arbiter. I am of opinion that the Lord Ordinary is right.

It is necessary to keep in view that this is a private partnership among parties all more or less closely related to one another, and intimately acquainted, and therefore quite able to judge of each other's qualifications to be partners. It is eminently a case of *delectus personæ*, and in a partnership of that kind parties must be careful how they bind themselves to act. Hence in most cases it is provided that the opinion of the majority shall prevail, and in all the ordinary transactions of the partnership that must be so, or the business could not be carried on at all. Now, it appears to me that the appointment of a manager is just an ordinary act of administration, and I put to myself this question,—Whether because parties differ as to who shall be appointed manager, the majority could bring the matter to this Court to determine who shall be manager, and thus, it may be, overrule the opinion of the majority? I suppose there cannot be a doubt that the answer would be that they could not; of course if the majority were abusing their power, the minority could then get the aid of this Court, but not except on very strong allegations of abuse of power. But if the Court could not interfere, why should the arbiter be able to do so, unless the matter has been specially committed to him? Because I could understand a clause of that kind, but it would require to be very specific, such as I have never seen in any contract of copartnership. But what is the clause here? It is this—[*reads art.* 11, *ut supra*]. Now, I do not care to look beyond that clause. Let it be every dispute between the partners as partners--that is to say, every dispute in regard to their position as partners. When a dispute of that sort arises, it is a matter which it is possible to bring before a Court; and in putting an arbiter in place of the Court it is only giving him the power of the Courts. Therefore the width of the meaning of the clause does not seem to affect the question.

It is said that this interpretation takes away all the meaning from the clause. I see no difficulty about that at all. Suppose there was a dispute as to the clauses of the contract. That is a proper subject of reference. Suppose that there is a dispute between two partners, or between a partner and the company as to the division of the profits, that unquestionably goes to the arbiter. In short, I think that if the parties were litigiously disposed, the arbiter would have plenty to do. But that he is to act as a court of appeal over the internal management of the company is a thing that I never heard of falling in a clause of arbitration before, and it is altogether out of the arbiter's jurisdiction in this case.

LORD DEAS and LORD SHAND concurred.

LORD MURE was absent.

The Court adhered.

Counsel for Complainers (Respondents) — Graham Murray. Agent—H. B. Dewar, S.S.C.

Counsel for Respondents (Reclaimers) — M'Kechnie. Agents — Pearson, Robertson, & Finlay, W.S.

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*Friday, March 7.**

FIRST DIVISION.

[Lord Curriehill, Ordinary.

SCOTT *v.* LOCAL AUTHORITY OF CARLUKE.

Arbitration—Disqualification—Where Arbiter also Engineer.

Under a contract for the execution of certain water-works the engineer was appointed arbiter "in the event of any dispute or difference in relation to the execution, construction, or completion of the work." In the course of the operations he reported to his employers that the works were in "a disgraceful state" through the fault of the contractor, and detailed the faults he had to find. *Held* that he was not thereby disqualified from acting as arbiter.

In the execution of a contract between the Local Authority of Carluke and Mr John Scott, contractor, Hamilton, for the execution of certain water-works, disputes arose between the parties which eventually led to this action being brought by Mr Scott for payment of certain sums which he alleged were due to him by the defenders. The contracts, of which there were two, contained the following clause of reference:—"In the event of any dispute or difference arising between the Local Authority and the contractor and his cautioners in relation to the execution, construction, or completion of the work contracted for, or any of them, or any part or portion thereof, or as to the quality or quantity of the work or materials thereof, or as to settling of accounts, or as to any other point or matter whatever in regard to the works, or as to the contract, or to the true intent, meaning, or effect thereof, or of the drawings, specification, and conditions, the same shall be referred to the amicable decision, final sentence, and decreet-arbitral of James Tait, C.E., Wishaw, whose decision shall be final and binding on all parties."

In answer 3 to the defenders' statement of facts the pursuer averred, with reference to the clause of reference:—"Explained that Mr Tait is disqualified from acting as arbiter in the reference by partial counsel, and by having formed and expressed views adverse to the pursuer on all the points in dispute, both in letters to the pursuer and in an *ex parte* report obtained from him by the defenders on 7th October 1878, and otherwise. The questions in dispute are truly and substantially questions between the pursuer and the said James Tait. Moreover, in his said report the said James Tait makes entirely unfounded accusations of dishonest practices against the pursuer or his men, and in consequence of this feeling he is incapable of judging fairly or impartially between the parties."

Mr Tait was the engineer of the works, and on the 7th October 1878 he had made the following report to the Local Authority:—"After opening up a piece of the track at several points, and seeing the disgraceful state in which the pipes had been laid, and the heavy expense it would take to put it right, I gave intimation to Mr Scott and told him I would allow it to stand open for a day or two so that he might see it if he felt so inclined. He, however, paid no atten-

* Decided February 1, 1879.

tion to the matter, and the whole of the fireclay track will require to be opened and the pipes lifted and relaid. So far as we have gone, I find that the drain has not been properly bottomed, and that not one pipe in twenty has been properly jointed. In some places, for a dozen yards at a stretch, the joints are perfectly open, no clay even being put in them. In other places a small piece of rope is put on top of pipe and no cement put in. In other joints cement has been run in, while no rope has been staved into the socket, and the result is that there are a great number of the pipes that have a projection of cement at bottom of pipe, and in several cases the pipes are about filled up. The area of pipe is 12½ square inches, and some of the pipes are so much filled up that only an opening of about 5 square inches is left. I have carefully stored one of such from each of the sections we have opened up, so as to produce it should any difficulty arise when we deduct the cost of redoing the work from the money in our hands belonging to the contractor. It is perfectly evident that the rope-yarn and cement have been kept at hand, and when any person was looking on the joints were done well enough, but immediately on going to any other part where work was going on the pipes were put in any way."

In consequence of this report the local authority had refused to pay Mr Scott what he alleged was due to him under the contract, and he had thereupon raised this action. He offered no further proof of his allegations against Mr Tait other than the reports referred to above.

The defenders pleaded, *inter alia*, that the action was excluded by the clause of reference contained in the contracts. The pursuers answered that the arbiter was disqualified from acting in the premises.

The Lord Ordinary (Curriehill) pronounced this interlocutor:—"The Lord Ordinary having heard parties' procurators, finds that the claims made by the pursuer in this action are embraced by and fall within the clauses of arbitration to James Tait, the defenders' engineer, that the pursuer objects to the arbitration being proceeded with, on the ground, as alleged by him, that James Tait has disqualified himself from acting as arbiter, and that the pursuer states that in support of the alleged disqualification of Mr Tait he has no proof to offer other than the letters and report referred to in his answer to the defenders' statement of facts (art. 3): Finds that the said James Tait has not by said letters or report disqualified himself from acting as arbiter under said clause of arbitration: Therefore supersedes further procedure *in hoc statu*, in order that the parties may have the pursuer's claims forthwith submitted to arbitration as aforesaid, reserving in the meantime all questions of expenses, and grants leave to reclaim."

The pursuer reclaimed, and argued—The arbiter by his report, and particularly by the allegation of dishonest practices implied in the last paragraph, had disqualified himself from acting. Had he not been the engineer there could have been no doubt; but it was no part of an engineer's duty to impute motives. The case was within *Dickson* v. *Grant*, February 17, 1870, 8 M. 566.

Argued for the defenders—The offices of engineer and arbiter were not imcompatible, and Mr Tait had done nothing as engineer which he was not entitled to do in that capacity—*Trowsdale* v. *Jopp*, July 12, 1864, 2 M. 1334; November 15, 1865, 4 M. 31.

At advising—

Lord President—I do not see the slightest reason for recalling the interlocutor of the Lord Ordinary in this case. This is a reference of a peculiar kind, and without intending to repeat what I had occasion to say in *Trowsdale* v. *Jopp*, I will just say that references of this kind are common in practice not only because of convenience but of necessity. It is quite indispensable that some one should be able to settle summarily and immediately the disputes which arise in the course of the work. The question is, whether the engineer, who is also arbiter, has done anything to disqualify himself from acting as arbiter?

Now, what he complained of was the faulty execution of the work by the contractor. But it is to be kept in view that he had two duties—as engineeer, to superintend and control the contractor and his servants; and he had also his duties as arbiter. It is the combination which makes the case peculiar; but it is quite vain to say that because Mr Tait faithfully performs his duties as engineer he is thereby debarred from acting as arbiter. All that he did was to say that the works were not being executed according to contract. He does not make vague allegations; he is clear and specific in his grounds. Now, in such a state of matters as this to hold that Mr Tait is disqualified is just to hold that the two offices—that of engineer and arbiter—are incompatible and ought not to be conjoined. But it is too late to theorise, as the matter is quite settled in practice.

Lord Deas and Lord Shand concurred.

Lord Mure was absent.

The Court adhered.

Counsel for Pursuer (Reclaimer) — Asher — Pearson. Agents—Campbell & Smith, S.S.C.

Counsel for Defender (Respondent)—Kinnear—Moncreiff. Agents—Mackenzie, Innes, & Logan, W.S.

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*Friday, March 7.**

FIRST DIVISION.

[Lord Rutherfurd Clark, Ordinary.

MURPHY AND OTHERS *v.* SMITH.

Entail—Destination—Clause of Devolution—Whether "Heir and Disponee" of a Substitute is within a Clause of Devolution which struck at Substitutes.

By a disposition and deed of settlement certain lands were disponed in favour of a series of heirs, which terminated in the settler's daughters, "equally among them, share and share alike, their heirs and disponees." The deed recited an entail of even date, by which the settler entailed certain other lands in favour of his eldest son and a series of heirs, and contained this further clause, that in case the disponee under the deed of settlement, "or any of the heirs of his body, or any of the other substitutes before men-

* Decided February 6, 1879.