Tuesday, November 26.

FIRST DIVISION.

[Lord Wellwood, Ordinary.

M'ALPINE *v.* THE LANARKSHIRE AND AYRSHIRE RAILWAY COMPANY.

Railway—Contract—Clause of Arbitration—Damages.

The specification for the contract for constructing a railway provided—"19. The schedule measurements are only assumed. The whole of the works when finished shall be re-measured and paid for at the schedule rates. Any other description of works ordered shall be measured and paid for at rates to be fixed by the said engineer, and no reference shall be made to any arbiter to fix such rates for additional or altered work, the engineer's decision being final and binding on all parties with respect to the character, description, execution, and measurement of the works to be executed under this contract and the rates to be paid therefor."

The contractor raised an action of damages against the railway company, on the ground that in consequence of the unreasonable delay of the company's engineer in providing the necessary plans, the pursuer, in order to complete the work within the specified time, was forced to erect extensive temporary works which would have been unnecessary if the plans had been properly supplied.

Held that this was an alleged breach of an implied condition of the contract, and that the loss arising therefrom was not a matter referred to the arbiter, who by the terms of the contract was not empowered to assess damages.

This was an action by Robert M'Alpine, contractor, Glasgow and Kilwinning, against the Lanarkshire and Ayrshire Railway Company, concluding for payment of £23,644, 1s. 9d. as the balance alleged to be due by the defenders under two contracts executed by him.

The first contract, which was called "The Barrmill and Kilwinning Railway Contract," was for a small railway about six miles in length between Barrmill and Kilwinning.

Contract No. 2, in connection with which the present question arose, was an extension of contract No. 1, and carried on the line from Kilwinning to Ardrossan.

With reference to contract No. 2, after stating the value of the works the measurements of which had been adjusted, the pursuer averred as follows—"(Cond. 13) The balance, amounting to £7556, 1s. 2d., is due to the pursuer in respect of the defenders' failure to furnish him timeously with plans and drawings as the works proceeded, and of alterations upon plans made while the pursuer was in course of executing the work, and of the defenders ordering him to stop part of the works while in an uncompleted state, and ordering him to employ a number of additional men in the mixing of concrete for the works who were not required for the performance of the work, but whom the pursuer was forced to employ and pay for needlessly, and in various other respects. As has been already stated, the defenders had not matured their plans before commencing operations on this contract, and did not furnish the pursuer timeously with the usual plans and information necessary to enable a contractor to arrange his work upon the contract advantageously, even after all allowances are made for the time necessary to enable the defenders to adjust and prepare the plans after the contract was begun, but, on the contrary, gave the pursuer instructions and supplied him with plans piecemeal, and did not give him the advantage of the permanent works of the contract as is usual and requisite for the proper performance by a contractor of his work. Repeatedly, for months in succession, the defenders' engineer failed to furnish the necessary plans, and in order to prevent the work coming to a stand-still, and the enormous loss which would have thereby resulted, the pursuer was forced, in order to carry on the works, to erect temporary bridges, and perform other temporary works at great cost, which but for the *culpa* of the defenders or their said engineer would have been rendered wholly unnecessary. Further, the defenders' said engineer, in consequence of a petty quarrel with the Police Commissioners of Ardrossan, stopped the works there for several months at enormous loss to the pursuer. A detailed statement of the said claims is contained in the said accounts, and is referred to. The expense incurred, and the loss and damage sustained by the pursuer as above stated, is moderately charged at the said sum of £7556, 1s. 2d. The pursuer during the course of the contract intimated his intention to make these claims."

The defenders pleaded—"(1) The pursuer's averments are irrelevant. (3) The action is excluded by the arbitration and reference clauses; *et separatim*, in any event decree should only be pronounced for such sums, if any, as the arbiter or engineer shall find to be due."

The specification for contract No. 2 contained the following provisions:—"19. The schedule measurements are only assumed. The whole of the works when finished shall be re-measured and paid for at the schedule rates. Any other description of works ordered shall be measured and paid for at rates to be fixed by the said engineer, and no reference shall be made to any arbiter to fix such rates for additional or altered work, the engineer's decision being final and binding on all parties with respect to the character, description, execution, and measurement of the works to be executed under this contract, and the rates to be paid therefor."

"34. Should any dispute arise as to the true intent and meaning of this specification, or as to the adjustment and terms of the contract deed to follow hereupon, or as

to what may be considered 'usual and necessary clauses' in the said deed, or as to any other matter connected with this contract to follow hereon (except as to maintenance or matters otherwise specially provided to be settled by the engineer solely), the same shall be referred to the decision of the said John Strain, civil engineer, Glasgow, whom failing to M'Taggart Cowan, civil engineer, Glasgow, and the award of either arbiter shall be final and binding on all parties."

The clause of arbitration in contract No. 2 was in these terms—"And it is hereby specially provided and declared that all disputes and differences in any way connected with, or arising out of, the execution of or failure to execute the works hereby contracted for, except such matters otherwise provided to be settled by the engineer of the first party solely, shall be submitted and referred to the amicable decision, final sentence, and decree-arbitral of John Strain, civil engineer in Glasgow, whom failing M'Taggart Cowan, civil engineer there, and whatever the said arbiter shall direct or decide by any decree or decrees-arbitral, interim or final pronounced by him, the said parties hereto respectively bind and oblige themselves and their foresaids to execute, implement, and abide by under the penalty above mentioned."

On 6th September 1889 the Lord Ordinary (WELLWOOD) pronounced the following interlocutor:—"Finds that the pursuer's claims under the Barrmill and Kilwinning contract No. 1 . . . fall within the arbitration and reference clauses of the said contract: . . . Finds that the pursuer's claims under or connected with contract No. 2 or Ardrossan contract other than the alleged claims of damages specified in the 13th article of the pursuer's condescendence fall within the arbitration and reference clauses in the said contract: Finds that the pursuer has not relevantly averred any claims of damages as distinguished from claims in respect of extra work, or other claims which may be open to him under the said contract No. 2, and to that extent sustains the defenders' first plea-in-law without prejudice to the pursuer claiming before the arbiter any of the alleged items of damage which he can instruct to be due in respect of extra work or other matters for which he is entitled to remuneration or allowance under the contract: Therefore supersedes procedure *in hoc statu* in order that the pursuer's claims under the said contracts may be referred to Mr M'Taggart Cowan, C.E., Glasgow (the arbiter second named in contract No. 1), and Mr John Strain, C.E., Glasgow, respectively, reserving to the pursuer to apply for interim decree for the said sum of £1218, 11s. 2d., and the defenders' answer to such application; meantime reserves all questions of expenses, and grants leave to reclaim.

"*Note.*— . . . These being the provisions of the specification and contract, the pursuer now complains (1) that the defenders did not timeously furnish him with additional plans, and that in consequence he was obliged to erect and perform expensive temporary works; and (2) that he was unnecessarily ordered by the company and their engineer to employ additional labour, and also to stop the works from time to time, and was thus put to much needless expense, and sustained loss for which he claims damages. The items of damage are set forth in detail in his claim. I think that averments of fault much stronger and more specific than those here made would be required to support such claims.

"No obligation is laid on the defenders, either in the specification or the contract to supply additional plans, although they have power to do so if they please.

"Again, as to the stoppage of the works and the ordering of additional works or labour, the widest discretion is given to the engineer, and it would be contrary to the whole spirit of the contract if, after the work was completed and in great part covered up, a court of law were to be called upon to review the decision or conduct of the engineer in every minute detail. A perusal of the various items of damage in No. 19 of process shows how unsuitable the questions are for determination in a court of law. There seems to be no reason why the greater part of the work executed should not have been treated in the same way if the pursuer considered that he had been unduly obstructed by the company or their engineer.

"It was clearly in contemplation when the contract was entered into that there were risks of various kinds which the contractor must be content to run, and among them was the risk of detention and the expense of temporary works which might be rendered necessary by the unforeseen exigencies of the undertaking and the orders of the engineer.

"It may be, however, that the pursuer may be able to satisfy the arbiter that he is entitled to remuneration or allowances under the contract for some at least of the items which he includes under the head of damages. While therefore I am of opinion that the pursuer has not stated any relevant claim of damages, I do not intend to foreclose him from claiming in the reference remuneration for such items, not as damages, but as allowances for extra work and other allowances to which he may be entitled under the contract."

The pursuer reclaimed.

After a short discussion the Court observed that the averments in condescendence 13, *supra*, were not sufficiently specific, and the pursuer was allowed to amend his record, and the defenders to answer the amendments.

The pursuer accordingly lodged a minute of amendment in the following terms—"In particular—1. The defenders failed timeously to furnish the plans for bridge No. 10. This was the largest bridge of the contract, and from its position in the centre of the contract it formed the key to the rest. In ordinary and proper course the building of the bridge ought to have been begun in August 1885, when the other works under the contract were commenced, or at latest by the middle of October 1885, so as to allow time for the bridge to be built before

the embankment reached it; but the plans for it were not furnished till 27th May 1887. *i.e.*, twenty-two months after the contract was obtained, and only nine months before the expiry of the contract time. The pursuer had to convey more than 100,000 tons of material across said bridge, and when the contract was entered into neither party contemplated the necessity for the erection of a temporary bridge across the Glasgow and South-Western Railway at this place, and no allowance or estimate was made therefor; but in consequence of the defenders' failure to furnish the plans foresaid a temporary bridge and embankments became absolutely necessary. The defenders further failed to furnish plans for permanent bridge at peg 64, which ought to have been supplied at least by the end of March 1886, but were not received till 14th July 1886. This delay caused the necessity of a temporary bridge where no such bridge was contemplated by either of the parties when the contract was entered into. They also failed to give instructions for the building of a cattle creep at peg 68, until within a day or two of the embankment reaching the spot, thus requiring the erection of staging and other unnecessary expense to the pursuer, detailed in statement No. 22 of process. Other temporary bridges, including those at pegs 22, 24, 77, 78, and 95, required to be kept up and maintained for long periods in consequence of the defenders' delay in furnishing plans for those bridges. The defenders' delay in furnishing plans for those bridges extended from six to fourteen months. The loss and damage sustained by the pursuer under this head is specified in items Nos. 1715, 1719, 1721, 1729, 1732, and 1733 of the detailed statement, No. 22 of process, and items Nos. 1, 2, 5, 6, and 7 of the statement of increased claims, No. 16 of process, and amounts in all to £2935, 8s. 10d.

"2. The defenders also failed timeously to furnish plans and give instructions for carrying off the water arising between pegs 86 and 90, also the water from the intercepted drain near peg 91, and the water from the stream at peg 94. It was the duty of the defenders to furnish these plans and instructions; and in the ordinary course of the operations they ought to have been furnished at least ten months before they were received. The cutting was completed at the site of the new outlet for the water arising between pegs 86 and 90 early in August 1886, but instructions for the disposal of the water were not received until 29th March 1887, and it required at least two months after that to execute the work. The water from the built drain at peg 91, which crossed the railway, was also allowed to flow into the cutting for ten months before instructions were received for its disposal. A permanent aqueduct required to be built for carrying the stream at peg 94 across the railway, and plans for it ought to have been, in the ordinary course of such work, furnished in the beginning of May 1886, but were not furnished till 31st August 1886. By this time the cutting had approached so near the stream that a temporary aqueduct and diversion of the stream were required. Great additional expense was thus caused to the pursuer entirely through the fault of the defenders; and the items falling under this branch of the claim are items 1724, 1725, 1726, and 1727 of detailed statement No. 22 of process, and item No. 3 of No. 16 of process, amounting in all to £1950.

"3. The slopes of the cutting between pegs 17 and 23 had been cleaned up and partly soiled for months before the order for drains had been received from the defenders. This order, through the fault of the defenders, was not received till 10th February 1887, whereas it ought to have been received at latest by August 1886. The additional cost thus caused to the pursuer forms item No. 1716 in the detailed statement, No. 22 of process amounting to £30.

"4. The cutting at peg 24 was completed in December 1885, and the water-pipe for the town of Irvine required to be carried across the cutting by means of a temporary bridge. The necessity for this bridge was caused through the fault of the defenders not timeously preparing and furnishing a plan for the permanent bridge, which ought to have been furnished at latest by the middle of December 1885, but was not received by the pursuer until 10th March 1887. This delay also caused additional loss to the pursuer in carrying ballast and other traffic below the temporary bridge. The expense thus caused is claimed under items Nos. 1717 and 1718 of the detailed statement, No. 22 of process, and amounts to £50.

"5. The pursuer also claims £900, being item No. 8 of the statement No. 16 of process. This expense was caused through the fault of the defenders in not arranging for the opening of the Glasgow Street Bridge, Ardrossan, in consequence of a dispute between them and the Ardrossan Corporation. The defenders ordered the pursuer to stop his cutting at peg 98, which necessitated the removal and afterwards bringing back of his whole plant and other material. The work stood idle at this place for about fifteen months. The pursuer had over 100,000 cubic yards at this time to excavate from the cutting, a portion of which went to form the embankment at Paisley Street, Ardrossan, to which the pursuer could not get access until Glasgow Street had been re-opened; and another portion to form the embankment of Ardrossan station, the plan of which station ought, in ordinary course, to have been furnished to him at latest by February 1886, but no plan was received until 15th July 1887.

"6. The defenders also in various instances furnished plans, and the pursuer executed portions of the work according to these plans; and the defenders thereafter, and after long delay, and the removal of the pursuer's service rails, and other plant, furnished other plans of an entirely different nature from those originally furnished, and required the work to be reconstructed accordingly. The items falling under this

branch of the pursuer's claim are Nos. 1720, 1722, 1723, and 1731 of the detailed statement No. 22 of process, and No. 4 of the statement No. 16 of process, and amount to £207, 9s. 8d."

The defenders' answers took the form of a general denial of the pursuer's statements, and especially of the necessity of any of the temporary works erected by the pursuer.

Argued for the pursuer — The present dispute did not fall under the clause of arbitration. It arose through the failure of the defenders' engineer to supply the pursuer with the necessary plans so as to enable him to proceed with his work. The pursuer had suffered damage by the actings of the defenders' servant, and they were liable to him in damages therefor. It would be unreasonable to refer to the company's engineer a question of his own negligence. The pursuer was bound to complete the works within a specified time, and therefore the defenders were bound to cause no delay in the furnishing of the plans, and their contention that the time within which the plans were to be handed to him was a matter entirely within their own discretion was absurd. The arbiter was not entitled under the contract to assess damages, and the pursuer's claim being essentially one of damages, he was entitled to a proof of his averments.

Authorities—On the clause of arbitration —*The Aberdeen Railway Company* v. *Blaikie*, January 28, 1851, 13 D. 527; *M'Cord* v. *Adams*, November 22, 1861, 24 D. 75; *Tough* v. *Dumbarton Water Commissioners*, December 20, 1872, 11 Macph. 236; *Kirkwood* v. *Morrison*, November 6, 1877, 5 R. 79; *Howden* v. *Dobbie*, March 16, 1882, 9 R. 968; *The Saville Street Foundry Company*, March 20, 1883, 10 R. 821; *Mackay* v. *Parochial Board of Barry*, June 22, 1883, 10 R. 1046; *Beattie* v. *Macgregor*, July 5, 1883, 10 R. 1094; *Levy & Company* v. *Thomsons*, July 16, 1883, 10 R. 1134; *Adams* v. *Great North Railway Company*, June 21, 1889, 16 R. 843.

Argued for the defenders—The clause of reference was framed in the most comprehensive terms with a view to include disputes like the present. The works which the pursuer had to make fell under the provisions regarding extra work, all questions regarding which were, it was arranged, to be determined by Mr Strain. The pursuer knew when he asked that contract No. 2 should be given to him that none of the plans were prepared, and he ought to have foreseen that there would have been delay before they were ready and prepared accordingly. It was a matter in the discretion of the defenders' engineer when the working plans were handed to the pursuer, who was not entitled now to rear up a claim of damages for necessary delay which he ought to have provided for—*Jones* v. *St John's College*, L.R., 6 Q.B.D. 115; *Willesford* v. *Watson*, L.R., 8 Chan. Div. 473.

At advising—

LORD PRESIDENT—There is a part of the Lord Ordinary's interlocutor which has not been challenged at all—that relating to the Barrmill and Kilwinning contract No. 1—and therefore we are concerned only with the findings which the Lord Ordinary has made as regards the contract called No 2, or Ardrossan contract. His finding on that contract is that the pursuer's claims under or connected with that contract, "other than the alleged claims of damages specified in the 13th article of the pursuer's condescendence, fall within the arbitration and reference clauses in the said contract." Now, that finding, I think, is well founded. The points in dispute other than the claim of damages in article 13 regard especially the final measurement of the work, and if there is anything else it is as regards the prices to be paid for certain parts of the extra work.

The 19th article of the specification provides this—"The whole of the works when finished shall be re-measured and paid for at the schedule rates. Any other description of works ordered shall be measured and paid for at rates to be fixed by the said engineer, and no reference shall be made to any arbiter to fix such rates for additional or altered work, the engineer's decision being final and binding on all parties with respect to the character, description, execution, and measurement of the works to be executed under this contract, and the rates to be paid therefor." This article was altered to a certain extent by the final contract, but only in so far as it appointed the arbiter under the contract to take cognisance of all these things, and to dispose of them instead of the engineer. That, however, turns out to be an entirely unimportant alteration, because the engineer and the arbiter under the contract are one and the same person. Now, I think it is impossible to hold that any question about measurement or re-measurement or fixing rates for additional or altered work or with respect to the character, description, and measurement of the works to be executed, and the rates to be paid therefor, can be taken away from the jurisdiction of the arbiter, and therefore it appears to me that the whole dispute embraced in this record, with the single exception of what falls under the 13th article of the condescendence as amended, must go to the arbiter's examination. So far I entirely agree with the Lord Ordinary.

But then he finds "that the pursuer has not relevantly averred any claims of damages as distinguished from claims in respect of extra work, or other claims which may be open to him under the said contract No. 2, and to that extent sustains the defenders' first plea-in-law without prejudice to the pursuer claiming before the arbiter any of the alleged items of damage which he can instruct to be due in respect of extra work, or other matters for which he is entitled to remuneration or allowance under the contract."

I should have also been entirely in agreement with the Lord Ordinary upon that finding, but for the alteration which has been made on the record since the parties came here. But I am not able to say that the new averments embraced within the 13th article of the condescendence are either irre-

levant in themselves or necessarily fall under any of the arbitration clauses in this contract and specification. The ground of damage alleged in these articles is that the engineer, or the defenders through their engineer, failed to furnish drawings for particular work within reasonable time, the consequence of which was that he was driven to the necessity, in order to get on with his contract at all, of constructing expensive temporary works, which would have been altogether unnecessary if the drawings had been sent in within reasonable time. I consider that is not a matter referred to the arbiters. In the first place, it seems to me to constitute a breach of an implied obligation in this contract, because the progress of the works and their completion within the time limited by the contract itself was necessarily dependent on these drawings being supplied in such time as to enable the contractor to go on with his work, and fulfil his obligation of completing it within the time limited. I think there arises from that a very clearly implied obligation upon the railway company and their engineer to supply these drawings within such reasonable time, and that their failure to do so, which I think is well alleged in the amended 13th article, is a breach of that implied obligation. That is necessarily, I think, from its very nature a claim of damages. I do not see how it can possibly be treated in any other way. I do not think it can be dealt with as a claim for extra work, or as a claim for additional payment in respect of the work which he performed. The claims do not answer to that kind of description at all. On the contrary, it is impossible, I think, to restore the pursuer against the consequences of the breach, or to repair the loss which he has sustained in consequence of the breach in any other way than in the form of damages.

I do not think it is contemplated in the reference clause or in the specification of the contract, that a claim of damages arising from a party resiling from their own express or implied condition in this contract should be referred to the arbiter or to the engineer. It would be unreasonable to hold that it does so unless the language was very clear, because it would really mean to refer to the engineer whether there was a good claim of damages in respect of his own negligence, and one would not be disposed to read the reference clause in such a way as to embrace in it such a matter as that. But there is another most important objection to holding this claim of damages to be within the reference clause; it being a claim of damages the arbiter, or referee, or engineer, or whatever he may be called, is not empowered to assess damages, and unless he is expressly empowered to assess damages by the contract of parties, he cannot do so, as was fixed in the judgment of the House of Lords in the case of *Blaikie* v. *The Aberdeen Company*, 1 Macq. 461.

It seems to me in every view, therefore, that this claim under the amended 13th article of condescendence is a claim that does not and cannot fall under the reference clause, and must be the subject of a separate proof or trial in this Court. I should therefore propose to your Lordships to recal that part of the Lord Ordinary's interlocutor which sustains the plea of relevancy as regards that 13th article of the condescendence, and remit to the Lord Ordinary to allow the parties a proof on this part of the pursuer's claims.

So far as I read the interlocutor of the Lord Ordinary, and also so far as I can gather from his note, he proceeds entirely on the relevancy of the statement as it stood in the 13th article of the condescendence as that article stood before him, and probably his Lordship might have arrived at a different result if he had been placed in the same position which we now occupy with the amended article before us.

LORD SHAND—I am of the same opinion.

I agree in thinking with the Lord Ordinary that the pursuer's claims, other than the alleged claims of damages which are specified in the 13th article of the condescendence, to which considerable specification has been added by the amendment now lodged, fall within the clause of reference to the arbiter. Your Lordship has referred to the 19th section of the specification, which was subsequently modified by substituting Mr Strain as a professional man for Mr Strain as the company's engineer under the contract, and I have only to add that I do not think one could very well figure words which more carefully and comprehensively include all questions that might arise in regard to the rates to be paid for the work, and extra work, or as to the measurements of that work when it was completed. The contract expressly gave schedule rates for ordinary work. It provides that extra work shall be priced by the engineer of the company, a provision which was subsequently varied under the contract to the extent of substituting the arbiter in case of dispute, and not only are rates thus fixed, but measurements and everything else of that kind is expressly referred to the engineer or arbiter. The claims of damages, which form a very large item in the pursuer's demand, are, however, in a different position.

I agree with your Lordship in thinking that none of the clauses of reference founded on comprehend these claims. The nature of these claims is this—When the contract was entered into there were in existence only certain plans, five in number, three of which related only to matters of minor detail, while the two remaining were merely block plans of the general line proposed. Accordingly there was a provision in the contract that from time to time the engineer of the company should furnish the contractor with plans as required for carrying on the work. No doubt a contractor undertaking work of this kind must lay his account with the fact that at times delays will occur in furnishing plans—many circumstances may occur to cause certain delay which may even be considerable, and to which no valid objection could be taken.

But in this case, according to the pursuer's statement, the delay which occurred was of quite an extraordinary and unusual nature, arising from the fault and neglect on the part of the engineer, for whom the defenders are responsible. The pursuer avers that for months—many months in some cases—the plans were not given to him when he was ready for the work, and when he ought to have had the plans to enable him to fulfil his contract, by which he was put to large expense in connection with the work of the contract, all as fully detailed in the states produced. The contract contains clauses binding the contractor to have the work done by a certain date, and clauses making him liable in penalties if the works are not then completed. It was impossible for him to fulfil the contract as to time unless the company through their engineer should supply him from time to time with plans, at all events within reasonable time to enable him to go on with the works. The averments which we now have, with the additional specification which has been given by way of amendment, come to this—That the company did not supply these plans within reasonable time, but on the contrary delayed for periods extravagant in length to furnish plans, thereby hanging up the work in the contractor's hands from time to time, delaying the execution of the work, and imposing upon him the necessity of incurring great expense so as to have the work completed by the time specified, or as near to that time as the circumstances admitted, all to his serious loss, injury, and damage.

Having completed the work his claim now is, that as there was breach of contract on the part of the company in failing to furnish the requisite plans within proper time he shall be allowed to recover the damage thereby caused. The counsel for the respondent was asked under which provision of the contract or specification he could maintain that such a claim fell to be disposed of by the arbiter, and the clause mainly relied on was, I think, that one contained in the specification article 34, and which is printed in the appendix, and is to this effect—"Should any dispute arise as to the true intent and meaning of this specification, or as to the adjustment and terms of the contract deed to follow hereupon, or as to what may be considered usual and necessary clauses in the said deed, or as to any other matter connected with this contract to follow hereon (except as to maintenance or matters otherwise specially provided for to be settled by the engineer solely), the same shall be referred to the decision of the said John Strain." The words which it was said would cover this claim are these—"Disputes as to the true intent and meaning of this specification . . . or as to any other matter connected with this contract to follow hereon."

Now, I must repeat, in regard to an arbitration clause of this kind, what I think I have said in previous cases, that where a company make their own engineer the arbiter to determine disputes and questions arising out of his own actings and conduct, and where fault is imputed to him, I think the Court should interpret the clause of arbitration strictly, and so as not to extend the reference beyond what the language expressly bears, or what is clearly included by necessary implication. I agree with your Lordships in thinking that in order to include a claim of this kind as a subject of reference, and especially a subject of reference to the company's own adviser or engineer, it ought to be expressly mentioned, and must at least be clearly indicated as one of the classes of questions to be included in the reference, which in this instance it is not.

I do not think this claim can properly be represented as really raising any question as to the true intent and meaning of the specification. The specification provides that the plans were to be furnished from time to time. That necessarily implies, with reference to the other clauses in the contract to which I have referred, that these plans shall be furnished within a reasonable time to enable the contractor to go on with his work so as to finish it within the time stipulated. It is said by the respondents that their reading of the contract is this—That the engineer might supply these plans at any time he pleased, and as late as he pleased, and even it was said he might delay to supply them till the last week before the contract was about to expire. That appears to me to be utterly extravagant. The suggestion by one of the parties that he is to put what is obviously a forced, unreasonable, and extravagant meaning on some term or clauses of the contract in order that he may get the dispute which has arisen referred to the arbiter in the hope that he may be induced to misread the contract, would never bring the dispute or difference under the clause of arbitration. The specification here is absolutely plain in its terms. As the contractor is bound as to the time, so, too, the company must be bound to supply the plans within a reasonable time on the other hand, and there is no case of any true dispute as to the meaning of the specification involved in the pursuer's claims. Then, in regard to the words "as to any other matter connected with this contract to follow thereon," I do not imagine that these words, which seem to relate to matters arising during the performance and execution of the contract, could possibly be held to include a claim of damages of this kind after the contract has been fulfilled by the contractor, and the works have been taken over.

Then, with reference to the other clause founded on which is contained in the contract itself—"It is hereby specially provided and declared that all disputes and differences in any way connected with or arising out of the execution of or failure to execute the works hereby contracted for" are referred to "the amicable decision, final sentence, and decree-arbitral of John Strain"—it appears to me that is really a clause executorial of the contract, that what is there intended to be referred and

is referred are questions arising in the course of the execution of the work or in course of the work where the contractors are failing to execute it, and where it is necessary to call in the arbiter to call on them to complete the work—questions as to whether the work being done is of the quality and character stipulated for, as to whether the contractor at the close of the work is entitled to leave it as duly completed or not, and the like questions. I think this clause goes no further, and that it certainly does not embrace the reference of such a matter as we are dealing with.

On these grounds I agree with your Lordship in thinking that we should find that the pursuer's claims of damage as stated do not fall within the clause of arbitration, and should remit to the Lord Ordinary to allow a proof. I may say I should have decided this point entirely as the Lord Ordinary has done, but for the specification that has been given with reference to the delays that occurred in furnishing the plans. These delays are, on the face of them, and on the statement of the pursuer as amended, quite excessive and unreasonable, and if the pursuer makes out a case of that kind it appears to me he would be entitled in law to recover such damages as he could show were the direct result of what must be regarded as the defenders' failure to perform their contract or breach of contract arising from the fault of their engineer.

LORD ADAM—I concur. I agree with your Lordships that all the matters, except those referred to in article 13 of the condescendence as now amended, fall within the clause of arbitration in this contract, and I do not think there is any doubt about it.

With regard to the matters alleged in the 13th article of the condescendence, my view is that they disclose a state of matters not within the contemplation of parties at the time when the contract was entered into, and not provided for by the parties in the contract. We have in the contract a somewhat similar matter with which the contract does deal, namely, delay arising from failure on the part of the railway company to give the contractor possession of the ground in good time. That is provided for; that has been made matter of contract between the parties, and is duly provided for. But this other, which is alleged here, does not appear to have been provided for at all, or to have been in the contemplation of the parties. Now, if that be so, I cannot doubt that these parties had an implied condition or an express condition in the subject in the contract—an implied condition that the plans necessary to enable the contractor to carry on his work and complete his work within two years—should be furnished within reasonable time. I cannot doubt that. I cannot think there is any force in the argument of Mr Dickson, that the railway company might have kept up their plans till the eleventh hour, and then have produced them, and all the same have proceeded against the contractor for damages. I do not think that that is a possible condition of this contract. I think it is implied that the plans should be furnished within reasonable time. According to the pursuer's allegation—it may be true or false—they were not so furnished, and in consequence a deal of extra work, not extra work in the sense provided for by the contract, but work that otherwise it would not have been necessary for the contractor to do in the course of the execution of this contract, and a deal of expense, were involved. "Such extra work was rendered necessary," he says, "as the direct result of the contract by your not duly and properly furnishing me with plans," and he is prepared to show a jury or the Court that he has suffered a certain amount of damages in consequence, and if he succeeds in making out a case I do not see why he should not recover damages.

LORD M'LAREN concurred.

The Court recalled that portion of the interlocutor reclaimed against which sustained the plea of relevancy as regarded article 13 of the condescendence, and remitted to the Lord Ordinary to allow the parties a proof upon that portion of the pursuer's claim.

Counsel for the Pursuer—R. Johnstone—Ure. Agents—Macpherson & Mackay, W.S.

Counsel for the Defenders—D.-F. Balfour, Q.C.—Dickson. Agents—Hope, Mann, & Kirk, W.S.

Thursday, November 28.

FIRST DIVISION.

[Lord Kyllachy, Ordinary.

THE DUKE OF ARGYLL *v.* M'ARTHUR AND OTHERS.

Landlord and Tenant—Grazing Lease—Construction—Outgoing Tenant—Mode of Estimating usual Average Stock of Farm.

The lease of a sheep farm, which included no right of common pasturage, referred to certain estate regulations which contained the following article—"The tenants shall be bound to keep the lands respectively let to them under a full and sufficient stock during the currency of their respective leases; and the proprietor shall have the power of fixing the souming of sheep, black cattle, and horses to be kept by each tenant; and the outgoing tenants shall at removal, whether the lease shall have come to its natural termination or not, deliver over at valuation the sheep-stock on the respective farms to the proprietor or incoming tenant, who shall be bound to receive the same; and in no case shall the number of the sheep so delivered over either exceed or be under the usual average stock or souming of the farm.

In a question between the landlord and the outgoing tenant—*held* (1) that