

sary, it is not desirable to throw out the present petition altogether.

LORD PRESIDENT—I concur, and would merely add that I understand that in keeping alive the application for the contingencies which Lord Kinnear has referred to, we are not expressing any opinion as to the relevancy of the statements in the petition. It is merely that a ministerial act may require to be done by the Court—namely, to rectify the register, and accordingly it is not convenient that another petition should be presented with that end. We will sist the petition *in hoc statu*, reserving the question of expenses.

The Court sisted the petition.

Counsel for the Petitioners—Ure—Cook.
Agents—Simpson & Marwick, W.S.

Counsel for the Respondents—C. S. Dickson—M'Lennan. Agent—Murray Lawson, S.S.C.

Tuesday, November 14.

FIRST DIVISION.

[Lord Kyllachy, Ordinary.

DUFF v. PIRIE.

Arbitration—Gratuitous Reference—Demand by Arbitrer for Remuneration—Reduction—Personal Bar.

An arbitrer who had accepted a gratuitous reference intimated to the parties that an award was signed and in the hands of the clerk, and requested them to pay him a fee of £300 before uplifting it.

In an action by one of the parties for reduction of the award on the ground that the arbitrer had acted corruptly in demanding remuneration, *held* that the pursuer was barred from challenging the award on this ground, in respect that he had paid his share of the fee without objection, and had taken part in subsequent proceedings before the arbitrer.

Observations by Lord Kyllachy, concurred in by the Lord President, as to the impropriety of an arbitrer who had accepted a gratuitous reference, demanding a fee towards the close of the proceedings.

Arbitration—Contract—Pleadings before Arbitrer—Award—Reduction—Ultra fines compromissi—Personal Bar.

A specification of works for the construction of a harbour contained detailed schedules of the works to be executed, but provided that contractors were bound to satisfy themselves of the accuracy of these before tendering, and that no claim should be allowed though they were found to be inaccurate. In a reference to the arbitrer named in the specification, the contractor claimed for the expense of

rock excavation beyond the scheduled quantity. The employer opposed this claim, on the ground that after the date of the contract negotiations had taken place between him and the contractor as to the amount of the rock excavation; that he had agreed to lessen the length of deepening required by the contract, and that the contractor had then definitely accepted the scheduled quantity as correct.

In an action by the employer for reduction of an award issued by the arbitrer, on the ground that he had given effect to a claim by the contractor for the expense of rock excavation beyond the scheduled amount, *held* that the employer, having rested his case before the arbitrer on an alleged separate agreement with the contractor, was barred from pleading that the arbitrer's claim was excluded by the contract.

Arbitration—Interim Award.

Observations by Lord Kyllachy as to the kind of case in which the Court will entertain objections to interim awards.

Arbitration—Contract—References—Award—Reduction—Ultra fines compromissi.

A contract for the construction of harbour works contained a clause of reference submitting to the arbitrer therein named all disputes as to the rights and obligations of either party under the contract, or any matter in any way connected therewith. In the course of the contract the employer, in virtue of powers given him by the contract, required the contractor to perform some extra blasting operations not specified in the contract. The contractor subsequently alleged that these operations had caused an accumulation of silt on the surface of rock which he was required by the contract to excavate, and he declined to proceed with the work of excavation unless the employer would pay for the removal of the silt. The employer having refused to do so, the dispute was referred to the arbitrer, who ordained the contractor to proceed with the work of excavation on the silt being removed, and ordained the employer to remove the silt, failing which the contractor should not be bound to excavate the rock.

In an action by the employer to reduce the award on the ground that the arbitrer had exceeded his powers in ordaining him to execute works, *held* that the arbitrer had not acted *ultra vires*, in respect that the order on the employer was not obligatory, but was merely imposed as a condition which the employer had to fulfil before he could enforce the order upon the contractor to proceed with the work of excavation.

In September 1888 a contract for the construction of certain harbour works was concluded between Thomas Duff Gordon Duff of Hopeman, in the county of Elgin,

and George Pirie, contractor, Aberdeen. By this contract Pirie bound himself to complete the works in terms of the specification annexed to the contract for the sum of £8873.

The "general conditions" of the specification provided, *inter alia*—"The contractor shall undertake and be liable for sea risks of every description during the progress of the works, he being held to have satisfied himself of the sufficiency of the designs before making his tender. . . . Contractors are required to state a slump sum for the whole works required, and to accompany their offers with a minutely detailed estimate. To assist them in doing so detailed schedules of the works specified are provided, which schedules are believed to be accurate, but at the same time are not warranted to be correct, and no claim of any kind shall be made or allowed though the same shall be found inaccurate, contractors being bound to satisfy themselves as to their completeness and accuracy before making any offer. The prices in this detailed estimate shall be used by the engineer in regulating the monthly payments."

Power was given to the employer or his engineer to order extra works to be executed as circumstances should seem to require it according to the rates in the contractor's alleged estimate, or if these were not applicable, according to such prices as he (the engineer) should think reasonable, and it was declared that the contractor's signature to the specifications, schedule of quantities, and drawings should be "full evidence of his adoption of the same, and his acknowledgment of their accuracy and sufficiency."

The specification further contained the following clause of reference:—"If at any time before the commencement, or during the progress, or during the period of maintenance of the works, or after the completion of the contract, any disputes or differences shall arise between the employer and the contractor . . . as to the true intent, construction, or meaning of this specification, or of the said drawings or schedules of quantities, or of the contractor's tender or acceptance thereof, or of any of the conditions contained in each and all of these, or of anything to be contained in the formal contract to be entered into as herein provided, or as to the terms in which such contract shall be framed, or as to the manner of executing or protecting or maintaining the works contracted for, or as to the quality of the materials employed or proposed to be employed therein, or as to the measurement or valuation of the works executed under the contract, or the amount of any advances to be made to the contractor, or as to any claims for additional or extra works, or as to any claims of deduction for or in respect of alterations or diminutions on the works, or as to any charge, account, cost, expenses, or damages made or claimed by the employer against or from the contractor, or his foresaids or sureties, or made or claimed by the contractor or his foresaids against or from the

employer, arising out of the execution or the failure in the execution of the works, or any part thereof, or arising out of or payable by reason of the performance or the failure in the performance of any of the obligations undertaken by the parties in the contract, and generally as to the rights or obligations of either party under this contract, or any matter or thing whether of the nature above specified or of any other kind, as well non-executorial as executorial, arising out of or in any way connected with the execution of or failure to execute the works contracted for, or the performance of or failure to perform any of the obligations undertaken by the parties, or the exercise of any of the powers conferred on them, or arising out of or in any way connected with the contract, then all such disputes and differences shall be submitted and referred to the decision, final sentence, and decret-arbital of the said John Willet, whom failing of William Smith, M.Inst.C.E., Aberdeen, presently engineer to the Aberdeen Harbour Commissioners, and whatever the said arbiters shall respectively determine in the premises, in whole or in part, by award or awards, decret or decreets arbitral, whether interim or final, to be pronounced by them respectively, the employer and the contractor . . . shall be bound to acquiesce in, implement, and fulfil to each other; which submission shall not fall by lapse of year and day, nor by the death or bankruptcy of . . . the employer or the contractor, . . . the said arbiters respectively having full power not only to determine the liability of any of the parties to the other for or in respect of the claims, charges, costs, expenses, or damages as to which any dispute or difference is referred, but also conclusively to assess and fix the amount thereof, as well as to award all the costs incurred under said submission. The said submission shall be held to exclude the jurisdiction of any court of law in reference to any of the matters before referred to."

In January 1892 differences arose between the contractor and the employer, and claims were submitted by them to William Smith, the arbiter named in the contract failing John Willet, who had died.

In his note of claim the contractor averred that he had completed and maintained the whole works contracted for with the exception of a part of the rock excavation required by the contract. He averred that owing to certain extra blasting operations ordered by the employer's engineer a quantity of sand and silt had been washed in by the sea on to the surface of unexcavated rock, that it would entail considerable expense to remove it, that he was not bound to do this work without being paid for it, and that the employer had declined to make any such payment. He claimed in all a payment of £2534 as being still due to him under the contract. This sum included a claim of £573 for rock which he averred he had excavated beyond the contract amount; and a sum of £460, made up of the following items:—(1) Cost of recover-

ing and repairing crane washed down from North Pier, £110; (2) value of framing destroyed during construction of North Pier, £150; and (3) value of concrete washed away during construction of North Pier, £200. He further craved the arbiter to fix and determine at whose expense the accumulated silt lying on the rocks yet to be excavated was to be removed.

The employer Duff denied that the accumulation of silt upon the top of unexcavated rock was due to the cause alleged by the contractor. He further denied that the amount claimed by the contractor was due, and in particular that the sums of £573 and £460 were due. With regard to the first of these sums, he stated that the question how much rock required to be excavated had been made matter of negotiation between the parties after the contract had been signed, that he had agreed to reduce the amount of deepening required by the contract by 20 feet, and that the contractor had thereupon by letter dated 13th December 1888 definitely accepted the scheduled amount of excavation as correct.

On 15th March 1892 the arbiter pronounced an "interim award and order" dealing with some of the matters submitted to him, and *quoad ultra* allowed parties a proof of their averments.

Proof was thereafter led before the arbiter on various points, and, *inter alia*, with regard to the cause of the accumulation of silt, the alleged agreement as to the amount of rock to be excavated, and the cause of the damage in respect of which the claim for £460 was made.

On 3rd June, after hearing proof, the arbiter pronounced a second "interim decree-arbitral." After reciting the reference clause and the previous proceedings in the submission, the award proceeded—"I do further ordain the second party (the contractor) at his own expense to complete the following works, namely—Sixth. *Rock Excavation*.—I ordain the second party, during and after removal of the silt specified in article seventh hereof, to bore, blast, and remove the remaining rock excavation below low water-level down to the specified depth of three feet below low water; this work to be done immediately following upon the removal of the silt or sufficient portions thereof to facilitate the work of boring and blasting. Seventh. *Silt*.—I hereby find and determine that the accumulated silt lying on the rocks yet to be excavated in the entrance channel of the harbour falls to be lifted at the expense of the first party, and ordain him to do so within a period of one month from the date of these presents, which period I reserve right to extend on cause shown, failing which the second party shall not be bound to implement article sixth hereof. . . . And I further decern and ordain the first party forthwith to pay to the second party the sum of £1257, 7s. 1d. as a further interim payment." . . .

On the same date the clerk to the reference wrote to the parties intimating that the arbiter had signed the decree, and requesting them, before taking the decree

out of his hands, to remit a fee of £300 for the arbiter. Both parties paid their share of this fee, and uplifted the award. The parties subsequently appeared before the arbiter on the question of expenses.

The present action was raised by Duff, the employer, against Pirie, the contractor, for reduction of both the awards issued by the arbiter, on the ground that they were *ultra vires* and *ultra fines compromissi*, and that the arbiter had acted corruptly in the sense of the Act of Regulations.

It is unnecessary further to refer to the objections to the first award. To the second award it was objected, *inter alia*—(1) That in the sixth finding the arbiter made the defender's obligation to complete the rock excavations in terms of the contract conditional upon the silt which covered the rock being removed by the pursuer; (2) that in the seventh finding he ordained the pursuer to remove the silt, and took upon himself to relieve the defender of his obligation to excavate the rock unless the pursuer implemented this incompetent order; and (3) that in decerning for £1257 the arbiter must have entertained one or other or both of the two claims made by the contractor, viz., the claim for £573 for the expense of rock excavation beyond the contract amount, and for £460 for damage done by the sea. With regard to the first of these claims, the pursuer repeated the averments he had made in the submission to the effect that the contractor by agreement apart from the contract had accepted the scheduled quantity of rock excavation as correct, and further averred that apart from the concession then made to the contractor in the reduction of the amount of deepening, the claim was entirely excluded by the original contract. With regard to the claim for £460, the pursuer averred that it was made in respect of "sea risks," liability for which was undertaken by the contractor in the contract. The pursuer further averred that the arbiter had acted corruptly in claiming a fee, as the clause of reference gave him no right to claim remuneration. He stated that he had paid his share of the fee under pressure put upon him by the arbiter to make the payment as a condition of the decree being issued.

The defender in answer averred, *inter alia*, that it was premature for the pursuer to object to the money decerniture as *ultra vires*, as both awards were interim ones, and the total sum decerned for did not exceed the whole of the defender's claim.

The defender pleaded, *inter alia*—" (2) The pursuer having acquiesced in and homologated the decret-arbitral of 3rd June 1892 is barred *personali exceptione* from insisting in its reduction. (4) The pursuer's statements are irrelevant. (5) The arbiter having power to decide as to the construction and meaning of the contract, and the decrees of the arbiter complained of being in all respects within his powers and subject to no exception, and being interim awards, the defender should be assoilzied. (7) The pursuer having paid

his share of the arbiter's fee, and appeared and pleaded before the arbiter after he had so done, he is barred from objecting to the decrees on the ground that the arbiter had fixed a fee to be paid to him."

On 16th February 1893 the Lord Ordinary (KYLLACHY), so far as the reasons of reduction above stated were concerned, repelled the same and assolized the defender, reserving all competent objections to the final award and decree-arbitral when issued.

"*Opinion.*—The pursuer in this case is Mr Duff of Hopeman, the proprietor of the harbour of Hopeman in Morayshire, and the defender is the contractor for certain recent extensions of the harbour works. The object of the action is to reduce two interim decrees-arbitral pronounced by the arbiter nominated in the contract, the grounds of reduction being generally, that the arbiter has exceeded his powers, has ignored the express terms of the contract, and has moreover been guilty of corruption in so far as having accepted the reference without stipulating for remuneration, he demanded before issuing his second decree-arbitral a fee of large amount fixed by himself, and payable by the parties in equal shares.

"There has as yet been no proof, but I have heard a prolonged argument in the Procedure Roll, each party asking a judgment on the record and productions, which latter include the contract and relative specifications, and also the proceedings before the arbiter in the reference.

"I have found the case to be attended with difficulty, and I have hesitated a good deal as to my judgment. I have not much doubt that the arbiter has taken considerable liberties with the contract, and I cannot regard lightly what appears to have happened about his fee. But what I have had to consider is, whether his action has been such as to invalidate his award, and I have also to consider how far the pursuer's challenge is premature, or on the other hand, comes too late.

"Perhaps I ought in the first place to deal with the matter of the arbiter's fee. I confess that if I had to decide this objection on its merits, I should have some doubt whether as the case stands I was in a position to do so. I observe that the arbiter has not been called as a party to the action, and if this particular objection was to be urged he ought to have been so. Moreover, I am not sure that I can take it as admitted that the demand complained of, which is contained in a letter from the clerk to the reference, was authorised by the arbiter. But in the view which I take it is not necessary to decide how far these difficulties are insuperable, or indeed to decide anything as to this part of the arbiter's conduct, for it appears to me that the objection urged, even if well founded, was capable of being waived, and I think it clear that both parties did waive any right which they or either of them may have had to bring the reference to an end on receipt of the communication which is complained of. It appears from the proceedings that they not only paid the

fee asked without objection, and took up the award, each party taking his chance of its contents, but that after the award was issued both parties appeared and pleaded before the arbiter, at all events on certain questions relating to costs. Indeed, it is stated, and so far as appears correctly, that no challenge on this score was intimated or even indicated until the adjustment of the record in the present action.

"I cannot hold that in these circumstances the pursuer can in a question with the defender urge this ground of objection now.

"I must at the same time take leave to say that I must not be understood to give any countenance to the argument submitted by the defender, to the effect that it is quite lawful and proper for an arbiter who has accepted a gratuitous reference to demand towards the close of the proceedings and on the eve of issuing his award, a fee for his trouble fixed by himself. I was told that such is the practice in England, and it may be so, for such abuses are difficult to check, inasmuch as from their very nature they tend to secure their own impunity, and can but seldom come under the cognisance of the Courts. But whatever may be the practice in England, I am at least confident that no such practice exists in Scotland. If it does so, I have never heard of it, and I should be very sorry to hear of it now. One thing I think is certain, that as the law of Scotland stands, such a proceeding on the part of an arbiter would most probably be held to amount to corruption. In the case of *Blair*, January 12, 1738, *Elchies voce Arbitration*, 3, the Court reduced an award on the ground of corruption because the arbiters refused to give up their award until they got payment of the fee demanded by them, which one party refused but the other agreed to give. And in the more recent case of *Fraser*, May 26, 1838, 16 S. 1053, the opinions of the Judges show, I think, pretty plainly that the result in that case would have been the same but for the specialties—(1) that the arbiters had stipulated for remuneration, not indeed strictly before acceptance, but yet at the outset of the submission; and (2) (what was greatly relied on) that the remuneration demanded was not fixed by the arbiters themselves, but was remuneration left to be fixed by a neutral authority. I think this last case by no means detracts from the general rule, and for my part I should be sorry if any laxity were permitted in such a matter, for nothing could, in my opinion, be of worse example than that an arbiter, having undertaken a submission without stipulating for remuneration, and having thereby agreed to accept such remuneration as the parties might send him, should nevertheless, towards the close of the proceedings, and while he still has the parties in his power, demand from each of them a sum of money fixed by himself, to which he has no legal claim, and should propose to enforce this exaction by declining otherwise to issue his award—that is to say, to perform his duty under the reference.

“So much for the pursuer’s challenge on the head of corruption. I may next consider the point taken by the defender, that the two awards being only interim awards, and being therefore open to be reconsidered in the final award, it is incompetent to reduce them now. Now, to some extent I think this argument has force. In a case of this sort it is always open to the Court to refuse to interfere until the pursuer has exhausted his ordinary remedies, and where an interim decree pronounced in a submission is challenged upon grounds which are doubtful, or which involve inquiry, and where at the same time the matter of complaint admits of being adequately redressed in the final award, I should certainly refuse to try a question which may ultimately be found to be unimportant. But, on the other hand, an interim award may sometimes be in substance a part award. It may in its nature be incapable of after correction. Or, again, while capable of correction, it may be so plainly and obviously bad that the party aggrieved is entitled to obtain redress at once. It is therefore, I think, impossible to lay down any general rule with respect to the challenge of interim awards. The principles which I have tried to indicate must be applied to each case as it occurs. We shall see by-and-by how far they help in the disposal of some of the questions which are here raised. . . .

“With respect to the second award, there are several of the pursuer’s objections which I cannot entertain. In particular . . . (2) It is also complained that the arbiter has ordered the pursuer to remove certain silt from the harbour as preliminary to the completion by the defender of the excavations under the contract. It appears to me that this is matter rather of form than of substance. What is meant by the award plainly is, that in the judgment of the arbiter the pursuer is responsible for the silt, and that the contractor is not bound to go on with his work until it is cleared away. There is really no order on the pursuer to execute new works. He may execute the work ordered or not execute it as he pleases. And that being so, I can see nothing wrong. The arbiter, I must suppose, has held it proved that the silt in question came, as the defender contends, from the blasting operations ordered by the pursuer outside the harbour, and outside the contract. As to this he may have been right or wrong, but he was entitled to judge. . . .

“It remains to consider the other and last objection, which is this—The arbiter has decreed against the pursuer for payment of a sum of £1257, 7s. 1d. ‘as a further interim payment.’ He does not explain how this sum is reached; but the pursuer undertakes to show, by comparing the sum awarded with the total of the contractor’s claims, that the arbiter must have included, at least to the extent of about £298, certain claims by the contractor which are expressly excluded by the contract. These claims are (1) for certain excavations within the contract limits, and necessary to deepen

the harbour to the contract level, but in excess of the estimated quantity of excavation contained in the schedules; (2) for the loss of a certain crane, and other losses sustained by the contractor from what were plainly sea risks, during the execution of the contract. The pursuer says, and I think with force, that if the arbiter entertained those claims, or either of them, he did not merely misconstrue the contract, but ignored or defied it, and that this, if it does not infer corruption, at least involves a breach of an essential, although implied, condition of the contract of reference.

“Now, if I were bound to hold that the arbiter had in fact sustained either of the two claims in question, I should have great difficulty in upholding the award. At least I should have great difficulty on the materials before me, or upon any explanations which the defender has been able to offer. But there here comes in the circumstance that this is an interim award, that the arbiter is not before me, and that he has not had an opportunity of explaining on what principle or on what calculation he has arrived at the sum of £1257, 7s. 1d. which is in question. It may be that the fact is as the pursuer says; but on the other hand it is at least possible that the arbiter has included some other items, as, for instance, the expense, or part of the expense, of the works ordered by him under these interim decrees-arbitral. Or it may be that there has been simply a miscalculation which can be set right in the final award. Now, while anything of that kind is possible, I should be unwilling to make the assumption, which the pursuer suggests—an assumption which would reflect seriously on the arbiter, and might be doing him great injustice. Accordingly I do not feel bound at this stage to follow the pursuer into the analysis and calculation on which this objection rests. I prefer to assume—what I think from the arbiter’s position I am justified in assuming—that if there is an error in this matter it will be corrected, and that the final award will be one which, in this and other matters, will respect the contract, and do justice between the parties.” . . .

The pursuer reclaimed, and argued—(1) The 7th finding was *ultra vires*, as the arbiter had no power under the contract to ordain the pursuer to execute any works. The 6th finding was conditional and inconclusive, and this was a sufficient ground for reduction of the award—*Clyne’s Trustees v. Edinburgh Oil Gas Light Company*, August 27, 1835, 2 S. & M’L. 243. (2) In awarding the defender £1257 the pursuer must have taken into account one or other or both of the claims for £573 and £460, for excluding these claims, and taking into account the amount awarded under the previous decree, the sum now awarded exceeded the defender’s total claim by £298. Both the claims mentioned were excluded by the express words of the contract; the first, in respect that the defender under the contract accepted the schedules of works as correct; and the second, in respect that under the contract he undertook all liability

for "sea risks." The award therefore was in excess of the competent claims made by the defender, and was reducible on this ground as *ultra fines compromissi*—*Adams v. Great North of Scotland Railway Company*, June 21, 1889, 16 R. 843—*aff.* November 20, 1890, 18 R. (H. of L.) 1; *Napier v. Wood*, November 29, 1844, 7 D. 166; *Glasgow City and District Railway Company v. Macgregor Cowan, & Galloway*, February 25, 1886, 13 R. 609. The decree was not an interim award which might be corrected in the final award. It was exhaustive and final as to the questions submitted to the arbiter with which it dealt—*Bell on Arbitration*, 262; *Edinburgh and Glasgow Railway Company v. Hill*, January 28, 1840; *Montgomery v. Carrick*, December 8, 1849, 12 D. 274. The case was one for total and not partial reduction, as the award slumped competent and incompetent claims together—*Mackenzie v. Inverness and Aberdeen Junction Railway Company*, June 9, 1866, 4 Macph. 810. Lastly, the awards were reducible on the ground of corruption, in respect that the arbiter, having accepted a gratuitous reference, had demanded a fee after the proceedings were far advanced—*Blair v. Gibb*, *Elchies' Decisions*, *voce Arbitration*, No. 3, and M. 644; *Montgomery v. Strang, Lennox, & Company*, 1798, M. 631; *Jack v. Cramond*, 1777, M., *voce Arbitration*, App. No. 5; *Fraser v. Gordon*, July 5, 1834, 12 S. 887; *Fraser v. Wright*, May 26, 1838, 16 S. 1849, *per Lord Glenlee*, 1056. It was not necessary that an arbiter should be a party to proceedings for the reduction of his award—cases of *Blair, Montgomery, Jack*, and *Adams supra*. But if necessary he might be called to explain it—*Glasgow City and District Railway Company, supra*. The fact that an arbiter had exceeded his powers did not justify a party in declining to proceed under the reference—*Cox Brothers v. Binning & Son*, December 18, 1867, 6 Macph. The pursuer could not therefore be barred from now claiming reduction.

Argued for the defender—(1) By the 7th finding the arbiter ordained the employer within a specified time to do certain work. Failing his doing that work, the contractor was relieved from the obligation to execute certain excavations. That was a perfectly competent order under the clause of reference, which gave the widest power to the arbiter to decide on the rights and obligations of either party under the contract, and assess the amount of their respective claims. It was neither conditional nor inconclusive in the sense of the decision in *Clyne's Trustees*. (2) There was no reason to think that the arbiter had given effect to incompetent claims by the contractor. The claim for £573 had been opposed by the pursuer before the arbiter on the ground that it had been agreed between the parties subsequent to the date of the contract that the scheduled quantity of rock to be excavated was correct. If the arbiter had included this claim in his award, it was because he was against the pursuer on the evidence submitted to him as to the alleged agreement. Having rested

his case on the alleged agreement before the arbiter, the pursuer could not now adopt a different ground and stand on his rights under the contract. The claim for £460 had been considered by the arbiter without any objection by the pursuer that it was an incompetent claim, and he could not now assail the arbiter's decision. Further, there was no suggestion that the claim was for loss occasioned by "sea risks" except in the pursuer's averments. The defender's case was that the loss had been occasioned through the normal action of the elements owing to the insufficient nature of the works. The question whether the claim was just under the contract was for the arbiter. Besides, there was no reason to assume that the arbiter had taken either of these claims into account. The amount of his award might be explained by his having awarded a sum for interest and penalty. At any rate, the award could not be condemned without the arbiter being heard—*Edinburgh and Glasgow Railway Company v. Hill, supra*. If he had awarded too much, his award was only an interim one, and could be corrected in the final decree—*Bell on Arbitration*, 262. Lastly, there was no relevant averment of corruption. It was not said that his mind had been corrupted, and it was difficult to see how an improper demand of a fee after an award had been signed could taint the award. The pursuer having paid his share of the fee without protest, and subsequently taken part in proceedings before the arbiter, had bound himself from taking this objection. The reasons for reduction therefore failed, and should be repelled.

At advising—

LORD PRESIDENT—I agree with the Lord Ordinary in holding that in the matter of the arbiter's fee the pursuer's challenge of the award is precluded by his own conduct. His Lordship's strictures on the proceedings ascribed to the arbiter are highly salutary; and it does not detract from my concurrence in these remarks if I add that I do not at present see how an extortionate demand for a fee made after an award has been honestly resolved on and signed can re-act on the award so as to render it corrupt and reducible. The Lord Ordinary's ground of judgment, viz. bar, being sufficient, it is not necessary further to examine the question.

Turning to the various objections to the two awards, I shall take first the award of 15th March 1892, making only this one general observation that the reference clause in the contract is one of great and remarkable latitude.

On the award of 3rd June 1892

The next point in dispute is the seventh head, and the form in which the arbiter has put his decision gave rise to a plausible argument for the pursuer. The matter stands thus: The contractor said that the execution of some extra work which had been ordered by the pursuer had caused an access of silt in a part of the work where rock had yet to be excavated. Now, the

arbiter had a long proof on the questions of fact as to the origin of the silt, and he came to be satisfied that the defender was right in his view, and that its amount was such as to render it a new obstacle in the way of the excavation of the rock, unforeseen and unprovided for in the contract. His view was therefore that the contract did not apply to the existing circumstances. This being so, he might, I think, have found that in the events which had happened the contractor was not bound to do the excavation; and this is what he has virtually though not expressly done. It is true that he in words ordains the pursuer to remove the silt, and on this being done, ordains the defender to excavate the rock. Now, if this order on the pursuer had been expressed as obligatory, or, in other words, if the contractor could, under this order, have forced his employer to remove the silt, it might be difficult to maintain that it was within the arbiter's powers. But then the closing words of this seventh head contemplate the employer not choosing to remove the silt, and prescribe the consequence, which is merely that then the contractor shall not be bound to excavate the rock. I consider, therefore, that the order comes to no more than this, that if the pursuer likes to remove the silt, then and only then the defender must excavate the rock. I have only to add on this head that the pursuer joined issue and went to proof on the questions raised on the record about this silt, and cannot now impugn the arbiter's power to decide them.

The remaining question is as to the decree for £1257, 7s. 6d. The pursuer alleges that in granting this decree the arbiter has taken into account two claims, both of which he maintains to have been *ultra fines compromissi*. Whether either of those things were taken into account there is unfortunately nothing to show, and it is to be regretted that in dealing with a matter of considerable complexity and magnitude the arbiter did not, either in his award itself or by issuing notes of proposed findings, let the parties see what he was giving this money for. It was argued indeed—and the Lord Ordinary has taken that view—that this being an interim award there would be an opportunity for the arbiter in his final award reconsidering any disputable question and rectifying any error in the award under consideration by ordering repayment. I am not satisfied, looking to the claims and procedure and also to the structure of this award itself, that the decree would be held to have only this provisional character, and that it was not, while entitled "interim," a determination of the merits of the claims dealt with. I do not pronounce on this, but the point is so far from clear that if I had thought that the pursuer had succeeded in showing that the arbiter could not legally take into account the two claims which he suspects to compose part of the lump sum awarded, I should have considered it necessary to ascertain whether in fact they had been taken into account by the arbiter. I have come to think, however, that the pursuer

has failed in this contention, and that, even assuming that the items challenged have been computed, this would not expose a final decree, and does not expose this decree, to reduction.

Now, the first of those heads of challenge relates to £573. The contract was for a lump sum, and in the schedule of quantities certain excavations were stated at 86:0 cubic yards. The contractor claimed payment for more than 8630, because he said more had been done and he was entitled to be paid for it. The answer made by the pursuer was that it had been settled by agreement, pending the work, that the quantity of rock to be excavated corresponded with the quantity scheduled, viz., 8630 yards. The case of the pursuer was thus rested not on the terms of the contract, but on the terms of the subsequent letters, or, in other words, the legal view now maintained was waived. The question thus submitted to the arbiter was clearly within his competence to decide. I may add that if the question had been one of the construction of the contract, I am not satisfied that a decision adverse to the pursuer would have been illegal even if legally erroneous.

The other claim for loss of a crane and other articles seems to have been considered by the arbiter without objection by the pursuer to the competency of the proceeding, and I am disposed to think that he cannot now impugn it as *ultra fines compromissi*. But as the pursuer, in order to make good his objection to the award, required to prove the incompetency of both this claim and the claim previously considered, it is not necessary to examine this matter in detail.

The result of my opinion is that the Lord Ordinary's decree of partial reduction should be recalled, and the rest of his interlocutor adhered to, the absolutor being extended to the whole conclusions of the summons.

LORD M'LAREN and LORD KINNEAR concurred.

LORD ADAM was absent at the discussion.

The Court repelled the reasons for reduction, and assolized the defender from the whole conclusions of the summons.

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