case was where the arbiter had heard evidence led by one party to the case, and not heard that which the other party might have brought forward. Here the arbiter had considered the question, he had come to the conclusion that the same case had been previously brought before him, that he had then given a proper judgment on the matter, that he had therefore no reason to call for evidence, but repeated his former judgment. He might have made an error in judgment or pronounced a wrong decision, but that was not corruption in the sense of the Act, as the judgment fell within his scope as arbiter, and therefore was not reducible—*Cameron* v. *Menzies*, January 25, 1868, 6 Macph. 279; *Mowbray* v. *Dickson*, June 2, 1848, 10 D. 1102; *Millar* v. *Millar*, March 10, 1855, 17 D. 689.

At advising—

LORD JUSTICE-CLERK—The Holmes Oil Company, the pursuers, entered into an agreement with the Pumpherston Oil Company, the defenders, for the years 1885, 1886, and 1887, whereby they sold to the defenders the whole crude oil distilled by them from two benches of shale retorts. The price to be paid was to be ascertained by a calculation based on the average "net naked price" received by the defenders "for the products obtained by them from each gallon of crude oil, or other crude oil of equal quality, manufactured during the year (*i.e.*, for the crude paraffin scale, lubricating and burning oils, spirit, and any other products presently unknown)," as ascertained at the end of the defenders' financial year by an accountant named, who was to be bound to accept the defenders' books "as final and conclusive evidence of the varying prices received by them during the year for the said products." And it was provided, that "In the event of any questions, disputes, or differences arising as to the true intent and meaning of these presents, or the due implement thereof, the same are hereby referred to the amicable decision, final sentence, and decree or decrees-arbitral of the said Robert Berry, whom failing the said James Roberton, as sole arbiter, mutually chosen by the parties; and both parties consent to registration hereof, and of any decree or decrees-arbitral, interim or final, to follow hereon, for preservation and execution."

The dispute which has arisen between the parties relates to the product described in the agreement as crude paraffin scale. In November 1886 the accountant issued a report in which, in accordance with the agreement, he set forth the quantities of crude paraffin scale appearing in the defenders' books as having been sold, and the prices obtained, and he fixed a price to be paid to the pursuers for the whole.

Again in 1887 the accountant, as before, set forth in his report the "crude paraffin scale" sold, and the prices, and fixed a price for the whole.

When this report was communicated to the parties, and before its final issue, the pursuers lodged objections, in which they complained that the reporter had not distinguished between two qualities of crude scale—which they called "hard" scale and "soft" scale—in estimating the price for crude scale, and desired that he should state how much hard and how much soft respectively were contained in the quantity appearing in the books as sold, and the prices obtained for them. The Pumpherston Company, in their answers to these objections, pointed out that in the previous year the pursuers had called on the arbiter to order the accountant to do what was now again demanded, and that the arbiter, after hearing parties, had refused to grant the order.

The accountant having issued his report without giving effect to the pursuer's representations, the pursuers appealed to the

arbiter, and objected to the report and to the previous report. The arbiter thereupon, having considered the matter, issued this interlocutor:—

"*Glasgow, 3rd May* 1888.—The arbiter having resumed consideration of the minute No. 1 of process, with relative report by Mr Moore, and considered the minute for the Holmes Oil Company, No. 3 of process, and heard parties' procurators—Finds that there is due by the Holmes Company the sum of £8350, 14s. 6d. as at 30th April last: Ordains the said Holmes Company to make payment to the Pumpherston Company of said sum of £8350, 14s. 6d., with interest thereon at 5 per cent. per annum from said 30th day of April till payment: Further, finds the Holmes Company liable in the expenses of the reference and incident thereto, including the clerk's professional charges, reserving power to issue a formal decree-arbitral should such be found necessary."

And to it he appended this note:—

"*Note.*—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; any difficulty as to an alleged hardship owing to the Pumpherston Company having sold, as is said, mainly 'soft scale,' and retained hard scale in their own hands, might have been avoided if the Holmes Company had accepted as a basis of calculation the principle of allowing a valuation of the scale unsold to be taken into consideration. That principle the Holmes Company repudiated in reference to Mr Moore's first report, and 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."

The allegation of the pursuers was that in distilling crude oil the crude paraffin scale comes off in crude scale of two different qualities, according to the temperature of the distillation, the one quality being described in trade by the name "hard scale," and the other by the name "soft scale." They further alleged that the hard scale is in the proportion of eight to two of the soft scale, and that the market price of the hard is about twice that of the soft. It was also alleged that the quantity of crude scale sold, and upon which the accountant based his reports, consisted entirely, or almost entirely, of soft scale. They averred that the hard scale, although not sold in the market, fell to be included in the average in striking the price to be paid, in respect the Pumpherston Company had erected manufacturing works in which they used up all the hard scale themselves, and that they should be held to have sold it to themselves. All these allegations, it clearly appears from their own averments, they laid before the arbiter, and had opportunity for stating arguments on the allegations to him, and of urging that they should be allowed to lead evidence in support of them. The arbiter refused to allow such evidence, and plainly did so on the ground that in his judgment the statements on which it was asked that proof should be taken were not relevant. It was his province as arbiter to consider and determine the meaning of the contract, and if he did so after duly considering the representations of parties, it is impossible for this Court to review his decision. But is it possible to reduce his deliverance as corrupt? It is of course possible that the conduct of an arbiter may be corrupt in refusing to allow evidence to be led. For example, if an arbiter to whom the decision of a question of fact had been referred refused to allow any evidence to be led, and decided the issue without any inquiry, his decreet-arbitral could be impugned as corrupt. The Regulations would undoubtedly cover such a case. But this would be because the arbiter refused to take the necessary steps to enable him to give his judgment. He would in such a case be in the same position as an arbiter who, on a question being referred to him, insisted upon deciding it without hearing parties. Such conduct would plainly imply legal corruption, for the arbiter would be deciding the question referred without allowing the parties to lay before him the materials without which he could not arbitrate between them at all. But there is no such case here. The arbiter hears parties on a demand for proof, holds that no relevant ground has been stated for allowing such proof, and interprets the contract as excluding the pleas on which the proof was demanded. That was, in my judgment, a fulfilment, whether soundly or erroneously, of the duty he had to do under the reference. He may have failed to understand the averments; he may have failed to give due weight to the arguments; he may have erred in the conclusion he came to upon the arguments. But even on that assumption—which I put forward as an assumption only—in what respect has he acted corruptly? He has not refused to hear parties; he has not refused to consider their arguments; and he has come to the conclusion which is expressed in his judgment honestly, after considering the pleas and the arguments in support of them. It is not pretended that he has done anything else. What is the ground for allowing a reduction to proceed against his award as corrupt? He has simply carried out his office as the judge chosen by the parties themselves to settle any "questions, disputes, or differences arising as to the true intent and meaning" of the agreement "or the due implement thereof," and according to the agreement, he, in doing so, did so by "final sentence." It appears to me that the pursuers set forth no ground for impugning the arbiter's decision as corrupt, and as therefore not to be final but to be taken out of the way, except that it was erroneous. Its erroneousness can be no relevant ground for reducing it if that erroneousness cannot be traced to some corrupt failure of the arbiter to do his duty in procedure. Here the procedure was in every respect regular.

There is no trace of his having, as averred by the pursuers, "failed to exercise the jurisdiction he was bound to exercise under the reference." To refuse a proof on the ground that what it is proposed to prove is irrelevant is a distinct exercise of jurisdiction, and the arbiter's judgment doing so is in terms of the agreement a "final sentence," unless it can be relevantly averred that it was obtained by fraud by which he was misled into giving a judgment which presumably he would not otherwise have given.

Now, it is worthy of remark that the case before the arbiter, both in 1886, when according to his note he first dealt with it, and 1887, when he gave the judgment quoted in the record, was in no way represented to him as one of fraud. The arbiter very clearly brought this point before the parties in his note. For he expressly says that "in the absence of any allegation of fraudulent dealing," he must "follow the principle of estimating the price according to the amount received from the various products during each year." Yet, with this before them, the pursuers neither then before the arbiter, nor in this Court, raised any question of fraud. It was not until the case had been heard in the Inner House that any suggestion was made about fraud, and that suggestion came from the Bench and not from the pursuers, who only on the 22nd of January, when the hearing was in progress before Seven Judges, tendered a minute proposing to add allegations of fraud to the record.

The point they thus desire to raise is that the accountant's reports were erroneously framed because of representations made to him by the defenders fraudulently. There can be no doubt that if Mr Moore, the accountant, was misled by fraud into framing reports not according to the agreement, and if the arbiter was misled into accepting such reports and acting on them, such fraud would be a ground for not allowing the defenders to obtain any benefit from a decision of the arbiter so obtained. I shall not stop to inquire whether the pursuers have by their minute of amendment succeeded in presenting a case of fraud which might be relevant. I shall assume that they have done so in dealing with the accountant's report.

On this second point it is important first to see distinctly what the accountant's duty was. It was to ascertain from the defenders' books, which he was bound to accept as final and conclusive evidence, the amount obtained by the defenders from sales of certain products specified by name, obtained by them from the pursuers' crude oil, and to calculate out a price for the crude oil in certain specified proportions. His duties were those of a calculator only, to ascertain the total price by bringing together rates and quantities, and with these to bring out a purely arithmetical result. It is not disputed that he so proceeded. He took the entries in the books and he made the calculations. It is not suggested that he incorrectly read the books or excerpted erroneously from them, or that his calculations were in any way at fault. It is not said that the books, from which alone he could take *data*, were falsely kept. I do not see how he could have done anything else than he did. The ground on which his conduct is impugned is that the defenders fraudulently represented to him that the quantity of crude scale which the books contained as having been sold consisted in fair proportions of hard and soft scale, so that the price in the books was a fair average price. Whether the defenders so represented to him or not seems to me to be a matter of no consequence, as it could in no way affect his duty. He had nothing to do with any such question. If he brought out the price according to what he found in the books, he did that duty. If he had done anything else he would have gone outside his duty. He found quantities and prices in the books of the products specified in the agreement, and upon these he made his correct arithmetical calculations, and brought out the result. He did not do that because of any representations by the defenders. He did it because that was what the agreement declared he should do. Accordingly when the pursuers endeavoured to induce him to do something different, he declined, and issued his report according to the books. I do not see how he could have proceeded otherwise, looking to the plain words of the agreement.

The pursuers having failed to induce the accountant to proceed upon other *data* than those contained in the books, appealed to the arbiter. The arbiter heard the parties. The principle upon which the accountant had proceeded was brought to his notice, the arguments of the pursuers against the principle on which he proceeded were stated, and the arbiter decided that the accountant had acted properly in taking the quantities and prices from the books. It is to be noted that no case of fraud was laid before him. And all that is now put before the Court was put before him. It was for him to decide, as a "difference" arising under the agreement, whether the accountant was proceeding according to it in making his report, and, he, after hearing parties, decided that he was. Again, it is not here a question whether that decision was one that was sound. Assume that it was not. It was still the decision of the tribunal chosen by the parties to decide all questions as to the "intent and meaning" or the "due implement of the agreement." And again the ground on which it is impugned as corrupt is not that it was pronounced without such procedure as was necessary to enable the arbiter to consider and deliver his judgment, but only that it was a bad judgment. I am unable to see that anything the defenders may have said to the accountant can be ground for reducing the judgment of the arbiter. The accountant did not proceed on anything they said, but carried out his duty as the agreement prescribed. The pursuers laid all they had to say about the defenders and the accountant's actings before the arbiter, and he decided that the accountant had proceeded on the proper principle in making

up his report, and there being no allegation before him that the *data* in the books—on which alone, under that principle, the report was made up—were false *data*, he decided that the report must be approved of and given effect to. All that was within his function under the reference. My opinion is, that neither in regard to the decision of the arbiter on the principle upon which the price payable was to be ascertained, nor in regard to the decision of the arbiter on the appeal made to him against the accountant's report, has any relevant case been stated by the pursuers.

LORD SHAND—The circumstances which have given rise to this action are certainly very peculiar. The pursuers, the Holmes Oil Company, are large distillers of shale, producing from it crude paraffin oil, but they do not carry on the further manufacture of the products of the crude oil. The defenders, the Pumpherston Oil Company, on the other hand, have large works for the treatment of the crude oil, and the gaining from it of its marketable products. In November 1884 the parties made an arrangement by which the pursuers agreed to supply the defenders for a period of three years with what seems to have been the whole of the crude oil produced at their works, while, on the other hand, the defenders undertook to extract from the crude oil the whole of its refined products, and to sell these, practically for joint behoof, because the price to be paid by the defenders for each gallon of the crude oil delivered to them (subject to a stipulation that the refined products should be taken as 72 per cent. per gallon of crude oil) was fixed at the one-half of the price to be received by them for the refined products from each gallon of crude oil.

One of the stipulations of the contract was that the pursuers should receive monthly payments for all the crude oil delivered to the defenders, these payments to be made—in the words of the agreement—"during the year, to account of the sums to be found due to them at the expiry thereof," and the accounts between the parties were to be settled at the end of each year. This stipulation of the agreement shows that in the view of both parties when it was entered into the sum of threepence per gallon, to be paid to the pursuers to account, was short of the full amount which would be due to them at the end of the year, when they were to receive a further sum after the refined products had been sold.

The dispute between the parties relates to the second and third years during which the agreement was in operation. At the end of both of these years the defenders, instead of paying to the pursuers a sum in addition to the interim payments made during the year, have claimed repayment of very large sums, on the footing that the value of the one-half of the refined products fell greatly short of the interim payments. The sum applicable to the year 1885-1886 does not appear to be stated on the record, but in the following year, 1886-87, the accountant, who professed to present a correct statement of the value of the crude oil delivered, estimated in terms of the agreement, stated the amount as £7298, 5s. 6d., with this extraordinary result, that the pursuers have been required by the decree-arbitral, of which they complain, to repay no less than £8350, 14s. 6d. of alleged over-payments by the defenders for the monthly supplies of crude oil made in return for the agreed-on rate of 3d. a gallon. It is startling to find that the parties, who were both duly cognisant of the details of the manufacture in which they were each engaged, should have made so great a blunder in their arrangements as to fix a scale for monthly payments to the pursuers on the footing that at the end of the year they should receive a further payment, while in the result it has turned out that these monthly payments were more than double the true value of the crude oil, or, in other words, that the pursuers at the end of the year have to repay more than half of the sums which they have received "on account" during the year. According to the results of Mr Moore's report for 1887 even a 1½d. per gallon was too large a payment to account, and yet the rate agreed to was 3d. The defenders do not suggest that there were any exceptional circumstances affecting the market rate of the refined products or otherwise to account for this. The pursuers, on the other hand, allege that this result has been brought about by fraudulent and unfair dealing on the part of the defenders, and the question to be decided is, whether, notwithstanding the pursuers' statements, the defenders are to be assoilzied from the conclusions of this action, or whether there should be an order for inquiry and proof? If the pursuers' statement be true (and for the purposes of the present judgment they must be accepted as true), no one can doubt that they have suffered great injustice, the amount involved for the two years in question being upwards of £14,000. The defenders maintain that the pursuers can have no remedy, but I am of opinion that the judgment of absolvitor by the Lord Ordinary should be recalled, and proof allowed by production of the whole arbitration proceedings and other evidence, written and parole, bearing on the averments of the parties, in order to ascertain (first) what questions, if any, in regard to the meaning of the contract have been decided by the arbiter; and (secondly) whether the reports of Mr Moore, bringing out the extraordinary results I have mentioned, which are complained of on record, were obtained by fraudulent or misleading information given to him by the defenders, and acted on by him, to the serious prejudice of the pursuers.

The action concludes for the reduction of the decree-arbitral of Mr Berry, the arbiter under the contract, and also of the reports of Mr Moore, the accountant named in the contract, for the two years 1886 and 1887. I think that the Court has not now before it materials for judging whether the arbiter has decided any point in regard to the meaning of the contract which can exclude

the pursuers from resisting the defenders' demand for the large repayment which they now ask. I think that those parts of the arbitration proceedings narrated on the record (where alone they are to be found), do not establish the decision of any such point; and I am farther and separately of opinion that, having regard to the pursuers' averments as to the misleading and fraudulent statements made by the defenders to Mr Moore, and on which it is said he acted in framing his reports, that the arbiter, in place of approving of Mr Moore's reports, was bound to have ordered inquiry—which he did not do; and at all events that the Court ought now to allow evidence to be adduced in support of the pursuers' averments on this subject.

In stipulating that in return for each gallon of crude oil delivered they should receive one-half of the net return of each gallon of the refined products, it is apparent that the pursuers were equally interested with the defenders in securing that the refined products should produce their full value, and that the means of ascertaining that value, which was entirely a matter under the defenders' control, should be attended with no doubt or difficulty. The agreement in its seventh head contemplated, and indeed stipulated, that all of the refined products should be sold by the defenders, and that the prices received by the defenders, less the sum of £750 per annum, "to cover the cost of selling and commission," should be ascertained at the end of each year. One-half of the prices so received for each gallon of refined products was to be paid to the pursuers for each gallon of crude oil (estimated to yield 72 per cent. of refined products) which they had supplied. The whole transaction appears to me to partake much of the nature of a joint adventure, in which the pursuers agreed to put in crude oil, the defenders in their refinery to turn out refined products, and the parties to be equally interested in the result. The payments "to account" for the crude oil as delivered is indeed the only element which prevents the transaction from being one of purely joint adventure, and that provision is to be explained by the fact that the pursuers were putting the whole subject of the adventure into the defenders' hands, supplying it each month as made to be finally accounted for only after a year had elapsed, and the refined products had been sold, and naturally they would stipulate for security or payments to account in consequence of the amount of capital which the crude oil represented, while the defenders were merely to manufacture the products. The material consideration, however, is that the pursuers have an equal interest with the defenders in the refining processes, and in the sales of the refined products, all of which were to be carried out by the defenders, and that being so, it follows, I think, that the defenders were bound, in serving their own interests, to be specially careful to guard also the interests of the pursuers, which were very much entrusted to them, especially as the pursuers were not entitled themselves to have access to the defenders' books. The agreement stipulated that the accountant acting for both parties should ascertain the results of the defenders' sales at the end of each year, or immediately thereafter; but it contains this further provision (which it was explained at the bar was inserted to prevent the pursuers from ascertaining the names of the defenders' customers to whom the products were sold) that the pursuers "shall be bound to accept the second parties' business books as final and conclusive evidence of the varying prices received by them during the year for the said products."

The agreement enumerates the well-known products of crude oil as follows, in the order apparently of their respective values—"the crude paraffin scale, lubricating and burning oils, spirit, and any other products presently unknown. Both parties are agreed that crude paraffin scale is a most valuable product, and that it is not sold as crude paraffin scale, but is subjected to certain processes with the result of producing different qualities of scale, which "are classified according to their hardness' (Answer to Condescendence 3), the hard scale being much more valuable than the soft scale. The pursuers aver that 'crude paraffin scale is not sold merely as crude paraffin scale,' but that after further treatment, as it was in fact treated by the defenders, soft scale of inferior value, and separately hard scale of greater value, are produced, and sold as soft scale and hard scale respectively. From the figures given on record and in Mr Moore's reports, it appears that from crude paraffin scale there is produced four-fifths of hard or valuable scale to one-fifth of soft or inferior scale. The former is used for the manufacture of candles, and the latter for the manufacture of matches, and the relative value of soft scale as compared with hard scale is only one-half.

It is admitted that the defenders failed in one material point to carry out the agreement. The agreement provided, as a means of ascertaining the true value of the refined products, that these products should all be sold, for the prices to be received were to be the subject of equal division, and in order to cover the commission and cost of selling, the defenders were to receive, and have received, £750 a-year; and the prices received, as entered in the defenders' books, were to fix the balance to be paid to the pursuers at the end of each year. Under that stipulation the pursuers might certainly have objected to the defenders retaining and consuming, as they did, a large quantity of scale, alleged by the pursuers to be hard scale, which they used in the manufacture of candles at a manufactory set up for the first time in the second year of the currency of the agreement; and I doubt much whether this proceeding, which was a breach of the contract, would not have entitled the pursuers to decline either to enter into any reference to Mr Berry, or to allow the accountant to present any report of results which could be binding on them, on the ground that the defenders themselves had so acted as to deprive the pursuers of

the means for which they stipulated for the ascertainment of the amount due to them. My opinion rather is that the pursuers on this ground might have objected entirely to be bound by any reports or to enter into any arbitration.

Their agreement was that they should have the actual prices for the products sold as the items of charge against the defenders, less only "the cost for casks, carriages, and discounts, and a fixed sum of £750 per annum to cover the cost of selling and commission," and if the products had all been sold no difficulty could have arisen in ascertaining the sum divisible between the parties. It is entirely owing to the circumstance that the defenders have retained and used the hard scale in their own hands, contrary to the agreement, that the present question has arisen, for the parties have been driven in the result to adopt some other means than the means stipulated in the contract in order to ascertain the net prices received as the value of the refined products, and the whole of the present dispute turns upon the value of the scale retained and worked up by the defenders themselves. The pursuers have become involved in a question of striking of proportions between scale sold and scale retained, questions both as to quantity and price, which have only arisen by the actings of the defenders in a way not authorised by the contract, by retaining in their own hands and consuming one of the most valuable products, for which their books give no price, as they would have done had this product been sold.

But it further appears to me that in another respect the defenders have failed in their obligations to the pursuers. As already noticed, the pursuers are themselves excluded from looking at the defenders' books. In these circumstances, it seems to me that it was incumbent on the defenders, with due regard to the interests of the pursuers (which in a transaction of this kind they were bound to protect), to keep their books in such a form or manner that the value of the products, which they retained and consumed instead of selling, should admit of being readily and accurately ascertained, and I think it is plain from the statements of both parties that this obligation was not fulfilled. The defenders themselves say, with reference to the entries in their books (answer 13), "No prejudice was sustained by the absence of the distinction between hard and soft scale,"—which shews that no such distinction is to be found in their books, while that distinction is, according to the pursuers' averments, essential to the ascertainment of the just state of accounts. The result, I think, has been that the defenders have been enabled to throw confusion into the whole of the accounts, and thereby, assuming the pursuers' averments to be true, by their unfair dealing to defraud the pursuers of a sum of £6000, concluded for in this action, in addition to the amount of upwards of £8000, for which the arbiter has granted a decree-arbitral. The complaint of the pursuers and the serious injustice done to them, assuming their averments to be true, may be readily seen. During the two years in question the defenders produced from the crude oil furnished to them by the pursuers 880,825 gallons. One-fourth of this quantity is 220,208 gallons. The pursuers, according to Mr Moore's reports, sold 224,415 gallons, and retained 656,410 gallons, so that in the result, speaking roughly, they sold one-fourth of the scale and retained the other three-fourths. The pursuers allege that the one-fourth sold consisted of soft scale entirely or almost entirely, while the three-fourths retained consisted of hard scale, being the product which they required, and which alone was useful for them in their candle manufactory. Of course no mischief would result from this to the pursuers if they got credit in account for the true value of the hard scale retained by the defenders. But how has this value been reached?

The price received for the scale sold has been admittedly made the medium or rule for ascertaining the value of the three-fourths of the scale retained. In this way it is clear that the defenders have retained 656,410 gallons of hard scale at a price or value, in a question with the defenders, of one-half of its true price or value; for the pursuers allege, taking the year 1886-87, that the price of hard scale in the market was 2½d. per lb., while the price of soft scale was 1¼d. per lb. The result, as stated by the pursuers' counsel, was that in this way the defenders are enabled now to claim repayment of the large sum for which the decree-arbitral was granted, while, if the hard scale retained by the defenders were charged or paid for at its true value, not only would the defenders have no claim for this large repayment, but there would be a large sum still due by them to the pursuers, in addition to the interim payments received to account during the two years in dispute.

The answer which the defenders make to this view, as I understand, is not that there is anything in the agreement which would warrant them in taking the price of soft scale as the medium for ascertaining the value of hard scale. There is obviously nothing in the agreement which could warrant such an extravagant proposition, and the defenders in the argument did not suggest that the agreement could possibly be so construed, although, nevertheless, I understand that in pleading the effect of the decree-arbitral the defenders impute this untenable view to the arbiter as having been the meaning which he attaches to the contract. What they (the defenders) say as shewing the meaning which they put upon the contract is this (answer 16)—"The quantity of soft and hard scale sold during the year was quite sufficient to test the market,"—which plainly means that they had sold not only a quantity sufficient in extent to test the market (although it shews that the defenders do not interpret the agreement as they maintain the arbiter did), but that the sales were also in proper proportions of hard and soft scale to furnish the means of fixing the value of the

scale retained and used, a statement which, however, even if true, does not exclude the effect of the pursuers' averment that all the scale retained was hard scale; for if all the scale retained was hard scale, an average of the prices of hard and soft scale sold in certain proportions could not give a fair criterion for fixing the value of the hard scale retained.

The pursuers claim that the accountant's reports and the decree-arbitral shall be reduced and set aside in order that a just accounting may take place between the parties, and this claim the defenders resist on the ground—(1) that the decree-arbitral proceeds upon an interpretation of the contract which excludes the claim; and (2) that the averments of unfair dealing are not relevant to support the pursuers' demand for inquiry. In regard to the first of these points, I think the defenders have not established that the arbiter has decided any point which can exclude the present claim. It is nowhere that I can discover distinctly stated by the defenders on the record what is the point which they allege the arbiter has decided, and I rather suspect they would find great difficulty in making any such statement. What is the particular clause or part of the agreement which has been construed, and what is the meaning or construction put upon it? Neither the record, nor indeed, so far as I can see, the judgment of the Lord Ordinary, supplies an answer to this inquiry. And it is in my opinion clear that the question as to what the arbiter has decided in the reference ought not to be determined, and cannot safely be determined, by reference merely to the parts of the orders and proceedings in the reference which happen to be quoted in the record. These seem to be copies or extracts only from certain orders in the arbitration, and having bestowed the best attention I can upon them, I think it is not possible to understand their meaning or effect without having the proceedings as a whole before the Court.

In order to exclude the action, the defenders must show that the arbiter has held that it is of no consequence whether soft scale only was sold by them, and the price of soft scale was thereupon applied to the hard scale, which the defenders themselves used. Nothing short of a judgment to the effect that according to the true meaning of the contract the price received for soft scale shall be taken as the price to be paid by the defenders for hard scale will serve the defenders' case, because the complaint is that the defenders have kept the hard scale at the price received for soft scale sold. This view is in itself so extravagant that it is scarcely possible to conceive that any arbiter, much less an arbiter of the intelligence and judgment of the present Sheriff of Lanarkshire, could entertain it. I would as soon impute to the learned Sheriff that he had held that two and two made five, for it comes to this, that the defenders, who were by the agreement to sell the whole of the refined products—in which case the hard scale would have produced double the value credited—by not having done so, but having kept it for their own profitable use, are by the terms of the agreement to retain the hard scale at half its value, or, in other words, at the rate at which the soft scale was sold. This at least cannot, I believe, be disputed, that unless by unambiguous language, or by clear and necessary implication from the language used, the Court will not impute to the arbiter any such judgment as that supposed. It is enough to add on this subject that when the defenders' counsel were asked how that result they contend for could be reached, they were unable to suggest any possible reading of the contract which would sustain it. They could not maintain that the contract admitted of any such meaning. Nevertheless they referred to the note of the arbiter appended to his deliverance, dated 3rd May 1888, as a judgment on the subject and to that effect. I do not, however, read that note as containing any such judgment.

The note itself refers back to earlier proceeding in the reference, which are not before the Court. It does not repeat or declare any decision again to the same effect as that formerly given, although if it did, as I shall afterwards show, this would not serve to support the defenders' contention. And the ground of the deliverance appears to me to be, not any declaration of the meaning of the contract, but rather a reference to the conduct or contention of the pursuers at an earlier stage of the arbitration; for he says that the difficulty which had arisen "might have been avoided if the Holmes Company had accepted as the basis of calculation the principle of allowing a valuation of the scale unsold to be taken into consideration." I feel some difficulty in following this observation by the arbiter, for it appears to me that the difficulty to which he refers would not have been avoided, but would necessarily have arisen, if the pursuers had then consented to a valuation of the scale unsold. That "principle," as the arbiter calls it, no doubt had been repudiated, and very properly repudiated in reference to Mr Moore's first report, which had no reference whatever to scale used up by the defenders in making candles, but only to scale in stock, which was to be sold in terms of the agreement. The repudiation by the pursuers of that "principle," and the absence of an allegation of fraudulent dealing, led the arbiter to express the opinion that "the principle must be followed of estimating the price according to the amounts received from the various products during each year." The note or deliverance as a whole is certainly very far from clear. The decree-arbitral proceeds on a consideration of certain minutes, No. 1 and No. 3 of the arbitration process, which do not appear to be before the Court, and which seem to me to be necessary in order to make the note intelligible; and the only point decided seems to me to be contained in the last sentence just quoted. To that principle, that is, the principle of estimating the price (I presume of scale unsold, but retained and used) according to the

amounts received for the various products for the year, the pursuers make no objection. If there was hard scale sold during the year in sufficient quantity to test the market, let the price received fix the price of hard scale retained. But if, as they allege, there was no hard scale sold, or if the quantity sold was very trifling as compared with that of the soft scale, then the principle settled by the arbiter did not possibly admit of being applied to the facts as they had occurred. If, as seems to be the case—in the absence of the further light which the proceedings or an examination of the arbiter himself would afford—he proceeded on the defenders' allegation, repeated on record (answer 16), that "the quantity of soft and hard scale sold during the year was quite sufficient to test the market," this demonstrates that he did not assign the extravagant meaning to the contract that the price received for soft scale should be the price to be paid by the defenders for the hard scale used by them; and if this be so, it further shows, keeping in view that the pursuers' averments directly traversed those of the defenders that justice requires that the Court ought now to allow the inquiry which the pursuers ask, because the arbiter in that view (that is, in the view that he did not proceed on the reading of the contract which the defenders now seek to attribute to him) was bound to allow the inquiry as essential in order to do justice between the parties.

The pursuers aver repeatedly on the record that "the price to be paid to the pursuers was arrived at without regard to the hard scale at all." And I may observe that even the defenders, by their own acting, seem to show the truth of this averment, for by the joint minute narrated by the defenders themselves in answer 14 the defenders proposed, subject to the condition of getting consignation of £8350, to allow the accounts to be opened up "to the effect of having the question of a fair average naked price for hard and soft crude paraffin scale ascertained from the Pumpherston Oil Company's sales of all qualities of these products during the said period." This offer seems to show plainly that hard and soft crude paraffin scale sold had not separately been taken into view in the mode of accounting to which the arbiter has given effect. Looking therefore to the decree-arbitral, and the arbiter's note appended, it does not appear to me to decide any question which can exclude the present inquiry.

The arbiter, however, refers to something which had occurred previously in the reference as to the admissibility of taking into consideration the different qualities of scale, and if it could be shown that at this earlier stage the arbiter had held that hard scale was to be paid for only at the price of soft scale, of course the pursuers must fail in their present demand. In the absence of the arbitration proceedings it becomes necessary to glean from the record such light as can be had as to what the earlier proceedings were, and as to any judgments there given. Mr Moore's report first objected to, viz., that for the year 1st December 1885 to 30th November 1886 (condescendence 7), states that he has examined the books for that year in order to ascertain the price payable for oil delivered "in terms of the agreement between the parties for that purpose, and in the meaning thereof embraced in the findings under the reference to Professor Berry, and has to report as follows." Where, then, are these findings, and why should the Court decide this case without having them in their very terms, with the claims or minutes for the parties which led to their being pronounced, before them? The findings apparently do deal directly with the meaning of the agreement. Again (as is also the case in regard to the later proceedings in May 1888), part of the proceedings only is mentioned, and that by way of narrative only in the defenders' 12th answer, and it seems to be clear from what is there said that what was decided in reference to the year ending in November 1885 has no possible application to the matter which arose for decision in 1888. In the former year the defenders had in hand a large quantity of "unsold stocks," which apparently they proposed to bring into account for the past year at prices to be fixed by estimate, and not by actual sales, as the agreement provided. The pursuers objected to this, and required that before any of the refined products were brought into account they should be sold, and all that the arbiter then decided was that this contention was right, as it plainly was, in terms of the agreement. It may be conceded that this was a decision as to the meaning of the agreement, a decision, however, on a point about which its terms are absolutely clear. The result was that for the first year the value of the refined products was got by taking the actual sums realised, and dividing the amount between the parties. The true bearing of this decision, if carried to its legitimate result, was that the defenders had no right to retain and use any paraffin scale at all, but must sell the whole in order to reach the total amount divisible between the parties. No more was decided, and in that state of matters the prices or value of different prices or qualities of scale was of no moment. It would appear to me to be extraordinary if the point thus decided in 1885 could warrant the defenders to retain and use the hard paraffin scale produced, and pay for it the price of soft scale.

The defenders, no doubt, at the end of their answer 12th go on to say—and to this they attach much importance:—"Thereafter on the 8th September 1886 the pursuers lodged a motion in the reference asking the arbiter to pronounce an order on Mr Moore to furnish the proportions of hard and soft scale sold by the defenders during the past year and the prices obtained therefor. This motion the arbiter refused, and on 30th September 1886 issued an award, finding, *inter alia*, that there was due from the pursuers to the defenders the sum of £3533, 17s. 11d. as at 30th April 1886, and he ordained the pursuers to pay that sum with interest to the defenders.

The pursuers obtempered this award." This statement stands on mere averment, and how far it correctly gives the purport of the proceedings themselves I cannot tell in the absence of the judgments or orders of the arbiter and the minutes or motions laid before him. But taking the averment to be strictly accurate, it comes to this, that the arbiter having properly decided that unsold products in stock should not come into the account, he refused to order detailed information distinguishing the proportions of hard and soft scale sold during the year and the prices obtained therefor to be furnished to the pursuers. I cannot doubt that this was quite a proper order. If the pursuers got their one-half share of the prices actually received, it was of no consequence to them what were the proportions of hard and soft scale sold, nor the separate prices obtained for each. There was no stock of products then retained and used by the defenders to be paid for by estimate, and so the price of scale sold, hard or soft, was not required as the measure of the price of scale retained. But in 1888 the state of matters was entirely changed. The defenders then had themselves to pay for the large quantity of scale (three-fourths of the whole, and this the most valuable in quality), and it was absolutely essential to obtain the fair and proper measure for fixing the value of the scale retained, and the best measure, if it could be had, was the price got for hard scale sold. When, therefore, the Lord Ordinary in his judgment says that the question which the pursuers raised in 1888 had been decided against them in 1886, I can only say that I think his Lordship entirely overlooks the distinction between the two questions —the vital distinction between the circumstances at the different dates. The question then decided—and it was a question as to the meaning of the contract—was that products sold alone were to come into the year's account. 'The other point, the pursuers' request to have particulars of hard and soft scale, was a subsidiary one, and the refusal of the request was clearly dependent on the decision of the real question raised as to the stock unsold. It involved, so far as I can see, no independent question, and no independent question as to which the arbiter had to decide, or did decide, the meaning to be given to the contract beyond the interpretation of it which excluded unsold stocks from the account.

On the whole, I am of opinion, on the first question raised in the case, taking it with such partial information as is before the Court as to the proceedings and findings in the arbitration, that the defenders have failed to show that there has been any decision by the arbiter as to the meaning of the contract which excludes the pursuers' demand for inquiry.

I am further of opinion, in any view, looking to the pursuers' averments of fraud and unfair dealing, that a proof ought to be allowed. The arbiter, in what I understand to be his final note, lays down the principle with which it concludes, as he himself states, "in the absence of an allegation of fraudulent dealing." What could be the kind of fraudulent dealing which, if alleged, would have induced him to order more inquiry? I should answer that question by saying—Any mode of keeping the books, or any misleading statements made by the defenders to Mr Moore which the defenders were enabled to make with effect from the way in which they had kept their books, and which resulted in this, that hard scale was charged to the defenders at the price of soft scale only. That seems to me to be such a fraudulent dealing as the arbiter must refer to. Now, the pursuers had no control over the defenders as to the mode in which the defenders kept their books, and were not indeed entitled to access to them. The point to be ascertained was not, as it should have been had the defenders fulfilled their part of the agreement, what were the prices realised for the crude paraffin scale, but what sum are the defenders bound to give credit for as the value of three-fourths of the scale which they retained and used. It must have been most difficult, if indeed possible, from the books alone, as the defenders kept them, to answer that question without some extrinsic evidence of the market prices of hard scale to fix that value, for the defenders admit (Answer 13) that there is an "absence of the distinction between hard and soft scale" in their books. Then what did the pursuers state to the arbiter as affecting the results brought out in Mr Moore's reports? Their minute of 28th April 1888, given in some days before the decree-arbitral was issued, is in these terms (Cond. 13):—"J. T. T. Brown, for the Holmes Oil Company, stated that the Holmes Oil Company objected to the results brought out in Mr Moore's report of 16th April 1888, as well as to those in his two former reports, as regards the average net naked price obtained for refined products, in respect that these results were arrived at by Mr Moore through incorrect, imperfect, and misleading information and *data* furnished to him by the Pumpherston Oil Company, Limited, and also in consequence of unfair dealing on the part of the Pumpherston Oil Company towards the Holmes Oil Company during the period of the contract." I think it may be assumed that the particular respects in which the information and *data* furnished to Mr Moore were "incorrect, imperfect, and misleading," and of the "unfair dealing" of the defenders stated in the discussion before the arbiter, were those now stated by the pursuers on record. The defenders, on the other hand, alleged that their sales of scale, hard and soft, were such as to test the market, and to give the means of fixing the fair price of the hard scale retained. It seems to me that it was essential to doing justice between the parties that an inquiry into the pursuers' averments and the defenders' answers should have been allowed; and that the case, therefore, is one of that class of which the case of *Millar*, 17 D. 689, and the case of *Mitchell* v. *Cable*, there referred to, are ex-

amples in which the Court have set aside the award. In the first place, I think that, even if no fraud or unfair dealing had been alleged, justice required that inquiry should be allowed. The defenders' books were after all not their own books exclusively in this matter. The accounts for the prices or value of the refined products of the crude oil were accounts in which both parties were equally interested, for they were equally interested in the results, and I am of opinion that if the *data* to be there found and the relative information given by the defenders were incorrect, imperfect, and misleading, even though innocent and not fraudulent, it was essential, in order to justice being done, that the arbiter should allow or order inquiry. But where unfair dealing was alleged, I think this should have been regarded by any arbiter as an averment of fraudulent dealing, and I certainly so regard it.

In any view, on the present record originally, and at least as amended, there are averments of concealment and fraudulent representations to the pursuers themselves and to Mr Moore, which induced Mr Moore to state an entirely inadequate price or value of the scale retained and used by the defenders. These are to be found in Articles 15, 16, and 18 of the condescendence, and even if it were held that the arbiter was not bound to allow the inquiry asked, I think the Court ought to allow that inquiry now. On the whole, I am of opinion that the judgment of the Lord Ordinary should be recalled, and that (it should perhaps be before disposing of any of the defenders' pleas) the pursuers should be allowed to obtain production of the whole arbitration proceedings, and to adduce proof of their averments.

LORD YOUNG—This action was fully argued before the Second Division of the Court on the 6th and 7th of June of last year. We then made avizandum. The case struck me as one of importance as well as a case of interest. It is indeed a case in which the pursuers' averments are either untrue or else a gross fraud is being attempted by the defenders. While the argument was still fresh in my mind I fully considered the whole matter, and I wrote out my opinion upon it. I communicated that opinion to the other Judges of the Second Division. The case was put out on 19th July, after my views had received the consideration of my learned brethren. There was an equal division of opinion, and it was necessary to resort either to a hearing before Seven Judges or to a consultation of the Whole Court. The former alternative was adopted.

Now, I confess that I wish I had then delivered the opinion I had formed, and that my brethren who differed from me and my brother who agreed with me had also expressed their views. That course ought in my opinion always to be taken in such circumstances. The Act of Parliament—the Court of Session Act 1868—under which we have adopted the procedure of sending the case to Seven Judges, provides for two courses in the event of equal division of opinion in the Inner House. Section 59 provides for re-hearing before a Court of Five Judges "in the event of either Division of the Court being equally divided in opinion upon a question of fact arising upon a proof, or upon a cause which in their opinion does not involve any legal principle of importance." Section 60 provides for the procedure to be followed "in cases of equal division of opinion not falling under the preceding section, and in cases of difficulty and importance which according to the existing practice may be referred by one of the Divisions of the Inner House to the Whole Court." It provides that "it shall be competent for such Division to direct that the printed papers in the cause shall be laid before three other Judges, to be named in the interlocutor, with a view to their opinions being communicated in writing, or to direct that the cause shall be argued before themselves with the assistance of such three Judges, . . . and the judgment to be pronounced thereon shall be in conformity with the opinions of the majority of the Seven Judges, and shall bear to be the judgment of the Division by whom the hearing was appointed after consulting with such other Judges, and may be signed in the absence of such other Judges at any ordinary sitting of the Division." Now, I think that the statute contemplates that at the time of referring the case to the tribunal of Seven Judges the Judges of the Division should deliver their opinions, and so put the parties in possession of their views upon the case. That was the practice under the old system when the Division determined to resort to the opinion of the Whole Court, and it was also the practice for the first few years after 1868 when a cause was to be referred to Seven Judges. Of later years, unfortunately as I think, a different practice has prevailed, and causes of exceptional "difficulty and importance" have been ordered to be re-argued before Seven Judges "by one counsel a side" without the parties having any proper means of knowing the arguments *hinc inde* which have chiefly weighed with the Judges of the Division. I think that is an erroneous practice. It is due most probably to some idea that Judges would more easily change their first opinions if they had not committed themselves to them by intimating publicly what they were. But giving that all due weight, I think the balance is in favour of the older practice, and for my own part I shall in future endeavour to secure that it be followed in the Division of the Court in which I sit. Had that older practice been followed I should have read on 19th July the opinion I am now to deliver, and your Lordships would have been saved the necessity of hearing it, and myself the necessity of reading it, now. As it is, I have no alternative. I must now read the opinion which I wrote in June last:—

The pursuers ask for reduction of a decree-arbitral which was pronounced under one or more of the reference clauses (for there are several) in a contract between them and the defenders. The grounds of reduction are generally that it was pro-

nounced under the influence of errors in point of fact caused by the defenders' misrepresentations to the pursuers' prejudice, and that the arbiter wrongfully refused the pursuers' special and frequent requests for inquiry whereby these errors would have been exposed. The defences are generally, first, irrelevancy and insufficiency of statement, and second, that the only dispute between the parties which was presented to the arbiter for decision regarded the true intent and meaning of the contract, and that in the arbiter's view of its true intent and meaning evidence of matter of fact was unnecessary to ascertain the state of account between the parties under it.

The Lord Ordinary has, without directing any inquiry, sustained these defences and assoilzied the defenders.

We have no other information, and the Lord Ordinary had no other, than is afforded by, first, the averments of the parties, which are conflicting, and second, the documents produced to satisfy the production, viz., the contract, the decree-arbitral, and two reports by Mr Moore. The question is, do these warrant us in at once sustaining the defences and assoilzieing the defenders?

To determine this question the general import of the contract between the parties must, I think, first be considered. At the date of it (November 1884) the pursuers were tenants of the oil shale in the estate of Holmes, and were in course of working it and distilling "crude oil" from the produce, but without any means or appliances for extracting "refined products" from the "crude oil." The defenders, on the other hand, had these means and appliances. By the contract the pursuers sold to the defenders all the crude oil which should be produced at their works during three years from 1st December 1884, guaranteeing that the minimum daily yield should be four thousand gallons. So far there is no dispute between the parties. But although the thing sold was "crude oil," which alone the pursuers produced, the price was to be calculated on the "refined products" to be extracted therefrom by the defenders. The provisions of the contract on this head are not happily expressed, but the meaning on careful reading is, I think, not doubtful. The import is, first, that the "crude oil" delivered shall (as matter of contract) be assumed to yield 72 per cent. of "refined products," and be paid for accordingly; second, that the price to be paid by the defenders to the pursuers for the crude oil delivered to them under the contract shall be calculated on 72 per cent. thereof, and at a rate per gallon equal to one-half of the rate per gallon which they themselves receive for the refined products extracted therefrom. I need not notice the provision for a deduction to cover cost of selling and commission—no question arising thereon.

It is averred by the pursuers, and I understand admitted, that at the date of the contract the defenders' trade consisted in extracting "refined products" from "crude oil," and selling these products in the market, and that they had no works or apparatus (and so far as the pursuers knew, none in contemplation) for using any of such products in a manufacture of their own.—See Condescendence 6 and Answer. In this view of the contract, viz., that it was understood and intended that the defenders would sell the whole "refined products" which they extracted from the "crude oil" delivered to them by the pursuers, the provisions that "the varying prices received by them during the year for the said products" should be taken from their business books is clear and intelligible, and as safe for the pursuers as need be, provided only that the defenders kept books, and that they were not fraudulent. There was no provision whatever for ascertaining the price of the "crude oil" otherwise than on the footing that the "refined products" extracted therefrom were to be sold by the defenders and the prices entered in their books, and this seems to shew clearly enough that the contract was made on the footing asserted in Condescendence 6, and I think not denied. This does not, of course, imply that the products of each year's supply should be sold in that year (which in a trade point of view might be imprudent), but only that in the end and result the pursuers should have for the crude oil supplied by them a price per gallon equal to one-half the price per gallon ultimately realised by the defenders for the "refined products extracted therefrom."

The contract (Art. 7) refers to the variety of the "refined products" expected to be obtained by the defenders from the crude oil, specifying those then known, but adding any other products presently unknown. Those actually obtained were all to be taken account of in ascertaining the price to be paid for the crude oil that yielded them. These were of various values in the market, but the present case requires that we shall take notice of only one of these, viz., "crude paraffin scale." The pursuers aver (Cond. 3) that "crude paraffin scale" is of a compound nature, and after it has been extracted from the crude oil is subjected to further processes for the purpose and with the effect of separating it into what are known in the trade as soft "scale," the average melting point of which is from 95 degs. to 102 degs., and "hard scale," the average melting point of which is 118 degs. Soft scale in 1886-7 realised a price of about 1s. per gallon. It is used in the manufacture of matches. Hard scale is worth about 1s. 8d. per gallon, and in 1886-7 realised that price. Hard scale is, after its separation from the soft scale, partially refined, and is then used for the manufacture of candles."

The first difference between the parties arose upon Mr Moore's report for the year 1885, the first year of the contract. What it was we know only from the defender's account of it in their answer to Cond. 12, from which it appears that Mr Moore having proposed to take account not only of the refined products obtained and sold, but also to put an estimate upon "the oils in process of refining and in stock," the pur-

suers objected to his doing so, and the defenders not agreeing, recourse was had to the arbiter, who decided in favour of the pursuers' objection. I think the question was a proper one for the decision of the arbiter, and that he decided it rightly, the plain meaning of the contract being that the market should be tested, and that it would have been unfair to the pursuers (who objected) to substitute an estimate of the value of products expected but not yet obtained from oils which were only "in process of refining," or of products obtained but retained in stock with a view to a rise of market price. There was then no idea that the refined products when obtained were to be dealt with by the defenders otherwise than by selling them. The defenders may indeed have even then formed the design of setting up works for "refining scale" and making candles, but if so, they, according to the pursuers' averments on record, kept it secret from the pursuers, the accountant, and the arbiter. The pursuers aver (Cond. 16) that the defenders, having that secret design of setting up such refining works, "did not sell the said hard scale, but accumulated the same till they had their refining works ready, and they then themselves used up the said hard scale in their own works so as to realise from it a much higher price than 2d. per lb. They, however, concealed this from the pursuers and Mr Moore." I notice this now only to observe that when the pursuers objected to account being taken by estimate of "the oils in process of refining and in stock," and insisted that the market should be tested by actual sales of the refined products, it was not in their contemplation, or, so far as they knew, in the contemplation of the defenders, that the most valuable of them, viz., the hard scale, was never to be sold at all, but to be stored by the defenders till their refinery and candle-works were ready, and then used by them in their own manufactory.

The pursuers' averments relate to the year 1886 as well as the year 1887, but as the decree-arbitral impeached regards the latter year only, I shall in what I have now to say confine myself to it. The dispute to settle which the arbiter was appealed to arose in this way:—By the seventh head of the contract the first party (the defenders) were entitled to require monthly payments on all "the crude oil delivered to the second party during the month, of 3d. per gallon, said monthly payments to be made to them during the year to account of the sums to be found due to them at the expiry thereof as before provided." These monthly payments made to account during the year 1887 amounted to £15,649. At the expiry of the year it was the duty of the accountant Mr Moore to ascertain the sums actually due, "as before provided"—that is, not at 3d. per gallon on the crude oil delivered, but at one-half of the net naked price per gallon received by the defenders for the refined products obtained therefrom. In his report for the year ending 30th November 1887, dated 16th April 1888, Mr Moore explains how he performed this duty and with what result, and as it is itself specially challenged, and is the basis of the decree-arbitral, which simply affirms the pecuniary result, it requires special attention. The pecuniary result is that for the year ending 30th November 1887 "the sum payable to the Holmes Company for the whole crude oil delivered is £7298, 5s. 6d. The defenders thereupon claimed repetition of £8350, 14s. 6d., being the excess of their payments to account over £7298, 5s. 6d., and the pursuers refusing, appealed to the arbiter, who simply found "that there is due by the Holmes Company the sum of £8350, 14s. 6d. as at 30th April last," and ordered payment with interest. The amount of the excess is somewhat startling, for it is indeed difficult to suppose that intelligent people who knew their business should have stipulated for a system of payments "to account" on actual deliveries which might, in the absence of any unforeseen calamity, amount to more than double the sum actually due. The whole case now before us regards the manner in which this at first sight remarkable result has been reached. It is impossible to conceive that the parties, when they made their bargain, contemplated the possibility of such a thing, that is, in the ordinary course of fair dealing between them, and without any unforeseen and very serious change of circumstances. This consideration is not of the nature of a legal argument, but it does I think legitimately prompt inquiry as to how a result *prima facie* so unlikely came about. The defenders do not even make a suggestion in explanation of it. The pursuers on their part assert that it is an erroneous and false result in fact, and accuse the defenders of misrepresentations and deceitful conduct practised by them in order to produce it.

It will be observed from what I have said that the controversy regards the value of the "refined products" obtained by the defenders from the "crude oil" supplied to them by the pursuers. I am not now speaking of the law respecting the grounds on which a decree-arbitral may be impeached, but of the controversy between the parties as buyer and seller under the contract between them, and on which the arbiter was appealed to. Now, what was the point of that controversy relating to the year ending 30th November 1887? It was, as I understand, this—from the crude oil supplied to them in the course of that year the defenders, according to Mr Moore's report, obtained "crude paraffin scale," being a "refined product," to the amount of 430,767 gallons. Of this they sold, according to the same report, 96,725 at a price of 1·2 of a penny per gallon. It will be observed that the quantity sold is of no significance to the result, the only important question being whether 1·2 of a penny per gallon was the true and fair price of the "crude paraffin scale" obtained from the crude oil supplied by the pursuers. The defenders aver that it was. The pursuers, on the contrary, aver that it was not. The conflict between the parties here is quite clear. The parties are agreed, and the fact is certain, that "crude paraffin scale" is of a

compound nature, and is always separated into "soft scale" and "hard scale," the latter being about double the value of the former. Now, did the 96,725 gallons of "crude scale" which the defenders sold consist of hard or of soft or of both, and, if so, in what proportions? I assume that 1·2d. per gallon was the price which they got for it; but was it entirely "hard" or entirely "soft," or partly the one and partly the other? Now, here the parties are in conflict in point of fact, and we have no evidence. The pursuers say that the 96,725 gallons sold consisted exclusively or almost exclusively of the "soft scale" which was yielded by the 430,767 gallons of crude scale which they obtained, the rest, viz., 334,042 gallons consisting of "hard scale," and of double the value per gallon, being retained by themselves for candle-making. The defenders, on the other hand, aver that "the quantity of soft and hard scale sold during the year was quite sufficient to test the market," which must be intended to convey the meaning that the 96,725 gallons sold consisted of hard and soft scales in the due proportions yielded by the 430,767 gallons of crude scale, in which case of course 1·2d. was the true market price. But if this is false, and the truth is that the scale sold (96,725 gallons) was all soft scale—being just about the amount of soft scale which would be yielded by 430,767 of crude scale, and that the residue of 334,042 gallons, being hard scale, was retained by the defenders and taken no account of, it seems clear that the defenders were guilty of misrepresentation in order to deceive the arbiter, and that their statements on this record are untrue. The pursuers aver quite distinctly that crude scale yields hard and soft in the proportion of 4 parts hard to 1 part soft, and that the defenders, after making the separation, retained for their own candle-making the 4 parts hard, and sold only the 1 part soft, with the result that the price was only about half what it would have been had they sold both kinds, not necessarily the whole, but, whatever the quantity, in the proportions of 4 hard to 1 soft.

It is averred that the arbiter declined to admit evidence or allow inquiry in any form as to the state of the fact. But how the account between the parties could be justly or intelligently settled in ignorance of the facts I am unable to conceive.

It was urged in argument on behalf of the defenders that in the arbiter's view of the meaning of the contract the state of the fact was immaterial, and that the construction of the contract was for him. Now, it is true that the contract provides that "in the event of any questions, disputes, or differences arising as to the true intent and meaning of these presents, or the due implement thereof, the same are hereby referred to" the arbiter. But did a question arise as to the meaning of the contract, and if so, what was it? We have none of the arbitration proceedings before us except only the decree-arbitral, which simply finds that a certain sum of money is due by the one party to the other. If there was a dispute as to the meaning of the contract on which the decision of the arbiter was required, and which he in truth decided, I think we ought to know distinctly what it was, and how it was decided. It is hard to believe that the defenders asked the arbiter to hold that it was according to the true meaning of the contract that the price of the refined product called "crude paraffin scale" was to be ascertained by the price received for the residuum of "soft scale" remaining after all the "hard scale" had been separated and removed from it, not only because such a view is extravagant on the statement of it, but because the defenders themselves assert that they acted on no such view of the contract, but on the rational view which they shared with the pursuers, viz., that the price of the crude scale as a whole—that is, as containing and yielding both hard and soft scale in certain definite proportions—was to be ascertained. The pursuers indeed deny the defenders' assertion that they so acted, and aver that by misrepresentation and false statements they deceived the accountant and arbiter into the belief that they did; the truth being that they sold only soft scale, and withheld the hard for their own use in candlemaking. I have already pointed out that on this record the defenders assert that "the quantity of hard and soft scale which they sold during the year was quite sufficient to test the market"—meaning of course, if the statement is honestly made, that the quantity of hard and of soft scale sold was in the proportion which the crude scale yielded. There is here a very serious controversy upon matter of fact, but I see no indication of a dispute or difference as to the true intent and meaning of the contract.

Now, I must regard this as a very grave and serious matter indeed. I think the pursuers charge the defenders with wilful falsehood, and if the truth be as the pursuers aver that the 96,725 gallons of scale which they (the defenders) sold in 1886 "consisted simply of the soft or inferior scale which had been extracted by the defenders from the crude oil," I could not regard the defenders' assertion to the contrary, not only to the accountant and the arbiter, but to this Court in the record before us, otherwise than as wilfully and deliberately false. Then I am clearly of opinion that the account between the parties could not be justly or intelligently ascertained and settled without in some way or other inquiring into the matter of fact upon which the parties so distinctly differed. With only the information now before me I do not know, and do not feel called upon to surmise why the arbiter refused inquiry. But at present, and without knowing how the facts stand, I am not prepared to accept the suggestion (for it is no more) that the arbiter refused inquiry because he had formed a legal opinion as to the true intent and meaning of the contract, which I think not merely erroneous but outrageous on the mere statemnt of it, and which, so far as I can see, was not even proposed to him by the defenders, whose whole case, as presented by themselves, was that they had

truly and properly acted on quite another view of it.

If the pursuers' averments are true, I think they will suffer gross injustice if the decree-arbitral is allowed to stand. This is not conclusive, for a party may suffer such injustice without legal remedy. At the same time there are numerous cases to the effect that a decree-arbitral may be reduced on the ground that the arbiter has refused to take evidence or make inquiry in any reasonable manner when the matter in dispute could not possibly be justly and intelligently decided without it. Before deciding whether or not the circumstances of this case warrant our interference, I think it is desirable that we should know the whole facts. In the first place, I think we ought to have the submission process before us. Then I think we ought to know of what the paraffin scale sold by the defenders truly consisted, whether it was all soft scale, as the pursuers aver, or consisted of hard and soft in the proportions usually yielded by crude scale, as the defenders aver. I think we ought also to have the difference in pecuniary result of the one or other state of the fact distinctly presented to us. Should the defenders' averments as to the truth of the matter (which they must know) prove to be accurate there will be an end of the case, and we shall have no occasion to encounter the difficulties attending interference with a decree-arbitral. If, on the other hand, their averments should prove to be wilfully and fraudulently false we shall be in a better position to consider satisfactorily whether or not the decree in their favour is legally assailable.

I am of opinion that the interlocutor ought to be recalled, and the case remitted back to the Lord Ordinary to allow a proof to both parties, the pursuers of course to lead.

This is the opinion which I wrote after hearing the argument. I adhere to every word of it. I am not willing to enter into the general question as to the grounds on which a decree-arbitral may be assailed. That question may not arise if the charge of wilful falsehood on the defenders' part prove to be unfounded. If it prove well-founded a question may arise as to whether the pursuers are precluded by any law from obtaining justice. As to the suggestion that the arbiter decided a question as to the meaning of the contract—whether the charge is well-founded or not—I have said enough to indicate my view; but I think the pursuers may prove out of the arbiter's own mouth that no such view ever was propounded to him, and that he never proceeded on any such view, but upon the assumption that the truth was as the defenders stated. It is no answer to the pursuers' case to say that a construction can be put upon the arbiter's note which indicates that he took a particular view. If evidence is to be excluded, that note ought to be excluded. If it is to be admitted the arbiter's evidence will be obtained, for it is settled that he is a competent witness.

I think the law is not on a very satisfactory footing as to mere errors of judgment on the arbiter's part on the one hand, and such error—such iniquity—on the other as the Court will interfere with. The words of the Act of Regulations, "corruption," "bribery," "falsehood," have had all their *prima facie* meaning taken away by decisions, for it has been often determined, and is matter of familiar statement, that a decree-arbitral may be set aside without reflection on the arbiter's integrity, and yet there is no meaning of "corruption" which can be imputed to an arbiter without imputation on his character. I have been looking at the language of Lord Deas in a case in which the decree-arbitral of a respected member of the legal profession was set aside on the ground that he determined matter of right which was not within the submission. I refer to *Alexander* v. *Bridge of Allan Water Company*, 7 Macph. 492. The arbiter was to fix the compensation payable to Sir J. Alexander for his rights in the existing waterworks, taking "into consideration the value of the water, the plant, and the whole circumstances of the case," and on the ground that Sir J. Alexander had no title to it, he declined to consider the value of water derived from a particular stream. There was a division on the bench. Lord Kinloch held the arbiter was right, but the majority held that he was wrong. Lord Deas said—"That which the law has stamped with the character of legal corruption may exist where the motives are perfectly pure, as no doubt was the case here. If, for instance, an arbiter refuse to allow a proof when a proof ought to have been allowed, it will be no matter how clear and conscientious his opinion may have been that no proof was necessary, and his refusal to allow it will be held corruption in the sense of the Act of Regulations." Again, we have the case of *Miller*, 17 D. 689, a case only valuable for the opinions, and in particular those of Lord Justice-Clerk Hope and Lord Wood. Lord Justice-Clerk Hope said (p. 716)—"I own I do not think that the competency of a reduction on such grounds as the Court have in many instances adopted depends on the construction of the term 'corruption.' I concur very much in the view taken by Lord Fullerton, Lord Mackenzie, Lord Moncreiff, Lord Jeffrey, and other Judges, that in reference to the contract of submission there are certain essential duties incumbent and imperative on an arbiter in the fair discharge of his duty without which, as substantially necessary for justice, his judgment cannot be sustained, and also that if he has been misled into a decision by matters for which one of the parties is responsible the Court will interpose." Now, here the pursuers may prove out of the arbiter's and accountant's own lips that the arbiter was misled by a matter for which the other party was responsible, viz., that 90,000 gallons crude oil were sold for £4000 only, and that that was necessary to bring out the sum for which the arbiter decerned. If that was false, the decree is unjust.

I am without hesitation of opinion that proof should be allowed.

LORD RUTHERFURD CLARK—When this case was argued before the Second Division, and again before Seven Judges, the only ground on which pursuers asked for judgment was that the arbiter had acted corruptly in not allowing them a proof. The suggestion of fraud came from the bench. It is not the less worthy of consideration on that account, but it is surprising that it should have entirely escaped the notice of the pursuers that they were the victims of what is represented to be a very gross fraud.

Taking the record as it has now been amended, the grounds on which the decree-arbitral is challenged are (1) that the arbiter acted corruptly; and (2) that the defenders obtained by fraud the reports of Mr Moore on which it is based. The question is whether these grounds of reduction, or either of them, have been relevantly stated.

First, as to the corruption of the arbiter. In dealing with this point I need hardly say that we are not concerned with the merits of the decree. It has been said that it is so obviously bad that the counsel for the defenders admitted that he could not defend it. I did not hear him make any such admission; but even if he did, I could not proceed on it, for if the arbiter acted within his province, and without corruption, his decree must stand, however bad it may be.

The corruption assigned is that the arbiter refused to allow a proof. I admit that there may be cases in which such refusal will amount to corruption within the meaning of the Regulations. When the case referred is a mere question of fact the refusal of a proof makes a just decision impossible, and if an arbiter acts in a way in which he cannot do justice, he cannot be acting honestly. Even though there were no conscious dishonesty the law will impute legal corruption, because there has been an entire disregard of the only conditions on which justice could be done.

But an arbiter, like any other judge, may refuse to allow a proof when he is satisfied that it is not necessary for the just decision of the case—as when, in his opinion, it relates to irrelevant matter—and he may do so without being chargeable with corruption, legal or moral. He is then acting within his proper function, and judging on the questions which have been referred to him. For of course all incidental questions which arise in the course of procedure are as much referred to his sole judgment as the final decision. We have thus to consider within which of these categories the present case falls.

The question referred to the arbiter was the price payable to the pursuers for certain quantities of crude paraffin oil which they had delivered to the defenders. It is necessary to see how it arose.

The oil was supplied under a contract dated in 1884. There is an elaborate formula given for fixing the price. Mr Moore, accountant in Glasgow, is charged with the duty of ascertaining "the average net naked price" received each year by the defenders for the products obtained by them from each gallon of crude oil. These products are crude paraffin scale, lubricating and burning oils, spirit, and any other products presently unknown. The pursuers are to receive for every gallon of crude oil a sum equal to one-half of that average price. It is stipulated that Mr Moore shall be bound to accept the books of the defenders as final and conclusive evidence of the varying prices received by the defenders during the year.

In each of the years 1886 and 1887 Mr Moore made a report, bringing out the average net naked price of the several products. It is not disputed that the figures on which they are based are accurate, nor is it said that there is any error in the resulting calculation.

The pursuers allege that the defenders did not sell the whole of the products obtained from the crude oil. They say that they retained for manufacture within their own works a large portion of the crude paraffin scale, and that portion of it which is the most valuable, and is in the record called hard scale. The consequence, according to their averment, was that the average price of scale was greatly too low, inasmuch as the average was struck on sales of a large quantity of soft scale and a small quantity of hard scale, or it may be on sales of nothing but soft scale. They therefore objected to Mr Moore's reports, and brought the matter before the arbiter.

When they were before the arbiter they alleged and offered to prove that the 96,725 gallons of crude scale referred to in the report of 1887 "consisted entirely, or almost entirely, of soft scale, and did not represent the total crude paraffin scale produced by the defenders," that the total quantity of crude scale produced from the crude oil was 430,767 gallons, and that the average price "realised therefor, or which would have been realised therefor, and could have been so realised if the defenders had sold the same in the market instead of refining it themselves, was upwards of 2d. per pound, in place of 1·2d. per pound realised for the 96,725 gallons," and that the 96,725 gallons consisted of the soft or inferior scale, and hence produced a lower price and a lower average. The pursuers contended (that is to say, to the arbiter), and now aver, that the "hard scale fell to be included in the average, the defenders being debited with the market price of such hard scale in respect of its being sold to or utilised by themselves." I have given the substance of the 15th article of the condescendence, which contains the averments on which the pursuers ask the Court to set aside the decree-arbitral on the ground that the arbiter acted corruptly. The 16th article of the condescendence relates to the report of 1886, and to a fraud by the defenders practised on Mr Moore. It has no reference to the arbiter.

I have now to consider what the question was which the arbiter was called on to decide, and that I think can be easily determined by reference to the conflicting views of the parties before him. The contention of the pursuers was that the hard scale, though not sold, was to be taken into

account in fixing the average price in respect of its being sold to or utilised by the defenders. The defenders maintained the negative of this proposition, or in other words, they founded on the provisions of the contract, and maintained that actual sales of the enumerated products were alone to be regarded. The pursuers have not suggested that this was not the question which the arbiter was asked to decide, and I cannot see that any other question was before him.

The pursuers say they moved for a proof. The arbiter did not allow it, and decided the case as it stood. He says in a note to an interlocutor which he issued before his final award—"The admissibility of taking into consideration the different qualities of the scale was decided by me in the negative in a previous stage of the reference between the parties;" and he adds—"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."

I cannot conceive how the arbiter can be charged with corruption, moral or legal. A question was put before him for his decision. If he decided it in favour of the pursuers a proof would have been allowed as a matter of course. If he decided it, as in fact he has done, in favour of the defenders, there was no need of a proof, for the accuracy of Mr Moore's report was not made matter of dispute. As I have already said, we are in no way concerned with the soundness of his judgment. We must sustain it, however wrong we may think it, for in pronouncing it he was in the due exercise of his function. The case, therefore, seems to me to fall plainly within the second category to which I referred at the beginning of my opinion. The arbiter held that the allegations of the pursuers were irrelevant, and in consequence did not remit them to probation. He pronounced that judgment on a question fairly raised by the parties before him, and I cannot see any ground on which it can be set aside as being a corrupt judgment.

It is said that he did not consider the question raised before him, because he says that it had already been decided by him in a previous stage of the reference. But all that the note says, or means to say, is that the arbiter had already given a judgment on what he considered to be the same question as that raised on the report of 1887, and that he meant to follow his former judgment. This, in my opinion, he was entitled to do, and even if he had refused a proof on the ground that it was excluded by a former judgment, I could not hold that he had exceeded his province or acted corruptly.

For these reasons, I do not think that a relevant case has been stated for reducing the decree-arbitral on the ground of the corruption of the arbiter.

I just wish to say, in closing this part of my opinion, that that has all along been the only ground upon which this decree-arbitral was directly challenged.

The second question is, whether Mr Moore's reports can be reduced on the head of fraud? If by reason of the fraud of the defenders they were false reports, the decree-arbitral would necessarily fall, as it is founded on them. I have therefore to examine the case which the pursuers have now stated with regard to these reports.

In considering this question I have first to determine the duty with which Mr Moore was charged under the contract. He was charged with the duty of ascertaining the average net naked price received by the defenders for the products obtained from each gallon of crude oil, on the condition that the books of the defenders should be conclusive evidence of the varying prices. His office was purely that of an accountant, and he was selected for it evidently because he belonged to that profession. If it be granted that the books of the defenders contain an accurate record of the sales of the products, and there is no averment or suggestion to the contrary, his report could be nothing else than a mere statement and calculation. It is not said that there was any error made by him in ascertaining the amount either of the products sold or of the price received for them. So far we may take the reports to be unchallenged and unchallengeable.

What the pursuers complain of is, that Mr Moore did not take into account the value of crude paraffin scale not sold, but retained and manufactured by the defenders. If he had so acted, he would, in my opinion, have gone beyond his province, and for this simple reason, that his duty was to ascertain the average of prices actually received by the defenders for certain specified products. If the crude scale was retained and not sold, there could be no price in the books of the defenders. If, again, it be said that it was sold after manufacture, the price of the manufactured article is not the price of any of the products, with which alone Mr Moore was concerned.

But whatever the duty of Mr Moore was, there is no uncertainty as to what he did. He stated the average price from the result of the actual sales, and, as I have already said, it is not averred that there is any error either in his statements or in his calculations.

The cause of the difference which has arisen is explained by the pursuers in the 6th article of the condescendence. They say that at the date of the agreement the defenders had no works for refining hard scale, and that it was intended that they should sell the whole paraffin scale, hard and soft alike. If this had been done, Mr Moore's report would have included the whole crude scale, because he was bound to take into account the whole sales of the products of the crude oil.

But a state of things arose which the pursuers say they did not contemplate. A large portion of the paraffin scale was retained by the defenders, and has been or will be sold not as crude scale, but as a manufactured article. A very grave question was thus presented. For it cannot be doubted, if the pursuer's allegations are

well founded, that the average price was reduced by the exclusion of the whole, or a large portion of what they represent to be the most valuable part of the crude scale. But it was not a question which Mr Moore could decide. He was charged only with the duty of an accountant. It was a question for the arbiter. Accordingly the pursuers appealed to him. They averred that a large quantity of the most valuable part of the crude scale was not sold as such, but was retained and sold as a manufactured article. They urged on him that the average price was unfairly lowered by the exclusion of the hard scale, and contended that it should be taken into account, though not actually sold, or sold only as a manufactured article. The arbiter held that by the contract "the principle must be followed of estimating the price according to the amount received from the various products during each year."

The pursuers say that the defenders practised a fraud on Mr Moore. They aver that the defenders fraudulently and falsely stated to him that the amount of crude scale actually appearing in the books as sold consisted in fair proportions of hard and soft scale. There is no other or further allegation of fraud.

I fail to see the relevancy of this averment. It is a fraud which led to no injurious result, and which caused no deception. Mr Moore has not thereby been induced to prepare false reports. On the contrary, his reports are admittedly accurate on the principle on which they are constructed, and the principle was fully known both to the parties and to the arbiter.

But it has been suggested that if Mr Moore had not believed the misrepresentation of the defenders, he would have prepared different reports, proceeding on the principle of taking into account the value of the unsold scale. If he had, he would, in my opinion, have exceeded his duty. But it is more to the purpose to observe that the arbiter has decided that the reports were prepared in the proper way. For he has decided that the value of the unsold scale was not to be taken into consideration in settling the average price, and he would have ordered Mr Moore to make his reports as they have been actually made.

If therefore the reports are true so far as they go, I cannot see on what ground they can be reduced as false, or as having been obtained by fraud. Nor in themselves are they of any significance in the question which is before us, unless they misled the arbiter. The pursuers do not say that any fraud was practised on the arbiter. He knew the principle on which the reports were prepared, and he approved of it. He knew that they brought out the average price on the result of actual sales, and excluded from consideration the hard scale which was not sold. He held that Mr Moore in thus framing his reports had settled the average price in conformity with the provisions of the contract. But he did not do so until the pursuers had brought under his notice their averment that the exclusion of the unsold scale unfairly lowered the average price. They failed in their contention, not because of any fraudulent misrepresentation which the defenders made to Mr Moore, but because the arbiter thought their contention was contrary to the terms of the contract, and that the reports had been framed in accordance with it.

On the whole, I am of opinion that the interlocutor of the Lord Ordinary should be affirmed.

LORD ADAM—I have had the opportunity of reading Lord Rutherfurd Clark's opinion, and I quite concur in it.

LORD LEE—I concur with Lord Shand and Lord Young in thinking that this action cannot be thrown out as irrelevant; and the authority upon which I hold that it may be sustained, and that the proceedings in the arbitration ought to be examined, is the case of *Miller* v. *Miller*. That is the leading authority for the proposition that although iniquity, in one sense of the term, is not a ground of reduction, there is a kind of iniquity, short of actual corruption or other moral delinquency, which must be sustained. The arbiter's failure to give both parties an equal opportunity of informing him of their claims and grounds of claim is a familiar example of this. And a refusal to allow evidence on a point essential to the decision of the question, and which plainly cannot be decided without evidence, is another. Lord Wood's opinion in *Miller's* case appears to me to sum up quite accurately the import of the decisions.

With regard to the case of *Adams*, it was decided on the ground that nothing was there alleged or proved beyond iniquity in the ordinary sense. If there was any argument that the facts shewed a kind of iniquity which the law holds equivalent to corruption, it is extraordinary and almost incredible that the case of *Miller* should not have been referred to. The report suggests that there cannot have been any argument on that point.

In the present case I think it demonstrated that the pursuers' objection to Mr Moore's report involved matter of fact which could not be decided without inquiry; and I further think that there are no sufficient grounds for holding that the arbiter decided to exclude inquiry upon any construction of the contract. His decision appears to have been rested upon what he had done in a previous stage of the reference when there were no similar allegations before him. His view that the price must be estimated "according to the amount received from the various products during each year" may be quite right. But the pursuers' allegations went to this—that owing to imperfect and misleading information furnished to Mr Moore by the Pumpherston Company, the amounts received from the various products during each year had not been ascertained, inasmuch as one of the most valuable products, very largely affecting the "average net naked price," had been altogether, or almost altogether, excluded from Mr Moore's view.

As to the allegation of fraud, I wish only to say that in my opinion no amendment of the record was necessary. Although the word was not on record at the date of the discussion in the Second Division, I think that the thing itself was there if the pursuers' allegations are true; for the statement of the pursuers was that Mr Moore was misled by unfair dealing on the part of the Pumpherston Oil Company and incorrect and imperfect information supplied by them.

LORD PRESIDENT—I am of opinion that the interlocutor of the Lord Ordinary ought to be adhered to. After the full expression of opinion given by several of your Lordships I should hardly have thought it necessary to say more than that I concur in the opinions of the Lord Justice-Clerk and of Lord Rutherfurd Clark, were it not for one circumstance to which I ought to allude.

This is a discussion avowedly on the relevancy of the pursuers' averments, and I cannot help thinking that some of my brethren have in their opinions a little forgotten that. It has been remarked, for example, that we have not the whole proceedings in the arbitration before us. But these proceedings were and are equally accessible to the pursuers and to the defenders. The pursuers have laid before us all those parts of these proceedings which they have thought it necessary to found upon. If they desired to set them forth more fully, that was a matter for their own consideration in making up their record. They have laid before us as much as they think useful and necessary for our consideration. That leads me to make the remark (in which indeed Lord Rutherfurd Clark has anticipated me) that when my brother Lord Young seeks to set aside as inadmissible the arbiter's interlocutor and note, which are quoted in article 14 of the condescendence, he forgets that the averments in article 14 are a necessary part of the pursuers' case. If article 14 had not been there I should have thought the pursuers' case even more irrelevant than I now think it. I am bound to accept the interlocutor and note there quoted as being, according to the pursuers' own showing, a step in the arbitration proceedings and constituting a deliverance disposing of the question before the arbiter. The interlocutor finds due a sum of £8350, 14s. 6d., and ordains the Holmes Company to make payment of that to the Pumpherston Company. That is quite according to the ordinary form in which an arbiter before executing a formal decree-arbitral, issues his findings as a proposed judgment in order that the parties if they desire it may be heard thereon. It is in the note appended to the interlocutor that we have the arbiter's views on the construction of the contract. Article 14 of the condescendence goes on to say, "Thereafter he" (the arbiter) "issued a decree-arbitral ordaining the pursuers to pay to the defenders said sums of £8350, 14s. 6d." The decree-arbitral, therefore, as well as the interlocutor, is based upon an opinion in law which the arbiter had formed as to the proper construction of the contract, and which he had indicated in his note. It is of this legal opinion on the construction of the contract that the pursuers complain, contending that it is so manifestly unsound as to amount to legal corruption. Without article 14 I think there would have been no averment of a ground for setting aside the arbiter's decree.

The Court adhered to the Lord Ordinary's interlocutor.

Counsel for the Reclaimers — Graham Murray—C. S. Dickson. Agents—Waddell & M'Intosh, W.S.

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

Tuesday, March 4.

FIRST DIVISION.

[Lord M'Laren, Ordinary.

STRAIN *v.* STRAIN.

(*Ante*, p. 239, and vol. xxiii. pp. 90, 739.)

Expenses—Decree in Name of Agent—Compensation.

In an action by a wife who had obtained decree of separation and aliment against her husband to enforce the decree for aliment by means of imprisonment, the Sheriff dismissed the action on the ground that the failure to pay was not wilful, and on appeal the Court held that the appeal was incompetent, and dismissed it with expenses. These expenses were not paid. Subsequently the husband brought an action of declarator against his wife for the purpose of having it found that the decree of separation should be recalled. This action was dismissed, and the wife found entitled to expenses. A motion was made for decree for these expenses in name of the agent disburser, which was resisted by the husband, on the ground that he was entitled to set the expenses in the appeal *pro tanto* against the expenses in which he had now been found liable. *Held* that the two actions were not so closely connected as to entitle him to do this, and motion *granted*.

On 2nd December 1885 the Court pronounced a decree of separation against Hugh Strain junior, coalmaster, Airdrie, in an action at the instance of his wife, awarding her £52 per annum of aliment.

Subsequently, proceeding under the Act 45 and 46 Vict. cap. 42, sec. 4, Mrs Strain raised an action in the Sheriff Court at Airdrie to enforce her decree by the apprehension and imprisonment of her husband. He had in the meantime been sequestrated, and on 18th June 1886 the Sheriff-Substitute found that he had not wilfully failed to pay the aliment, and accordingly dismissed the petition. Mrs Strain appealed, but the