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"the mouth of the Rossie Drain," amounting to £5; or with a charge in the account of Thomas Stewart, also produced in the said cause, for having been, as stated by him in his deposition made in the said cause, "employed with twelve workmen on the Eden, in bring-"ing up the level, as above mentioned, for about three "weeks" (three days out or in) "and that the wages he "paid to those workmen were 2s. 6d. per day each, he "being allowed 4s. per day," whatever such charge may be ascertained to amount to; but this finding is to be without prejudice to any right which any party or parties may be able to establish against the appellant in respect of such sums or charges in any other mode of proceeding: and find, that this excess in the decree-arbitral ought not to be taken to affect the validity of the decree arbitral, farther than to rectify the same with respect to the said excess as to the sums aforesaid; and it is ordered and adjudged, that the cause be remitted back to the Court of Session in Scotland, to vary the interlocutors complained of in the said appeal, so far as it shall appear necessary to vary the same in consequence of this finding; and it is ordered, that the same be, and the same are hereby, affirmed in all other respects.

For the Appellant, *Saml. Romilly, Geo. Cranstoun.*

For the Respondents, *John Jardine, A. Clephane.*

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[Dow, vol. v. p. 247.]

WILLIAM JOHNSTONE, Esq. of Lathrisk, *Appellant;*

JOHN CHEAPE, Esq. of Rosse; JAMES BALFOUR WEMYSS, Esq. of Winthank; JAMES HERIOT, Esq., W.S.; HENRY BUIST, Esq. of Lindores, Tenant in Orkie, and ANDREW THOMSON, Esq. of Kinloch. } *Respondents.*

House of Lords, 10th July 1817.

(Deepening the River Eden.)

DECREE-ARBITRAL—PROROGATION—ULTRA VIRES COMPROMISSI—CORRUPTION, FALSEHOOD AND BRIBERY.—In the reduction of a decree-arbitral. Held (1), that the decree was not inept from defect in the prorogation of the submission. (2). That the arbiter had exceeded his powers, in deciding matters not

within the submission, but that the decree was only impeachable, to the effect of rectifying the excess, and did not vitiate the decree-arbitral *in toto*. (3). That it was not a valid objection to the arbiter, that he had himself an interest in the matter.

The appellant's lands of Lathrisk are situated on the south side of the River Eden, in the County of Fife. The eastern boundary of these lands is a small brook called Browling Burn, which meets the Eden a little above the Kettle Bridge. On the north side a drain falls into the river, called the Rossie Drain, which was cut by Mr Cheape of Rossie, one of the respondents, for the purpose of draining a large sheet of water, called Rossie Loch, on his estate, on that side. The appellant has some property on the same side with the drain.

The appellant stated, that at a time when he had just quitted the army, and was unacquainted with the real affairs and interests of his estate, Mr Cheape had induced him and some other proprietors, to enter into a contract of submission, by which they empowered Andrew Thomson, Esq. of Kinloch, to get the Kettle Bridge removed, and a new one erected to the westward of that bridge, and the channel of the river Eden deepened and widened from the point where the said bridge stands, up to the point where Rossie Drain falls into the Eden. The appellant farther states, that Mr Cheape had represented that this deepening of the Eden would improve their lands on the one hand, and enable him more effectually to carry off the whole water from Rossie Loch, on his estate, through means of the Rossie drain, on the other.

The parties named Mr Thomson arbiter, to fix the proportion of expense, according "to the benefit which the lands "belonging to or possessed by each of us, will derive there-"from."

The operations were gone into; the arbiter fixed the proportion of expense falling on each; and pronounced his decree-arbitral.

The appellant stated that, having afterwards discovered that the operation of deepening the channel of the Eden, was of no benefit, at least of scarce any use to his estate, he declined to obtemper this decree-arbitral, and brought a suspension, and also an action of reduction to set aside the decree-arbitral, on the following grounds:—1st, That the decree-arbitral was null and void, and not binding on the pursuer, in respect, the term of the submission, in so far as he was concerned, had expired before it was pronounced.

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The submission was subscribed by him on the 11th March 1811; but the decreet-arbitral was not pronounced till the 11th day 1813. And, although it appears that the arbiter had subscribed two several minutes of prorogation, the first dated the 8th day of November 1811, and the other dated the 2d day of November 1812, yet these could be of no effect whatever, because the said decreet-arbitral proceeds upon a pretended submission amongst five parties, and these prorogations cannot apply to that submission, because at the date of the last of them, the submission had not been subscribed by two of these five gentlemen. 2d, The said decree-arbitral was *ultra vires compromissi*, in respect the arbiter thereby "decerns and ordains the said parties, or "such of them as have lands in property or possession opposite "to the said river, and their heirs and successors, to keep the "river and the banks thereof, now that the said improvements "are completed opposite to the lands belonging to or pos-"sessed by each of them within the above-mentioned points, "in good and sufficient condition and repair, in all time "coming, so that none of the lands belonging to, or possessed "by any of the parties in the submission, shall be injured by "neglecting such repairs otherwise; the arbiter decerns "and ordains the person or persons failing so to do, not only "to perform these stipulations, but also to pay whatever "damage may be sustained by any of the other parties in "consequence of such neglect, as the same may be ascertained, "by fit neutral men." And, because the matters thus determined by the arbiter, were not submitted to his decision, but were disposed of by an agreement or obligation amongst the parties themselves, which is recited in the said submission, and which is materially different in its import from the above quoted decerniture. 3d, That the said Andrew Thomson, in pronouncing the foresaid decree-arbitral, decided a matter in which he himself had a considerable interest. 4th, That there were strong reasons to believe, that in pronouncing this decree, the arbiter was influenced by corrupt motives, arising from the transactions or understanding between him and the said John Cheape, relative to the arbiter's own drain. 5th, That the decree-arbitral was grossly iniquitous, and that the arbiter acted with partiality. That he had refused to give him notes of his intended award. That he had refused to receive evidence that the appellant's lands derived little advantage from the operations, so as to show that the proportion of expense falling to him ought to be very small. Nor was

he allowed to examine the accounts and vouchers as to these operations.

The defences stated to this action were, 1st, That power having been given to the arbiter to prorogate the submission, from time to time, and as such prorogations were of course consented to by the pursuer's signature to the deed, it was *jus tertii* on his part, to state this as a reason of reduction.

2d, The pursuer (appellant) had the least reason of any of the parties to find fault with the clause here cited, which is inserted in the decreet-arbitral, as his lands and marl, being situated highest up, he derives the whole benefit of the measure, with a very trifling burden, and it is by no means clear that the powers given to the arbiter were not sufficiently ample for this purpose. If the Court shall be of opinion that they are not, then it is conceived that, although they may hold this clause *pro non scripto*, it does by no means follow that the decreet-arbitral should be reduced as to the other parts of the decerniture.

3d, The third reason of reduction above quoted, was well known to the pursuer, previous to his signing the submission.

4th, The well known character of the arbiter, is a sufficient answer to this action of reduction. In as far as regards John Cheape, he pointedly denies any such transaction or understanding as that alluded to by the pursuer.

5th, There is not the slightest reason for maintaining that the arbiter acted with partiality. He did not rely on his own judgment, he took the assistance and opinion, on all the operations, of men of skill; and he believed that the benefits to the appellant, in working an immense body of marl, yielding him £600 per annum, would not have been disputed. Besides, the arbiter heard all the facts condescended on by the appellant, although he did not think them of such a nature as to induce him to alter his judgment.

In apportioning the expense, it appeared that the arbiter found the total expense to be £759. Of this he apportioned £534 on the appellant; on Mr Cheape, £146; on Mr Wemyss, £43; on Mr Buist, £22, and on Mr Heriot, £13.

The appellant had contended that his lands, being further up the river, and there being a fall from these lands to the river of 300 feet, any operation below the mouth of the Rossie Drain, was perfectly useless to his lands, and, therefore, that not more than one-twelfth part of the expense ought to have been imposed on him.

The Lord Ordinary (Gillies) pronounced this interlocutor:

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—"Repels the reasons of reduction, sustains the defences, "assoilzies the defenders, and decerns." On reclaiming petition, the Court adhered.

Against these interlocutors the present appeal was brought to the House of Lords.

Pleaded for the Appellant.—1st, The decree-arbitral is void, because the term of the submission had expired before it was pronounced. To perceive the force of this reason, it will be observed, that by the law of Scotland, "where the "day within which the arbiters are to decide, is left blank "in the submission, their powers of deciding, has been by "practice limited to a year." Erskine B. iv. T. 3, § 29. According to the same author, "this hath proceeded from the "words of the style, by which the arbiters are empowered to "determine against the day of next to come; "which clause, in what way soever the blanks shall be filled "up, cannot possibly reach beyond the year." In the present case, the day within which the arbiter is to decide, was left blank, but power was given him to prorogate or extend the period, if he saw cause, by an order to that effect. The clause in the submission is in these words:—"And whatever "the said arbiter shall decide and determine by decreet-"arbitral, to be pronounced by him betwixt the day "of , or between any further day to which this sub-"mission may be prorogated, and which he is hereby em-"powered to do at pleasure." If the arbiter, therefore, did not make an effectual order of prorogation within the year, the submission fell, and he had no power to pronounce an award afterwards. The submission was subscribed by the appellant, upon the 11th of March 1811, but the decree-arbitral was not pronounced till the 11th day of May 1813. It is true, the arbiter made two orders prorogating the submission, one upon the 8th November 1811, and the other upon the 2d November 1812; but these orders were ineffectual, because the submission bears to have been entered into by the five parties, namely, the appellant and the respondents, John Cheape, John Balfour Wemyss, James Heriot, and Henry Buist. But two of these parties, namely, James Heriot and John Balfour Wemyss, did not subscribe till a period subsequent to the date of the last order of prorogation. Till all the parties had subscribed, the arbiter had no power to make any order, and, therefore, these inept proceedings could not prolong the submission for more than a year.

2d. The award was *ultra vires* of the arbiter. He ordains the parties "to keep the river and the banks thereof in good "and sufficient repair." The parties agreed, by a contract among themselves, to keep the banks in repair by the submission, but they did not empower the arbiter to pronounce any decree to that effect; the award is, therefore, beyond the limits of the submission. Even if this order had been equitable, it would not have been obligatory, but it is most iniquitous. By the submission, the parties bind themselves "to "keep the said river and banks thereof, after the improve-"ments are completed, opposite to the lands belonging to, or "possessed by each, between the above mentioned points, "*and which are to be thereby benefited*, in a good and suffi-"cient condition and repair, in all time thereafter." But the arbiter omits altogether, in his award, the words, "and which "are to be thereby benefited," which forms one of the important conditions of the agreement.

The appellant's lands are opposite more than three-fourths of that part of the channel of the river which has been deepened, but the greatest part of these lands have derived no benefit whatever from the operation. According to the arbiter's award, however, the appellant must pay three-fourths of the expense of keeping the work in repair, when at least eleven-twelfths of the benefit is reaped by others.

3d. The appellant averred and offered to prove, both before the arbiter, and in the Court of Session, that if the expense of executing the work had been apportioned among the parties in the ratio of the benefit derived from it, he could not have been subjected in more than one-twelfth of the whole sum, or about £63, 5s. But the arbiter has found him liable in £534, which is considerably more than two-thirds of the whole sum. Both the arbiter and the Court refused to allow any proof upon the subject, though relevant to set aside the award.

4th. There was produced written evidence under the arbiter's own hand, that he had burdened the appellant with a much greater sum than that which, he was conscious, corresponded with the benefit which the appellant had received. It has been mentioned that the only part of the appellant's estate materially profited by the operation, is Easter Lathrisk. This is proved by a letter from the arbiter himself.

5th. The arbiter had an interest in the question, and therefore acted as a judge in his own cause, which is of itself sufficient to vitiate his award. He has a property called

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Broadmire, containing a bed of marl, the surface of which is drained by a drain conducted through part of Mr Cheape's property, and falling into Rossie Drain. The arbiter had other lands, called Monkmoss, which may also be drained by a cut to the Eden.

Pleaded for the Respondents.—1st. It is incompetent to bring the awards, or decrees-arbitral, under the review of the Court of Session by the Act 1695, except on the ground of corruption, bribery, or falsehood, in the arbiter. Here, from the known character of Mr Thomson, the arbiter, such accusations are not for a moment to be listened to, far less are they made out from any one single slip in the whole proceedings. In regard to the expiry of the submission, the appellant's argument proceeds on the assumption, that the submission was limited to one year, though with a power to the arbiter to prorogate. It is true, where the submission mentions no time within which the award must be given, it has been laid down as a rule, that the parties mean that it should be pronounced within twelve months. The common way in Scotland is, to say that the award shall be pronounced between the of next to come, which necessarily limits the time to the next twelve months; but, in the present case, the words, *next to come*, are omitted, and must have been purposely omitted, from the nature of the case. The operations were to begin immediately, but it was impossible to say precisely, when they would be finished, and consequently, when the arbiter could apportion the expense. The parties, then, could not intend a limitation which would throw every thing loose, and occasion a confusion inextricable, in case the arbiter neglected to prorogate, and the work was not completed within the year. Besides, it has been settled by decisions of the Court, that where the submission bears different dates, the twelve months shall be reckoned from the last date. And, therefore, the award, in this case, was, in any view, regular in that respect.

2d. That part of the decree-arbitral, which is said to be *ultra vires* of the arbiter, is merely copied from the obligation, where the parties expressly bound themselves to keep the works in repair, after they should have been completed. This part of the decree-arbitral may be superfluous and unnecessary, but surely it can afford no ground of reduction of the decreet-arbitral itself. A decreet-arbitral, containing a finding *ultra vires* may, nevertheless, be sustained, in so far as it is *intra fines compromissi*. Even, therefore, supposing the

Montgomery *v.* Strang, Lennox and Co., June 13, 1798. M. p. 631. Kid *v.* Patterson, June 19, 1810. Fac. Coll., vol. xv., p. 705.

decerniture of the arbiter as to keeping the works in repair to be *ultra vires*, this affords no ground for setting aside the other parts of the decreet-arbitral, which are confessedly comprehended under the submission.

3d. It is stated, that the arbiter decided a matter on which he himself had a considerable interest, and decided it in his own favour, inasmuch as a considerable time ago, the arbiter cut a drain running from his lands of Kinloch, passing through the property of the respondent, Mr Cheape, and falling into a great drain made by the latter, which empties itself into the Eden, and that in this way the arbiter derives considerable benefit by the operations on the Eden. But this, supposing it to be made out, cannot affect the award. All the parties had previously agreed about the operations in the Eden. The only thing, therefore, referred to the arbiter, was the proportion of expense each was to bear, and that was to be done according to the benefit each might derive. Mr Thomson had made no alteration on his drain since the operations on the Eden were begun, nor had he any occasion to do so, because, before this, he had a sufficient level, from the tail of the drain being considerably higher than the old bed of the Eden, at the point where the Rossie drain joins it.

4th. The arbiter, it has been also alleged, had shown partiality, because he had declined to show the notes of his opinion, and his evidence was refused. But, in these allegations, the arbiter had not shown gross partiality. He has shown even no discourtesy, far less partiality. Having satisfied his conscience, was the arbiter to admit evidence, which he was convinced could have no influence upon him? That he was not bound to do so, is a question that has been decided in the case of Kirkaldy.

Kirkaldy *v.* Dalgairns, June 16, 1809. Fac. Coll., vol. xv., p. 318.

After hearing counsel,

THE LORD CHANCELLOR said—(*Vide* Dow for speech).

The Lords spiritual and temporal, in Parliament assembled, find, That the arbiter, in so far as he "Decerned and "ordained the said parties, or such of them as have "lands, in property or possession, opposite to the said "river, and their heirs and successors, to keep the river "and the banks thereof, now that the said improvements "are completed, opposite to the lands belonging to, and "possessed by each of them within the above mentioned "points, in good and sufficient repair in all time coming,

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"so that none of the lands belonging to, or possessed by, "any of the parties in the submission, shall be injured "by neglecting such repairs, and decerns and ordains "the person or persons failing so to do, not only to per- "form these stipulations, but also to pay whatever "damage may be sustained by any of the other parties, "in consequence of such neglect, as the same may be "ascertained by fit neutral men," had no authority so to decern and ordain; but that this ought to be held *pro non scripto*, and to be considered as an excess not vitiating the other parts of the decreet-arbitral. And it is further ordered, that with this finding, it is ordered and adjudged, that the cause be remitted back to the Court of Session, to vary the said interlocutors, so far as this finding may require the same to be varied. And it is ordered and adjudged that the said interlocutors, in all other respects be, and the same are hereby affirmed.

For the Appellant, *Sir Saml. Romilly, Geo. Cranstoun.*

For the Respondents, *John Jardine, And. Clephane.*

NOTE.—Unreported in the Court of Session.

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THE DUKE OF BUCCLEUGH v. MONTGOMERY, &c.

HIS GRACE THE DUKE OF BUCCLEUGH AND QUEENSBERRY, ... *Appellant;*

SIR JAMES MONTGOMERY of Stanhope, Bart., THOMAS COUTTS, Esq., Banker, London, WILLIAM MURRAY, Esq. of Henderland, and Others, Executors and Trust Disponees of the late Wm. Duke of Queensberry, ... } *Respondents.*

House of Lords, 10th July 1817.

This case was remitted for re-consideration, and is fully reported under the second appeal, together with all the other appeals in the Queensberry and Neidpath entails, in 1819.

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THE DUKE OF BUCCLEUGH v. HYSLOP.

DUKE OF BUCCLEUGH AND QUEENSBERRY, *Appellant;*

JOHN HYSLOP, Tenant in Halscar, . . *Respondent.*