

Friday, February 2.

FIRST DIVISION.

(Without the Lord President.)

[Lord Stormonth Darling,
Ordinary.

DOUGLAS & COMPANY v. STIVEN.

Arbitration—Reference Clause—Want of Specification—“Customary” Mode of Arbitration—Proof of Custom—Arbitration (Scotland) Act 1894 (57 and 58 Vict. cap. 13), sec. 1.

In a contract of sale of timber it was provided that in the event of a dispute arising it should “be referred to arbitration in the customary manner of the timber trade.” It appeared from a proof that the usual though not the universal method of arbitration in the timber trade was by reference to two arbiters and an oversman. *Held* (aff. judgment of the Lord Ordinary) that the agreement to refer in the customary manner must be read as an agreement to refer to two arbiters and an oversman, and that it was a valid arbitration clause under section 1 of the Arbitration (Scotland) Act 1894.

Observations (per Lord Stormonth Darling, Ordinary, and Lord Adam) on the proof of usage necessary to explain a custom of trade expressly referred to in a contract, as contrasted with that necessary to read into a contract a custom of trade not expressly referred to.

James Stiven, timber merchant, Dundee, entered into a contract with Douglas & Company, timber merchants, London, for the purchase of certain birch poles. The contract contained the following clause:—“Should any dispute arise respecting the fulfilment of this contract, the buyer is not entitled to reject the goods nor any part of them, but the dispute, if it cannot be arranged by agreement of buyer and Mr John H. Douglas on joint inspection, shall be referred to arbitration in the customary manner of the timber trade. The cost of the arbitration to be paid by the party in default.”

Disputes having arisen as to deductions from the price of the poles claimed by Stiven in respect of their alleged inferior quality, and in respect to other matters which it is not necessary to enter into, Douglas & Company brought an action against him concluding, *inter alia*, for payment of £85, 19s. 7d., being the balance of the price.

In his defence Stiven pleaded, *inter alia*—“(2) The action ought to be dismissed in respect of the arbitration clause, or at all events it ought to be sisted until determination by arbitration of the matters in dispute between the parties.”

In reference to this plea, by minute of amendment of the record, he made the following averment:—“By the custom of the timber trade disputes referred to arbitration are settled by two arbiters, one chosen by each party, and by an oversman

appointed by said arbiters. The contract refers to said custom, and in terms thereof the price payable to the pursuers can only be determined after the matters in dispute referred to in this statement of facts have been decided in this manner by arbitration.”

To this amendment the pursuers made the following answer:—“In particular, the statement added by amendment to article 4 of the statement of facts for defender is denied. No custom of trade as to arbitration such as there alleged exists, and disputes in that trade are referred in all the ways known to the law. By the custom of the timber trade, where disputes are referred to arbitration in any form, it is invariably a condition-precendent of such arbitration that the buyer accepts the draft or drafts of the seller for the price of the goods, or pays for the goods before the arbitration is entered upon. In this case the defender has refused to accept such draft or pay for the goods, and he accordingly is not in a position to insist on arbitration.”

The Arbitration (Scotland) Act 1894 provides, section 1—“From and after the passing of the Act an agreement to refer to arbitration shall not be invalid or ineffectual by reason of the reference being to a person not named, or to a person to be named by another person, or to a person merely described as the holder from the time being of any office or appointment.” Section 2—“Should one of the parties to an agreement to refer to a single arbiter refuse to concur in the nomination of such arbiter, . . . an arbiter may be appointed by the Court.” Section 3—“Should one of the parties to an agreement to refer to two arbiters refuse to name an arbiter, . . . an arbiter may be appointed by the Court.”

On 30th November 1898 the Lord Ordinary (STORMONTH DARLING) sisted the action until the matters in dispute between the parties should have been determined by arbitration in terms of the contract mentioned in the record, and granted leave to reclaim.

Opinion—“This is an action for the price of birch poles and squares sold by a timber merchant in London to a timber merchant in Dundee, and the defence on the merits consists of a claim to certain deductions from the price on the ground of late shipment and defective quality. But there is a preliminary plea that the action ought to be sisted till the matters in dispute have been determined by arbitration under a clause in the contract, which is set out in statement 4. The clause deals with the contingency of a dispute arising ‘respecting the fulfilment of this contract,’ and it provides that in such a case the buyer shall not be entitled to reject the goods nor any part of them, but the dispute, if not arranged by the parties on joint inspection, ‘shall be referred to arbitration in the customary manner of the timber trade.’

“This, says the pursuer, is not a valid clause of arbitration, even under the Arbitration (Scotland) Act 1894. His argument is that the reference is too vague, that the

Act merely gets over the difficulty of the arbiter or arbiters not being named, but that it leaves the old law untouched in every other respect. In particular, he says, it postulates either an agreement to refer to a single arbiter or an agreement to refer to two arbiters, for its executory clauses (2, 3, and 4) are made applicable to these two cases only, and this agreement is neither of the one kind nor of the other.

"The argument is plausible, but I think unsound. It comes with rather a bad grace from the pursuer, who, if I understood counsel aright, was the author of the clause, and at all events was a consenting party to its insertion; for the argument really comes to this, that the clause is meaningless. I say this all the more because the pursuer is an Englishman, and under the English Arbitration Act (52 and 53 Vict. cap. 49) the argument would be unstateable. Section 2 of that Act provides that a submission, or in other words (see section 27), 'a written agreement to submit present or future differences to arbitration, whether an arbitrator is named therein or not,' unless a contrary intention is expressed therein, shall be deemed to include the provisions set forth in the first schedule to the Act, and one of the provisions of that schedule is, that 'if no other mode of reference is provided, the reference shall be to a single arbitrator.'

"But although the Scottish Act does not contain any similar provision, I am not disposed to hold that it is inapplicable to a clause like this. Its leading purpose, I think, is that where parties to a contract have agreed to arbitration even in the most general terms, they shall be held to their bargain, and if either party refuses to carry it out the Court shall do so for him.

"The clause refers to the 'customary manner of the timber trade,' but the parties are at issue on this matter, the defender averring that the custom is to have two arbiters and an oversman, and the pursuer that 'disputes in that trade are referred in all the ways known to the law.' But if the defender is willing (as he says he is) to give the pursuer his choice of either a single arbiter or two arbiters and an oversman, I do not see that the pursuer can escape from the duty of doing what is necessary to carry out the particular mode which he selects. If he does, then I think the Court in its discretion might proceed under either section 2 or section 3 of the Act. But it is perhaps premature to suggest that the pursuer will act in that way.

"I may observe that in the case of *Gilmour v. The Caledonian Insurance Company* (L.R. 1893, App. Ca. 85), the clause of reference was 'to the arbitration of one person to be chosen by both parties, or of two independent persons, one to be chosen by the party claiming and the other by the company.' The case arose before the passing of the Act of 1894, and the clause was held effectual on the ground that the contract, being one upon which no cause of action accrued until the amount of damage had been ascertained by arbitration, was excepted from the rule of Scots law that a

reference to arbiters not named could not be enforced. But I do not find that it was suggested either in argument or by the House of Lords that the clause was ineffectual because of its alternative form. I shall therefore sist the action until the matters in dispute between the parties shall have been determined by arbitration."

The defenders reclaimed, and on 19th January 1899 the First Division recalled the interlocutor of the Lord Ordinary, and remitted to him to allow a proof before answer of the averments contained in the minute of amendment for the defender and in the answers thereto (both quoted *supra*).

A proof was taken, from which it appeared that the usual mode of arbitration in the timber trade was by two arbiters and an oversman, though occasionally by express provision a single arbiter was employed.

On 22nd June 1899 the Lord Ordinary pronounced an interlocutor sisting the action till the matters in dispute between the parties shall have been determined by arbitration in terms of the contract mentioned in the record.

Opinion.—"What the First Division remitted to me to do was to allow a proof before answer of the averments contained in the minute of amendment for the defender and in the answer for the pursuers. I have now taken that proof, and it seems to me that the averment of the defender in his minute is conclusively proved. That averment is that by the custom of the timber trade disputes referred to arbitration are settled by two arbiters, one chosen by each party, and by an oversman appointed by the arbiters. It would be very strange if that were not the custom, because any other custom would make a clause of arbitration almost nugatory unless parties could agree beforehand in naming a single arbiter. But as one would expect from business men, those engaged in the timber trade have anticipated that difficulty, and accordingly the witnesses for the pursuers are just as emphatic as the witnesses for the defender in saying that the customary mode is to provide for a reference to two arbiters and an oversman. Be it observed that the object and purpose of this proof is not to read into a mercantile contract something which is not there, but to interpret a phrase which requires interpretation from the evidence of witnesses. The words requiring to be interpreted are 'in the customary manner of the timber trade.' Now, the parties must be assumed to have meant something effective by using these words, and therefore I apprehend that a court of law ought to be satisfied with evidence of a prevailing custom without demanding that decree of universality which the law does require where the purpose of the proof is to read into the contract something that does not occur in it at all, but which both parties must be understood to have had it in their minds though they have said nothing about it. If that be the proper standard to apply in the present case, it seems to me that the defender has amply proved his averment. . .

"I shall therefore practically repeat my

former judgment, basing it, of course, on the evidence taken."

The pursuers reclaimed, and argued—The case was not advanced by the proof, all that was established was that in the timber trade, as was doubtless the case in all trades, reference was usually made to two arbiters and an oversman. No universal custom had been proved. The case must therefore be taken as a mere general obligation to refer, which was not binding, and did not fall under the Arbitration Act 1894. That Act provided machinery for carrying out an agreement to refer to a single arbiter, or an agreement to refer to two arbiters, but it provided no machinery for carrying out a general agreement to refer, which was therefore inoperative. In order to read into the contract, instead of an agreement to refer in the manner customary in the timber trade, a reference to two arbiters and an oversman, the evidence would require to show that the custom so to refer was universal in that trade, which the defender had failed to do—*Fawkes v. Lamb*, February 12, 1862, 31 L.J., Q.B. 98; *Field v. Lelean*, February 5, 1861, 30 L.J., Exch. 168. *Separatim*, the evidence showed that in the timber trade payment of the price was a condition-*precedent* to arbitration, and that condition the defender had not yet fulfilled.

Argued for the defender—The pursuers had agreed to arbitration in the mode customary in the timber trade. That had been shown to be by two arbiters. Why, then, should they refuse to carry out their agreement. The proof did not add any new term to the contract; it only explained a phrase of doubtful meaning—*Hamlyn & Company v. Talisker Distillery Company*, May 10, 1894, 21 R. (H.L.) 21.

At advising—

LORD ADAM—This is an action brought by the pursuers against the defender for payment of two sums of money, the first being the balance of the price of certain timber furnished by the pursuers to the defender under a contract between them, and the second embracing also the price or value of certain other timber, the property of the pursuers, alleged to have been taken possession of by the defender.

The present position of the case is this—The contract in question contains a clause to the effect that if any dispute should arise respecting the fulfilment of the contract it should be referred to arbitration in the customary manner in the timber trade. On considering this clause of the contract, and a plea founded thereon by the defender, the Lord Ordinary on 30th November 1898, pronounced an interlocutor by which he sisted the action until the matter in dispute between the parties should be determined by arbitration in terms of the contract.

When the case came before us on a reclaiming-note it appeared that the defender, by a minute of amendment of the record, averred that by the custom of the timber trade disputes referred to arbitration were settled by two arbiters, one

chosen by each party, and by an oversman appointed by the arbiters. In answer to that minute the pursuers averred that no custom of trade as to arbitration such as alleged existed, and that disputes in that trade were referred in all the ways known to the law. By interlocutor dated 19th January 1899 we recalled his Lordship's interlocutor, and remitted to him to allow a proof before answer of the averments contained in the minute and answers, and to proceed. His Lordship accordingly allowed a proof—and on a consideration of the proof he has by the interlocutor now under review practically repeated, as he says, his previous interlocutor.

I agree with the Lord Ordinary in thinking that the parties to the contract, when they agreed to refer disputes arising under the contract to arbitration, must have intended an effective arbitration, and I further agree with him in thinking that when they agreed to refer such disputes to arbitration in the customary manner in the timber trade they recognised that there was a customary manner in the timber trade, to which they referred and which they had in their minds. It may accordingly be quite true, as averred in the pursuers' answer to the defenders' minute, that disputes in that trade are referred in all the ways known to the law, but that is not inconsistent with the fact that there may be one of those ways so usual in the trade as to be entitled to be called the customary manner, and which the parties may safely be considered as having referred to in the contract. It is to be observed that the defender does not propose by parole proof to add a term to the contract which is not expressed in it. In such a case I agree with the Lord Ordinary that quite a different degree of proof would be required than is necessary in this case. What the defender has to do is to explain by his parole proof what the parties meant or referred to by the words "in the customary manner" which they have used in the contract.

Now, I agree with the Lord Ordinary that it is clearly proved, that if parties fail to agree otherwise, the usual or customary manner of arbitration in the timber trade is, that each party appoints an arbiter with power to them to name an oversman, and I do not doubt that the parties intended this manner of arbitration when they entered into the contract. I think, therefore, that the contract may be read as if it had expressed this as a term of the contract, and as if it had run that any dispute should be referred to arbitration, each party naming an arbiter with power to them to appoint an oversman.

If that be so, then I do not see any reason why the first section of the Arbitration (Scotland) Act 1894 should not apply to the case.

I therefore agree with the Lord Ordinary. But if your Lordships agree with me I think our interlocutor should contain a finding as to the result of the proof, and that we should find that it is proved that the customary manner of settling disputes by arbitration in the timber trade in the sense

of the contract is by each party choosing an arbiter, with power to them to appoint an oversman.

LORD M'LAREN—This is a narrow case, but on a balance of opposing considerations I concur in Lord Adam's opinion. May I add that this question could hardly have arisen if the contract had been made in England, because in the relative English Arbitration Act there is a section to the effect that where no particular mode of arbitration is provided the reference shall be understood to be to arbitrators nominated by the respective parties, with power to appoint an umpire. Why this useful provision of the English Arbitration Act has not extended to Scotland I have difficulty in understanding, but we must take the Act as we find it. The result of this discrepancy is that we have had two hearings in this Division of the Court and a proof, all on the question how that arbitration clause is to be explicated. I can hardly doubt that with less expenditure of time and at less cost to the parties the Court would have determined the merits of the case if the parties had not chosen to raise this preliminary question. It is to be hoped that contracting parties when they mean to refer their disputes to arbitration will be a little more clear in their statements—which only require a few words—as to how the court of arbitration is to be constituted.

LORD KINNEAR concurred.

The Court pronounced this interlocutor:—

“Find that the customary manner of settling disputes by arbitration in the timber trade in the sense of the contract mentioned in the record, is by each party choosing an arbiter, with power to the arbiter to appoint an oversman: Sist the action till the matters in dispute between the parties, so far as falling under the contract, shall have been determined by arbitration in terms of the said contract.”

Counsel for the Reclaimers—Clyde—Aitken. Agents—Webster, Will, & Company, W.S.

Counsel for the Respondent—Salvesen, Q.C.—Hunter. Agents—White & Nicholson, S.S.C.

Saturday, February 3.

SECOND DIVISION.

[Lord Low, Ordinary.

THORBURN v. DEMPSTER.

Process—Record—Defences—Court of Session Act 1850 (13 and 14 Vict. c. 36), sec. 1—Act of Sederunt 7th February 1810—Act of Sederunt 1st February 1715, sec. 6.

The defender in an action lodged defences, in which he neither admitted nor denied the pursuer's averments on the merits, but merely stated that he was a domiciled Englishman and not subject to the jurisdiction of the Scottish courts. He declined to state his

position on the merits until it was shown that he was so subject, and his only plea-in-law was “No jurisdiction.”

Held that these defences were not competent defences to an action, and case remitted to the Lord Ordinary to allow the defender to lodge defences if so advised.

Jurisdiction—Action on Contract Relating to Heritage—Foreign.

Held by Lord Low (Ordinary) that an Englishman who has concluded an *ex facie* formal and effectual contract for the purchase of heritage in Scotland, is subject to the jurisdiction of the Scottish courts in an action for the enforcement of that contract.

This was an action at the instance of John Hay Thorburn, Leith, against Alexander Dempster, Eaton Hall, Penmaenmawr, North Wales, against whom arrestments were said to have been used to found jurisdiction, in which the pursuer concluded for decree ordaining the defender to implement a contract for the sale of a distillery in Aberdeenshire.

The pursuer averred that on 18th May 1898 he entered into a minute of sale with the defender, whereby the pursuer agreed to purchase the distillery in question from the defender, and to fulfil various other stipulations relative to the sale, which were specified in the minute of agreement. The minute of sale upon which the pursuer founded was produced. It was a probative deed executed in the Scots style, and according to the solemnities of the law of Scotland.

In defence to this action the defender lodged defences, which are here given in full, and which ran as follows:—

“Answers to pursuer's condescendence—Ans. 1 to 8. With reference to the alleged contract of sale, the defender declines to make any admission until it is shown that he is subject to the jurisdiction of the Scotch courts.

“Statement of facts for defender—Explained that the defender is not subject to the jurisdiction of the Scottish courts, as he is a domiciled Englishman and does not possess property, either heritable or moveable, in Scotland. In order to found jurisdiction against defender the pursuer arrested in the hands of Harvey's Yoker Distillery Company, Limited, having their registered office at No. 43 Renfield Street, Glasgow, the sum of £30,000 sterling more or less, alleged to be due and addebted by the said arrestees to defender. The defender neither possesses any shares in the said Harvey's Yoker Distillery Company, Limited, nor are the said arrestees debtors of defender.

“Plea-in-law for defender—No jurisdiction.”

The Court of Session Act 1850 (13 and 14 Vict. c. 36), sec. 1, enacts as follows:— . . . “The allegations in fact which form the grounds of action shall be set forth in an articulate condescendence, together with a note of the pursuer's pleas-in-law, which condescendence and pleas-in-law shall be annexed to such summons, and shall be held to