REPORTS OF CASES

ARGUED AND DETERMINED

IN

The House of Lords.

ALEXANDER DREW, . . APPELLANT.

PETER DREW AND THOMAS LEBURN } . . RESPONDENTS.(*a*)

1855. 5*th*, 6*th*, *and* 8*th March.*

Arbitration: Stopping the Proceedings.—Circumstances under which it was held that an action brought to stop the proceedings on an Arbitration could not be sustained, the objections to the conduct of the Arbiter having been waived in course of the proceedings before him.

Method provided in England for stopping an Arbitration.

Method provided for the same purpose in Scotland. *Fraser* v. *Gordon* (*b*) commented upon.

Remarks by the Lords on the duties of an Arbiter.

An Arbiter greatly errs if he in any the minutest particular takes upon himself to listen to evidence behind the back of any of the parties to the Submission.

CERTAIN disputes having arisen between Alexander and Peter Drew, they submitted them to the arbitration of the Respondent Leburn, who, before pronouncing any Decree, issued certain "Notes" of his opinion.

Alexander Drew, conceiving that Leburn had rendered himself incompetent by partiality and corruption to proceed further with the Submission, commenced an action before the Court of Session to have it

(*a*) Reported, Sec. Ser., vol. xiv., p. 564. (*b*) 5 July 1834.

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declared, that Leburn was "legally disqualified from acting as arbiter," and praying that he might be "interdicted, prohibited, and discharged," from doing so. The Court of Session held that the action could not be supported.

The circumstances of the case, and the ground which governed its determination, are fully explained by the Lord Chancellor (*a*) in moving for judgment.

Sir *Fitzroy Kelly* and Mr. *Hodgson* were heard for the Appellant.

Mr. *Roundell Palmer* and Mr. *Anderson*, for the Respondent *Peter Drew*; and Mr. *Rolt* and Mr. *Mundell*, for the Respondent *Leburn*.

Lord Chancellor's opinion.

The LORD CHANCELLOR:

My Lords, this is a case in which a gentleman of the name of William Drew died some years ago, leaving several children; two of them, Alexander Drew, the Appellant at your Lordships' bar, and Peter Drew, one of the Respondents, had some disputes as to rights of property under the father's will. In order to avoid litigation, Alexander Drew and Peter Drew agreed to submit those disputes to the decision of Mr. Leburn, who was a gentleman skilled in the law, and a person of respectability. An instrument was drawn up giving to that Submission all the effect of a Submission according to the law of Scotland. Now, according to that law, as it has been stated at the bar on both sides, a decree by an arbitrator is of a somewhat more formal and more effectual character than an award upon a Submission in this country, because it is a document upon which diligence may immediately issue. However, the principles upon which the arbitrator is to proceed must be the same both in that country and in this. The arbitrator is

(*a*) Lord Cranworth.

bound to proceed fairly and honestly, and to conduct himself without bias or partiality towards either side; and he subjects himself to the gravest censure if he acts otherwise.

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The date of the Submission being in June 1848, the arbitration proceeded through that year and the following year 1849, and it was broken off in the month of January 1850 by the present Action of Declarator instituted by Alexander Drew, in which he alleges that the Court ought to stop any further proceedings under the arbitration, by reason either of corruption or of misconduct on the part of the arbitrator, Mr. Leburn.

The case came before the Lord Ordinary, and from him upon a reclaiming note to the Lords of Session, who were unanimously of opinion that there was no ground for their so interfering.

Against that decision Alexander Drew has appealed to your Lordships' House, contending that there were competent grounds for putting a stop to the pending arbitration.

Upon the question of putting a stop to a pending arbitration, the law of England and the law of Scotland materially differ. As the law of England stood before the recent alterations, commencing, I think, with the statute (*a*) introduced by my noble and learned friend (*b*), when he held the Great Seal, followed by several subsequent statutes amending and extending the provisions then made, if parties submitted a matter for arbitration to a private tribunal to be decided by a selected person, either of them might at any time, without assigning any ground, revoke that Submission. That

(*a*) 3 & 4 Will. 4. c. 42. enacting, that a Submission shall not be revocable by any party without leave of a Court or Judge.

(*b*) Lord Brougham.

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was an inconvenient, and, I think I may be allowed to say, an irrational state of the law. If parties choose to select their own judge, they ought to be bound to submit to his decision, and not to let it proceed to a certain point, and then, if they can extract from any expression of opinion, or any look of the arbitrator, that he was hostile to them, revoke the submission. I say that was an absurd state of the law, which has since been rectified, and now the law may be represented as being that neither party to a submission can stop an arbitration pending its proceedings without first obtaining the sanction of some Court of Westminster Hall, or of one of the Judges, for so doing. It was, however, very reasonable that there should be still reserved the power of stopping it upon reference to a Court or Judge, if circumstances made it improper that it should proceed; because the proceeding before a Court or Judge for that purpose would be by a very short and summary proceeding. For instance, the party to the arbitration might say, "Things are in such a state that if the reference goes on, the only result will be that more expense will be incurred and the award must inevitably be set aside. I will not take any further part in it. I have found out that the arbitrator is corrupt, he has done something which he has no right to do; when the award is made, it will be a nullity; and therefore it is better to have the proceeding stopped *in limine*." The Legislature has, therefore, still reserved a power enabling a party to a reference to apply in a summary manner to a Court or to a Judge, in order that he may, with the assent of that Court or Judge, put an end to the litigation. That, in the Courts in England, is a very short and summary proceeding. The person applying states upon affidavit the ground upon which he says the reference ought not to proceed. If that statement upon affidavit

be answered, then the Court does not interfere, but says, "Let it go on till the award is made." If it is not answered or is not satisfactorily answered by affidavit, the Court may interfere, and suffer the party to stop the arbitration.

Now the law of Scotland is different; when a party has regularly submitted to arbitration, he cannot revoke the submission. It must go on; and there are no summary means of interfering analogous to the proceeding by application to a Court or a Judge in this country; there is no similar mode of finding fault with the arbitration by affidavit: and this is one of those cases in which I venture to think, the law of England affords greater facility and convenience than the law of Scotland; but there being no summary method of stopping a pending arbitration in Scotland, still the Courts have said, (at least it is supposed that the Courts have said,) You may even, pending a proceeding, come with an Action before the Court, and show, in the same way as you may in England upon your affidavit, that there has been corruption or something equivalent to it. And the Courts have said, at least in one case (*a*), it may be competent upon alleging corruption, for instance, or something which will render the award necessarily bad, to come before the Court of Session and have a declaration and interdict to stop any further proceedings under that submission.

That, my Lords, has been so decided in the case which has been referred to of *Fraser* v. *Wright*, or it seems to have been so decided; but it is not necessary for your Lordships to give any opinion upon the question whether that was a correct or an incorrect decision. All I should wish to say upon that

(*a*) *Fraser* v. *Wright*, 5th July 1834.

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decision is, that I trust, so far as I am concerned, I may not be supposed by anything I now say to be either assenting to or dissenting from that decision. I wish to leave it perfectly open. There may be cases in which a proceeding similar to that which is now before your Lordships may be sustained; but I will, just in passing, remark, that I think many of the difficulties which I should have felt if we had sustained the Appellant's case here, would apply equally to the case of *Fraser* v. *Wright.* If corruption could be proved, or if there could be any short way of seeing whether there was a *primâ facie* case of corruption or not, then I think there might be very good ground for interfering to stop the proceedings; but inasmuch as it is just as easy to allege corruption if it is falsely alleged as it is to allege anything else, I think I see some difficulty in the way of the decision of *Fraser* v. *Wright.* That, however, is not this case; because the grounds upon which Alexander Drew seeks to stop the proceedings here are not that there has been anything properly called corruption on the part of Mr. Leburn—the whole of the evidence shows that there has not—but he has placed his case upon these grounds: First, he says that Mr. Leburn has an interest in sustaining the views of Peter Drew against Alexander Drew, which were not fully understood by him when he consented to the submission; secondly, that he has proceeded in a mode which, if not strictly partaking of corruption, involves yet an irregularity of so grave a nature, that if we were now proceeding to set aside the award, it would be beset with the same difficulties, and it must be treated as corruption under the statute (*a*), namely, examining witnesses behind the backs of parties who were interested in seeing

(*a*) The Scotch Act of 1695.

that they were properly examined, and in seeing that the truth was properly brought out; thirdly, that Peter Drew, one of the parties, was examined, not upon oath, but upon his solemn declaration.

Lord Chancellor's opinion.

My Lords, upon the first ground, that Mr. Leburn, the arbitrator, was interested in sustaining the case of Peter Drew, one of the parties, against Alexander Drew, we intimated, after the Appellant had closed his case, that we did not call upon the Respondents to give any answer to that allegation, because it appeared to all of us that there was not the slightest ground for any such suggestion. The interest alleged, the existence of which, even supposing it was not known—though it does not appear to be at all clear that it was not known to everybody from the beginning; indeed, the circumstances seem to show that it must have been known—but, whether known or not, the interest is next to nothing. It was, as I observed in the course of the proceedings, an interest existing in the same way as in the case of an old writ of *quo minus* in the Exchequer; because, as it is said, Mr. Peter Drew has certain trust monies in his hands, of which Mr. Leburn, the arbitrator, is one of the trustees, and Mr. Peter Drew, if this award goes against him, will be less solvent or more insolvent than if it goes in his favour. If it goes in his favour, it will be more likely that he will be able to pay Mr. Leburn, the arbitrator, his debt, than if it goes against him. My Lords, I do not hesitate to say, that that is a sort of interest, if you call it interest, with which it is quite impossible for your Lordships to deal. If parties choose to appoint a person arbitrator without making inquiry into those minute circumstances, they must abide by the result. It is not suggested that there was any fraud in concealing from the parties any existence of interest. The interest, therefore,

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seems to be a question entirely out of the case; indeed, it was not the point mainly relied upon.

The point mainly relied upon was the second, namely, that Mr. Leburn, the arbitrator, had, upon several occasions (one is as good as a hundred), privately examined witnesses behind the back of Mr. Alexander Drew, one of the litigant parties. Now the answer that is given is this: Why, it is perfectly true they were examined behind the back of Mr. Alexander Drew, and so they were behind the back of Mr. Peter Drew; and the reason they were examined was that Alexander Drew desired it to be done. However, I quite admit the force of what was said by Sir *Fitzroy Kelly*, that we cannot look at that as a question to be inquired into. If, therefore, the examination of these parties behind the back of Mr. Alexander Drew was, upon the whole of the proceedings that are before us, legitimately shown to be a circumstance that would render this award void, then I think the Appellant would have made considerable progress in his case; because I wish to be understood as not in the slightest degree questioning or insinuating a doubt against the authorities which have been referred to, laying down that an arbitrator misconceives his duty if he in any the minutest respect takes upon himself to listen to evidence behind the back of a party who is interested in controverting or is entitled to controvert it. Several cases have been referred to, but if there had been none, I agree with Lord *Eldon* that the principles of universal justice require that the person who is to be prejudiced by the evidence ought to be present to hear it taken, to suggest cross-examination or himself to cross-examine, and to be able to find evidence, if he can, that shall meet and answer it; in short, to deal with it as in the ordinary course of legal proceedings. But I, for the moment, suppose that there is no such answer; indeed,

I am bound to do so. We are now dealing with the questions of relevancy and competency; we are now to consider that the allegation is this, that he proceeded to hold certain private examinations and communications on the subject thereof behind the back of Alexander Drew. Is that a ground upon which the award could be set aside or would be set aside, so that your Lordships ought to reverse the decision of the Court of Session, refusing to stop the proceedings under the arbitration?

My Lords, agreeing as I do most fully in the doctrine of all these cases, that the arbitrator entirely misconceives his duty in so examining witnesses, nevertheless, if from any reason whatsoever (and here the reason suggested is the consent of the parties) the arbitrator has examined a witness behind the back of the parties, and afterwards tells the parties, "I have examined So-and-so behind your back; do you wish that I should re-examine them?" and they say, "No, we do not, we desire you to proceed nevertheless;" then that is an error that may be waived. It is not enough that he should tell them, "I have examined A.B. behind your back, now come and let me examine them in your presence." I think, in that case, the party might very fairly say, "You have examined them behind my back, therefore I beg leave to say that I shall double up my papers and walk away." In this country we should say, "I will proceed now to a Judge to have this arbitration stopped, because I cannot tell what impression the witness may have made upon your mind behind my back; and I will not attempt to remove that impression afterwards by having him examined in my presence. I will not submit to the decision of a judge who has so far forgotten his duty as to listen to anything to my prejudice behind my back, which I have not had an opportunity of contradicting." But

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if, being aware that the examination has taken place behind his back, being apprised of it, and being asked, "Do you wish to have him examined in your presence?" he says, "No, I do not—proceed with the arbitration," it is evident that that is a waiver of the objection. Therefore the only question is this, whether upon those proceedings legitimately before us it does appear that Mr. Alexander Drew, knowing of the examination of these parties behind his back, nevertheless did wish the proceedings, in spite of all that, to go on.

Now, my Lords, upon that matter I desire to call your Lordships' attention to what I find in the printed case. This arbitrator, as I think the Judges below truly say, acted with more candour than perhaps was necessary, because from time to time, at each meeting, he made notes of everything that passed, and a sort of summary of what had gone before. I do not know the date when these parties were examined; but some time previous to the 12th of July 1849, it appears that Mr. Leburn, the arbitrator, did examine three witnesses behind the backs of both parties, and therefore behind the back of Mr. Alexander Drew, as Mr. Leburn says, because Mr. Alexander Drew desired it. I will suppose that not to be legitimately before us; however, this is certainly before us, because this is put in by Mr. Alexander Drew himself, that at the meeting of the 12th of July 1849, the arbitrator having met with the parties and their agents at Glasgow on the 2nd instant, and having heard them fully in support of their respective claims, examined Mr. William Drew, Miss Drew, and Donald Ferguson upon a certain point. Well, Alexander Drew being informed that he had examined those parties, must of course know that it was behind his back, because he complains that he was not there. Then what takes place? Why

at that same meeting, I think, but if not then at a subsequent meeting on the 8th of October, I find this requisition of the arbitrator: "And farther appoints Mr. Alexander Drew to state whether he wishes Miss Drew, Mr. William Drew, and Donald Ferguson to undergo a more formal examination by him before the arbiter, in regard to the alleged arrangement as to the rents." That was the point upon which they had been examined. He asks him if he wishes it, and I must infer he does not, because they never are examined, and it is not suggested that he expressed any wish that was refused. No less than ten meetings take place afterwards, and yet Alexander Drew makes no objection at all, and never asks the arbitrator to do what the arbitrator offered to do, namely, to have them examined in his presence, but lets the arbitration proceed.

Now a similar remark applies to the other point, namely, the objection made to the examination of Peter Drew upon "solemn declaration." It is said by the note issued by the arbitrator on the 12th of July 1849, that "The arbitrator having heard the parties and their agents on this claim, and having *in their presence* taken the solemn declaration of Mr. P. Drew on the subject, is of opinion that this claim cannot be sustained." We are told that that is not an uncommon way of taking evidence in Scotland; but at any rate the thing having been done in the party's own presence, to say that he shall be allowed to object to it, after having allowed the proceedings to go on for months subsequently, no less than ten meetings having taken place, is perfectly preposterous, and out of all reason.

It therefore appears to me to be quite clear that nothing is stated here upon either of the grounds suggested; first, that the arbitrator has examined

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witnesses behind the back of the parties, or as to taking the examination of Peter Drew, one of the parties, upon solemn declaration, that would entitle the Court to stop the arbitration from proceeding.

Lord Chancellor's opinion.

I cannot but observe the great force of what was pressed upon us by the Counsel for Mr. Peter Drew, that the consequence of such an interference as this must be most mischievous to the parties. We are now in the year 1855. This arbitration was going on, and apparently coming close to a termination at the end of 1849, or in January 1850, and this proceeding is instituted, the result of which is only to see whether there are grounds for preventing the arbitrator from making his award. If the arbitrator had been allowed to proceed to make his award, all that would have been over, and if further litigation was necessary, the consequences of that would have been a litigation of a final character; but this sort of suit is absolutely in its nature interminable, for the moment it has been decided, if it should be decided that none of these grounds upon the issue being directed are made out, and that the arbitrator is to go on, what is to prevent the parties the next day from instituting another suit, there being no mode of testing the truth except by a course of proceeding similar to the present?

I am very happy to think that we entirely concur with the Court of Session in the decision to which they have come, and I trust this will be a precedent to prevent similar proceedings for the future.

Lord Brougham's opinion.

The Lord BROUGHAM:

My Lords, I entirely agree with my noble and learned friend in the view which he has taken of this case. I entirely agree with him also in desiring to exclude the inference, that we either give any opinion in favour of the case of *Fraser* v. *Wright* or against

Lord Brougham's opinion.

it. We leave that decision entirely untouched, as not at all necessary to be approved of or disapproved of at this time. I do not, however, contend that there may not be cases in which it would be justifiable in the Court to stop what is called a "going Submission," and to interfere upon an application, unfortunately not as our more convenient course sanctions, by a summary application, but by an Action of Declarator and interdict, as in the present case. I do not take upon myself to say, that I may not imagine cases which would justify the Court, in respect of the incurable nature of a flaw in the proceedings suggested by such a suit, sanctioning the suit and stopping a going Submission; such cases may arise. I can imagine one very easily of gross corruption on the part of the arbitrator. If one party chooses to insist upon going on, and the other party says, "What is the use of going on now, when the result can only be that the award or decree of the arbitrator must from its nature be set aside?" I can well imagine that the Court of Session would be justified in sustaining the reasons of a declaration and interdict, and stopping a going Submission. But nothing of the sort occurs in the present case.

Interlocutors affirmed, and Appeal dismissed with Costs.