

Circumstances in which *held* than an arbiter had power to deal with a question of extra work, and to pronounce a finding that a claim for unfinished work was counterbalanced by a claim for extras.

In 1858 the defender Connel was in course of building a house in Glasgow, and agreed to sell it to the pursuer at the price of £1250, conform to minute of agreement and sale. This minute provided that Connell should paint and paper the house to the satisfaction of Mr Bell, architect, who was named arbiter, and should finish the whole work according to plan, schedules of work, and list of additional work appended, any difference between the parties being referred to Mr Bell. Certain differences arose as to extra and also as to unfinished work, and the parties had recourse to the arbiter, who, after various procedure, found that Fraser's claim for unfinished work was counterbalanced by Connel's claim for extras, and on the whole matter held Fraser liable in payment of a balance of £80. Fraser now sought to reduce the award, on the ground that it was *ultra vires* of the arbiter to pronounce his finding of compensation, no claim for extra work having been referred to him. The Lord Ordinary (ORMIDALE) reduced the award.

The defenders reclaimed.

GORDON and SCOTT for reclaimers.

SHAND for respondent.

The Court unanimously reversed and assolized the defenders, holding that the extra work clearly fell within the submission, and was therefore competently included in the award; and that, if the parties had thought it did not, they should have so represented to the arbiter. They had not done so, although the arbiter had issued notes, in which he distinctly set forth that he proposed to put the one claim against the other, neither party interfered to remonstrate. The whole parties evidently proceeded on the footing that this matter was before the arbiter, and the decree-arbital, pronounced seven weeks after the note was issued, rightly disposed of the whole matter. One of their Lordships was inclined to hold that, even if the parties had proposed to withdraw from consideration of the arbiter the matter of extra and unfinished work, he might justly have refused to allow that, and have gone on to dispose of the matter, so as to prevent more litigation between the parties.

Agents for Pursuer—J. & R. D. Ross, W.S.

Agents for Defenders—D. Crawford & J. Y. Guthrie, S.S.C.

Thursday, January 7.

KENNEDY v. NESS.

Physicians' Fees—Parochial Board—Remuneration.
Amount of remuneration fixed by the Court as due to a physician by a parochial board for medical attendance on pauper patients.

This was an action raised by the executor of the late Dr Kennedy against the Parochial Board of the parish of East Wemyss, for a sum of £130, as the amount due to Dr Kennedy for professional attendance as medical officer of the Board.

It appeared that in the autumn of 1866 Dr Kennedy was employed by the Board to take charge of the district in which the village of Methil was situated, and to attend the pauper cholera patients there. He acted on this employment until his death on 11th November 1866; and, after an abor-

tive attempt at arbitration, his executor now brought this action for £130 as the fair remuneration due to the deceased. The defenders alleged that they had offered £50 in full of the pursuer's claim, and in respect of that offer they claimed absolvitor. After a proof, the Lord Ordinary (JERVISWOODE) found that the employment was to be reckoned as extending over a period of forty-three days; that three guineas a day was a reasonable charge; and decreed for the sum concluded for, with expenses.

The Board reclaimed.

Lord Advocate (MONCREIFF) and GEBBIE for reclaimers.

SOLICITOR-GENERAL (YOUNG) and A. MONCREIFF for respondent.

The LORD PRESIDENT was of opinion that the Lord Ordinary had fixed the remuneration at too high a rate, proceeding apparently on a mistaken idea as to the amount of labour which Dr Kennedy had had to undergo in preparing for the approach of the cholera. He thought £65 was a fair sum to allow in the circumstances, without entering into any minute calculation as to how that amount was made up.

LORD DEAS concurred, and thought it a pity that the matter had not been referred to some one who was neither a doctor nor a lawyer, and who might have settled the matter in a short time, and in a common-sense way, without any litigation.

LORD ARDMILLAN thought that as a physician must necessarily abandon other and more remunerative practice when he takes to attending cholera patients, the pursuer was entitled to a somewhat larger sum than their Lordships proposed to give, but at the same time he did not differ from the judgment.

LORD KINLOCH agreed with the majority.

The respondent asked expenses.

The defenders, while admitting their liability for expenses up to the date of the Lord Ordinary's interlocutor, objected to any further liability, as they had succeeded in reducing by one-half the sum awarded by the Lord Ordinary.

The Court adopted the defenders' view.

Agents for Pursuer—Murray, Beith & Murray, W.S.

Agents for Defender—Adamson & Gulland, W.S.

Friday, January 8.

GLOVER AND OTHERS v. CITY OF GLASGOW UNION RAILWAY COMPANY.

Railway Company—Lands Consolidation (Scotland) Act 1845—Superfluous Lands—Adjudication.
Creditors of a Railway Company, before the works were completed, brought an adjudication of certain of their lands as "superfluous." *Held* that before completion of the works, and without experience in working the line, it was impossible to say that any land taken by the company for their undertaking was "superfluous."

This was a process of adjudication instituted by the trustees of the late Mr Glover as creditors of the defenders. The pursuers averred that the lands described in the summons "pertain and belong heritably to the defenders, and are superfluous lands and heritages, not necessary for the construction of their line of railway, or the carrying on of their undertaking. The Union Railway could be constructed and maintained in terms of the defen-

ders' Acts of Parliament, and Acts therewith incorporated, irrespective altogether of said lands and heritages. The defenders are in the position of ordinary proprietors of said lands and heritages. No part of the Union Railway has yet been opened for public traffic, and the pursuers obtaining decree in this action will in no respect interfere with the said railway being opened, and thereafter carried on for public traffic."

The defender pleaded "(3) In respect that the subjects described in the conclusions of the summons are held under a statutory title, and for statutory purposes, from which they cannot be diverted, the pursuers are not entitled to adjudge the same, or to maintain the conclusions of the present action. (4) In respect that the defenders' rights to the subjects in question are not adjudgeable, and that the defenders have no right or interest in the subjects excepting for the purposes of the undertaking, and subject to their Act of Incorporation, the action cannot be maintained. (5) Adjudication not being a competent remedy under the statutes referred to in the submission and decret-arbitral for the recovery of the debt alleged to be thereby constituted, the defenders ought to be assoiized."

The Lord Ordinary (JERVISWOODE) sustained the third and fourth pleas for the defenders and dismissed the action, adding this note, "It appears to the Lord Ordinary that this process of adjudication cannot be resorted to by the pursuers consistently with the provisions of the Lands Clauses Act, to which reference is made, so as to operate security and ultimate payment of the debts which are set forth in the conclusions of the summons, and in the 3d head of the revised condescendence on behalf of the pursuers.

"To this conclusion the Lord Ordinary is led by a consideration mainly of the terms of the provisions contained in the 120th section of the Lands Clauses Consolidation (Scotland) Act 1845. The pursuers themselves found their case on the allegation that the lands which they here seek to adjudge, are, in fact, superfluous lands in the sense of that statute.

"But, if this be so, they are and can be such only in respect of, and with relation to, the provisions of the statute by which that peculiar quality may be attached to them.

"It would seem, then, to follow, that if the process of adjudication to which the pursuers have here resorted be inconsistent in its operation and effect with the statutory enactments which ascertain the character of and provide for the manner of dealing with superfluous lands, that the process itself must be inapplicable and incompetent as a mode of attaching these lands for the payment of debts alleged to be due to the party resorting to the diligence.

"Now this matter, as it appears to the Lord Ordinary, must be determined with relation to the provisions of the said 120 section of the foresaid statute, whereby it is provided, that within 'the prescribed period, or, if no period be prescribed, within ten years after the time limited by the special act for the completion of the works, the promoters of the undertaking shall absolutely sell and dispose of all such superfluous lands in such manner as they may deem most advantageous, and apply the purchase money arising from such sales to the purposes of the special act, and in default thereof, all such superfluous lands remaining unsold at the expiration of such period shall thereupon vest in and become the property of the owners of the lands

adjoining thereto, in proportion to the extent of their lands respectively adjoining the same.'

"Now, is it compatible with these provisions that the pursuers should now adjudge the lands in question? The Lord Ordinary thinks not; and although the pursuers, apparently impressed with the difficulties attending the proposition for which they contend if carried out in its integrity, suggested that they might be permitted to adjudge, subject to giving effect hereafter to the provisions of the 120th section of the statute, the Lord Ordinary has been unable to see that the pleas of the defenders would thereby be avoided or met.

"The process of adjudication for debt contemplates in its issue, if the debt be not paid, the sale of the subjects affected by it, and therefore, if the pursuers adjudged these lands legally at all, they obtain as a consequence the right of ultimate sale on the failure of payment. To renounce the right to sell because inconsistent with the condition and character of the subjects adjudged, is, as the Lord Ordinary thinks, to confess that the process itself is inept and insufficient as applied to the subjects against which it is directed.

"On the whole, while the question is, so far as the Lord Ordinary is aware, novel, and is unquestionably difficult, he is unable to see grounds on which to sustain this process."

The pursuers reclaimed.

GIFFORD and SHAND for reclaimers.

CLARK and LEE for respondents.

At advising—

LORD PRESIDENT—I am of opinion that this action must be dismissed, although I do not proceed exactly on the same grounds as the Lord Ordinary has done.

The summons is based on two separate grounds. The first is, that the defender's heritable estate of every description, without any distinction as to its nature, is subject to adjudication for debt. Now, that ground of action has been abandoned in the discussion, and therefore it is not necessary to give any opinion on it. But still it is right to say that the pursuers, in abandoning that ground, are acting in conformity with the well-matured and universal opinion of lawyers on the subject. The railway and works of the company for their statutory purposes, are not liable to be adjudged.

But it is contended, separately, that the lands described in the summons being superfluous lands, not necessary for the undertaking, are adjudgeable; and that is an argument of considerable importance. It is a question which may be attended with very considerable difficulty in certain circumstances. Supposing it to be admitted by the Railway Company that the lands are superfluous, then the question would not be without difficulty, and it would arise purely. But it is not necessary to give any opinion on that, for not only does it not arise here, but it is not likely to arise in any case. It is not admitted that the lands are superfluous; that is disputed; and the question is whether the pursuers have relevantly averred that these are superfluous lands within the meaning of the "Lands Clauses Act?"

In judging of the relevancy of averments in a question of this kind it is indispensable to keep in view the point of time at which the adjudication is led. The Railway belonging to the defender is in the course of construction, and I think we may gather from the averments of the pursuers, although they are not so precise as they ought to have been, that the work of the railway is not very far

advanced, because we see that even the renewed period of the compulsory taking of land has not expired. It may, therefore, fairly be taken to be the fact that the railway and works are not yet even approaching completion. In such circumstances it is very difficult for any one to determine—it would be difficult even for Directors of the Railway to determine—that any land taken by them is properly superfluous. For it is not enough to make land superfluous according to the fair construction of the Lands Clauses Act that possibly or probably in the end it may not be required for the purposes of the undertaking. So long as there is a probability or possibility of it being required for any of the statutory purposes, it cannot be dealt with as superfluous. I will even go further, and say that the Directors of such a Company would be acting in violation of their duty in treating that land as superfluous which may yet be useful for the undertaking. Now, it is said that this land is not necessary for the construction of the line, or for carrying out the undertaking. That is a very bold averment. It is an averment of a prophetic kind, which, I think, the Directors are not justified in making, and, therefore, how the pursuers are in a position to say that it will in the end be found out to be superfluous I cannot tell. There is the same difficulty in all their averments. In the fifth article of their condescendence they say that one part of the lands stands separated from the other parts by properties which the Company have no longer any power to take by compulsory sale. They have lost their opportunity by allowing the time for giving the necessary notices to expire on 1st February 1868. If that were so, then I must hold that, for the purposes of such an undertaking as that of the defenders, no piece of land whatever, either in town or country, not lying contiguous to other lands, can ever be anything but superfluous land. That is out of the question. There are many purposes for which detached portions of land may be very valuable to the promoters. Farther, they say that other portions of lands described in the 7th, 8th, and 9th heads of the summons are superfluous, for this reason, that at that part of the line of railway where they are situated the permanent way is finished, and does not cover more than a small part of these subjects. By the permanent way I take them to mean the two sets of rails, up and down. But every one knows that until the railway is completed no one can foresee what ground may be required for sidings, or at what points they may have to be formed. Here again, nothing but a spirit of prophecy would enable any one to say whether any portion of land was superfluous or not.

It must be borne in mind, too, that land cannot be acquired by the promoters beyond the limits of deviation; and it is presumable that all the land within the limit of deviation is useful for the purposes of the undertaking. Power to take it would not be granted unless it was *prima facie* useful. Therefore that which converts such land into superfluous land must be nothing more or less than the experience of the railway company themselves, and they cannot come to a satisfactory conclusion on that matter until their works are completed. Now here the works are not completed. When they are so then it will be seen what land becomes superfluous, for I think no land can be superfluous at the commencement of the undertaking. After the works are completed, the Statute contemplates that they may see about selling off what they do

not require. They have ten years to do that, exercising their discretion as to what is to be sold off, and it is only after the expiry of the ten years that the land, if not then sold, vests in the owners of the adjacent properties. It is hopeless to maintain that at this stage any one can say with an approach to accuracy that any part of the land will turn out to be superfluous land; and therefore I am of opinion that this adjudication must be dismissed.

The other Judges concurred.

Agents for Pursuers—J. & R. D. Ross, W.S.

Agents for Defenders—Murray, Beith, & Murray, W.S.

Friday, January 8.

MUNGLE AND OTHERS v. YOUNG AND OTHERS.

Landlord and Tenant—Mineral Lease—Arbitration Clause.

Mineral tenants in the estate of M. had under their lease the usual powers of working, winning, and carrying away the minerals, and were also empowered to remove the minerals of M. by means of pits in the adjoining estate of B., and *vice versa*. Disputes as to the true import of the lease were referred to an arbiter by an arbitration clause. The owners of M. seeking to prevent their mineral tenants from using the roads on M. for the purpose of carrying minerals raised from B. to a third estate of A, held (1) that the question did not fall under the arbitration clause; and (2) that the right claimed by the mineral tenants was neither expressly nor by implication conveyed to them by the lease.

In 1862 Andrew Mungle of Muirhall let to James Young, his heirs, assignees and sub-tenants, on a 32 years' lease, the coal, limestone and fire-clay in and under the lands of Muirhall, "with full power to the said James Young and his foresaids, at their own expense, to search for and to work, win, raise and carry away the coal, limestone and fire-clay, and seams of coal, limestone and fire-clay hereby let, as fully and freely as the said Andrew Mungle could do himself, and for these ends, under the conditions and restrictions aftermentioned, to set down pits and sinks and to drive levels for working the said coal, limestone and fire-clay hereby let, and to erect machinery for draining and bringing up the said minerals or either of them, and to make roads or railways, build houses for workmen employed at or in connection with the works, and generally to perform and carry on upon the said lands every other operation usual and necessary for working, winning and carrying away the said coal, limestone and fire-clay," &c.

A rent or lordship was stipulated, and the lease further provided that, "in respect that the said James Young has entered, or is about to enter into a lease similar to the present with William Smith of Breich Mills of the coal and other minerals in his lands of Breich Mills lying contiguous to the said lands of Muirhall, and may work the coal and other minerals in other lands adjoining the said lands of Muirhall and Breich Mills, it is hereby agreed that, in the event of any pits being sunk or opened in the said lands of Muirhall, the coal, limestone and fire-clay in which, with the foresaid exception, are hereby let, the said James Young and his foresaids shall be entitled to make use of the said pits for winning and carrying away the said coal, limestone and fire-clay in the said lands