

Friday, February 28.

FIRST DIVISION.

[Sheriff Court at Aberdeen.

BUCHAN v. MELVILLE.

Arbitration — Arbitrator — Submission and Reference — Reference of any Dispute Arising out of Contract to One of the Two Contracting Parties.

A reference to one of the parties to a contract of all disputes having relation to or arising out of the contract is legal and binding and must receive effect, provided that the other party, when agreeing to the reference, was aware of the proposed arbitrator's interest.

Arbitration — Arbitrator — Disqualification of Arbitrator — Interest.

Where under a building contract all disputes having relation to or arising out of the contract were referred to one of the parties thereto, viz., the employer, held that he was not disqualified from acting as arbitrator by having lodged defences and led and given evidence as defender in an action against him on the contract at the instance of the builder.

Contract — Building Contract — Conditions — Conditions Signed ex intervallo — Arbitration Clause — Arbitration.

A builder whose offer to execute certain work had been accepted "subject to your signing . . . the conditions of contract in the usual way," about two months after the date of the letters of offer and acceptance by which the contract was concluded, and after a considerable portion of the work had been done, signed certain general conditions relating to the contract, by one of which all disputes were referred to the decision of the other party to the contract. He admitted that he had an opportunity of considering the conditions, but said that he had only glanced through them and did not notice the clause of reference, and that if he had noticed that clause he would not have agreed to it. Held that he was bound by the condition containing the clause of reference.

This was an action brought in the Sheriff Court at Aberdeen by William Buchan, builder in Aberdeen, against Alexander Melville, C.E., 42 Union Street there, in which the pursuer craved decree for £113, 11s. 6d., being the balance claimed by him as due under a building contract.

The defence was (1) that the action was excluded by an arbitration clause in the contract between the parties, and (2) that the defender, in respect of certain miscellaneous deductions claimed by him, damages due for delay, and deductions for defective workmanship, was entitled to credit from the pursuer for a sum exceeding the sum sued for.

On 13th September 1899 the pursuer wrote to the defender offering to execute the

mason-work of two houses to be erected on ground belonging to the defender "in accordance with plans, specifications, and schedule of quantities prepared by you, at the total cost of £588, 9s.," which sum by a subsequent letter dated 29th September he reduced to £550. On 29th September, in reply to the pursuer's letter of the same date, the defender wrote accepting the pursuer's offer to execute the work for £550, "subject to your signing the plans, specifications, and conditions of contract in the usual way." The work was thereupon proceeded with.

On 27th October, in a letter to the pursuer, the defender wrote—"I notice you have not yet signed the plans, specifications, and general conditions of contract of the above houses. You might call here and get this done as early as possible." On 27th November the defender again wrote—"Although I have written you requesting you to sign the plans and conditions of contract for these houses in terms of your offer and my acceptance of same I notice you have not done so." In this letter he also stated that the plans and conditions were lying at his office for signature, and again requested the pursuer to call and sign them. At a date subsequent to these letters, but which was not exactly ascertained, the pursuer called and signed a document described as "general conditions of contract." He also signed, at a date not exactly ascertained, a schedule of quantities of masonwork of the two houses in which reference was made to "general conditions of contract." The evidence was contradictory as to how far the pursuer at the time of signing was aware of the contents of the general conditions of contract, but he admitted he had had them before him, and had the opportunity of considering them before signing.

The "general conditions of contract" consisted of five loose sheets of paper, and contained sixteen lithographed articles and a seventeenth interpolated in manuscript. The pursuer had signed on the last page only, but identified the document produced as the one he had signed, although repudiating knowledge of the contents of the articles.

The 15th article was in the following terms:—"In case of any dispute arising between the proprietor and the contractor having relation to or arising out of the contract during the work or after completion, whether with reference to the execution of any part of the work, as to the true intent and meaning of these presents, or the settlement of accounts, or to anything else, whether executorial or non-executorial, the same shall be referred to Alexander Melville, C.E. and architect, Aberdeen, (i.e., the defender), whose decision will be final and binding on all parties without further appeal."

The 17th article, which was the one interpolated in manuscript, was in these terms—"It is specially conditioned that the architect shall not be disqualified by being the employer." There was a conflict of evidence as to whether this article had been inserted

prior to the date of signing, and the Court ultimately held that this had not been proved, and consequently that this article was not binding upon the pursuer.

The 1st and 16th articles contained a provision that the houses should be ready for occupation by 1st April 1900, and the 16th article in effect authorised the arbiter to award damages for breach of this provision.

The houses were being erected by the defender for himself, and he was consequently both proprietor or employer and architect. It was admitted that this was known to the pursuer at the time he made his offer.

The work was executed by the pursuer.

The defender had from time to time paid the pursuer certain sums, amounting in all to £425, to account of the sum stipulated in the contract.

The sum sued for was the balance of the sum stipulated in the contract together with £5, 2s. 6d. for extras, and with a deduction of £16, 17s. for some work included in the schedule but not executed.

The defender admitted the extras, with the exception of one which made a difference of 3s. 4d. He, however, averred that the deductions to which he was entitled amounted to £71, 1s. 6d., and he further averred that the pursuer was owing him £50 for loss and damage caused through delay in completing the contract, and £100 as an abatement for loss and damage arising from defective workmanship.

The defender pleaded, *inter alia*—“(2) The pursuer having contracted with the defender, in case of any dispute arising between them in relation to the contract during the work or after completion, whether with reference to the execution of any part of the work, as to the true intent and meaning of the said conditions, or the settlement of account, or to anything else, whether executory or non-executory, to refer the same to the defender, whose decision should be final and binding on all parties without further appeal, the jurisdiction of this Court is excluded and the present action is therefore incompetent.”

The pursuer pleaded, *inter alia*—“(2) The alleged conditions of contract founded on by the defender not being stamped, holograph, or tested, or duly signed by pursuer, cannot be founded upon in this action to any effect. (3) The defender being barred from acting as arbiter on the ground of interest, said alleged conditions of contract should be set aside, and the questions at issue between pursuer and defender decided at common law.”

After a proof before answer allowed by him “for the ascertainment of the terms of the contract between the parties, and particularly as to whether the conditions of contract founded on by defender are part thereof and binding on the pursuer,” the Sheriff-Substitute on 11th March 1901 issued the following interlocutor:—“Having considered the cause, Finds in fact that pursuer is bound by the conditions of contract, and specially by condition No. 15 thereof: With this finding appoints the

case to be enrolled for further procedure, and grants leave to appeal.”

Note.—“This is an unpleasant case in some respects. There is a direct conflict of evidence between defender and his three employees on the one hand, and pursuer and two of his co-contractors on the other hand.

“I confess to having the very greatest difficulty in coming to a conclusion as to which party is telling the truth on the matter of fact chiefly in dispute between them, but in the view I have come to I do not absolutely require to come to a conclusion on this matter in order to dispose of the case.

“I think that upon pursuer’s own evidence, combined with the undoubted facts, I must hold that he is bound by the general conditions.

“As will be seen, his offer contains no reference to the conditions, but the acceptance does, it being subject to the plans, specifications, and conditions being signed. The conditions were not signed at once, but the schedule was very soon after the acceptance, and the form of tender there signed bears reference to the general conditions.

“Defender’s evidence is to the effect that he read over the conditions to the pursuer before even an offer was given in. Pursuer denies this, and I cannot hold it as proved.

“It is proved, however, that more than one letter was written by defender to pursuer asking him to call and sign the general conditions, the last being on 27th November.

“By this time the work under pursuer’s contract was well advanced, and the terms of defender’s letter show that he was urgent that pursuer should sign.

“Defender says he does not know when pursuer did sign the conditions, but thinks it must have been soon after 27th November, as no further letters were written. Defender’s clerks cannot speak definitely as to when they were signed, except that it was after 27th November. One of them thinks it was about January 1900, and another says there was snow on the ground, and pursuer himself says it was about the middle of January, and I think we may take it that that was about the time; but whenever it was there is no question that pursuer did sign the conditions.

“As to what occurred when he did sign there are varying statements. Pursuer says he asked one of the clerks present if there was anything particular in the conditions, and was told there was nothing. This is denied by the two clerks who were present, and is not proved. Pursuer goes on to say he looked through the conditions, but not properly—he read little bits of them. He identifies No. 13 as the conditions he signed, but says he did not notice the 15th clause, and that if he had he would not have signed, as he had been warned through the association not to sign such a thing.

“He is asked whether this should not have made him more careful in reading the conditions, and he replies he had not

time. In reply to further questions put by myself, he says he had heard of previous cases in connection with defender and his conditions, and that what he was warned not to sign was a condition making the proprietor sole arbiter. I quite believe pursuer may have been warned by his association, because this condition is well known in connection with former cases both in this Court and in the Court of Session. But when pursuer admits that he was warned, that he had the conditions put before him with the opportunity of carefully considering them, that he did not take this opportunity, but went over them carelessly 'because he had not time,' it is, I think, altogether out of the question that he can be listened to when he now says he did not know of the conditions and would not have signed if he had, and asks to be let off in consequence.

"No doubt there is evidence to the effect that the conditions had been added to since they were signed—the point on which there is so much contradiction. If this were proved there might be something to be said for the view that the whole conditions were invalidated, and a great deal for the view that the additions made would not receive effect. But, as I have already indicated, I am hardly prepared to accept the pursuer's evidence and that of his witnesses as against the witnesses for defender and defender himself as actually proving that the written additions were made after signature.

"In the view I take it is sufficient to hold that it is not proved that these additions were made after signature, while it is unquestionable that clause 15 was there when pursuer signed the conditions.

"It is fair to point out, however, though in my view it is not required for the disposal of the case, that there seems no reason why the witness Copland at all events should be at all biassed in defender's favour, while the two tradesmen examined for pursuer have still to settle up with defender, and the way they are dealt with may quite possibly depend upon whether the clause in question in this case is to be operative with them. And I further think it more likely that the 1st April should have been inserted at the commencement of the contracts, when it was a reasonable date for their completion, than that it should have been added after everybody had signed, and at a time when plainly it must cause a dispute if sought to be enforced."

On 29th March 1901 the Sheriff-Substitute sided the cause till the next Court-day in order that the defender might, if so advised, issue his award.

On 10th April the defender issued an award, in which, after narrating the purport of the articles of the conditions of contract under which he was acting, and that having failed to get the pursuer to attend with him he had himself gone fully into the measurements and quality of the work, he found that, allowing for various items detailed and for two sums of £30 and £45 in respect of defective

workmanship, the pursuer had been overpaid to the extent of £69, 18s. 8d., and further found the pursuer liable to the defender in payment of the sum of £50 in respect of his failure to complete his contract timeously. For both these sums he decerned against the pursuer.

On 12th April the Sheriff-Substitute allowed the award to be received and seen.

The pursuer lodged the following minute:—"Morrison, for pursuer, stated that since the contract for the erection of two dwelling-houses in Bonaccord Street, Aberdeen, mentioned on record, was entered into between pursuer and defender, on or about the 29th day of September 1899, and particularly while the work was in progress, the defender has from time to time falsely alleged (*first*) that the pursuer was delaying the erection of said buildings, and (*second*) that the pursuer's work was defective and untradesmanlike, he well knowing the said allegations to be false. This the defender did, after naming himself as arbiter between himself and the pursuer in the conditions, corruptly and solely for the purpose of lending colour to the award which he intended to issue after the pursuer had completed his work. Further, that the defender as the work proceeded repeatedly refused to give pursuer payments to account, well knowing that the pursuer was entitled to the same, and that with the intention of paying the pursuer only such a sum as would induce him to finish the work, and of thereafter issuing an award finding nothing further due to the pursuer; and further, and generally, that the defender acted towards the pursuer subsequent to said 29th September 1899 with animus and hostility, whereby he is disqualified from acting as arbiter between himself and pursuer and from issuing any award. . . . Said pretended award is *ultra vires*, the defender having decerned therein in his own favour for the following sums of damages, viz.:—

- | | |
|--|-----------------|
| 1. In respect of defective workmanship in the erection of south gable of the south-most house, whereby the said gable is considerably off the plumb, - - - | £30 0 0 |
| 2. In respect of defective workmanship in the fronts of both houses, whereby the door, lintels, window-sills, belt-course, and rustic work are considerably off the level, - - - | 45 0 0 |
| and | |
| 3. In respect of pursuer's failure to complete the work by the 1st day of April, - | 50 0 0 |
| Making in all the sum of. | <u>£125 0 0</u> |

"Morrison, for pursuer, accordingly moved the Court to find that the defender is disqualified from issuing said pretended award, and in any event that said award is *ultra vires*, and thereafter to fix a diet of proof for the disposal of the cause, or to do otherwise in the cause as to the Court shall seem proper."

The defender lodged the following answers—“The pursuer’s averments as contained in said minute are denied and are irrelevant, and further, it is not competent for the Court to consider the merits of the award. The Sheriff-Substitute, by interlocutor dated 11th March 1901, held that the pursuer is bound by the conditions of contract, and especially by the 15th condition thereof containing the clause of reference to defender as sole arbiter. Pursuer’s averments, in so far as intended to contest the validity of this condition and the other clauses of reference to defender contained in the said conditions of contract, and also of the award following thereon, are irrelevant in respect that the reduction of the award in this process is incompetent; and further, in respect that there are no facts averred to support the allegations of corruption, falsehood, animus, and hostility made by pursuer against defender in said minute. Defender has not throughout the contract or submission done anything as arbiter to invalidate the award, and it was pronounced by him *bona fide* and in obedience to the orders of the Court. The copy correspondence, to which express reference is hereby made, shows that defender as employer was perfectly justified in paying to the pursuer no larger instalments than have actually been paid. The items of £30 and £45, to which pursuer takes exception in the said minute, are not treated by the arbiter in his award as damages (although the reference clause is sufficiently comprehensive to entitle him to assess and award damages), but as deductions or allowances in the ordinary course in respect of defective workmanship on the part of pursuer. With reference to the arbiter’s decerniture against pursuer for £50 in respect of the non-timeous completion of his contract, the award bears that such decerniture is pronounced under and in virtue of the 16th article or condition of the said conditions of contract, which confer express power on the arbiter to that effect. The motion made in said minute should accordingly be refused, and no sum having been found due by defender to pursuer under the award, which is valid and binding, the action should be dismissed, with expenses to defender.”

On 14th June the Sheriff-Substitute issued the following interlocutor—“Refuses the crave of said minute, and, under reference to the interlocutor of 11th March last, and the note annexed hereto, dismisses the action: Finds the defender entitled to expenses,” &c.

Note.—“I must say I was considerably impressed by the argument of the defender’s agent that I had no jurisdiction to consider these objections. The case of *Forbes v. Underwood*, January 22, 1886, 12 R. 465, while not exactly in point, makes it, to my mind at least, doubtful whether it is competent for me to consider the validity of an arbiter’s award. But the same procedure which is proposed in this case has had the sanction of the Second Division of the Court of Session in a former case in which the defender here was defender, and

where practically identical questions were raised as are raised by the minute of objections in this case (*Robb v. Melville*, November 1898); and there is also the authority of Lord Lee in *Nivison v. Howat*, November 22, 1883, 11 R. 189, for holding that an arbiter’s award is a document which can be competently challenged in the Sheriff Court by way of exception in terms of section 11 of the Sheriff Court Act of 1877. Apart from these authorities I fancy I am precluded by my former interlocutor of 11th May from considering the question of jurisdiction.

“There remains, however, the question of whether the objections made are relevant to go to proof, and whether in the present case they ought to be allowed to go to proof.

“I have considered these questions with care, and, to take the second point first, have come to be of opinion that it is inadvisable to allow them to go to proof in this action. My reasons are these—(1) To go to proof now would practically mean beginning an entirely new action, involving in the event of the pursuer’s success in all probability a third proof, or at least a reference as to the character of the work done. (2) To go to proof and judgment on these objections would not necessarily dispose of the whole question between the parties. If the objections are repelled the action will fall merely to be dismissed. There will remain a large claim at defender’s instance against pursuer, for which no doubt defender will require to raise action. (3) There is no hint in the pursuer’s condescendence of this objection to defender acting as arbiter on the ground of his having disqualified himself by showing bias and acting unfairly and corruptly, though pursuer has a plea that defender is barred from acting on account of interest. This ground of objection (*i.e.*, that defender acted falsely and corruptly) was quite as open to pursuer when the condescendence was framed as at the time of the lodging of the minute, but the sole question raised and fought was whether pursuer was bound by the conditions of contract.

“In these circumstances I see no good reason for allowing this action to proceed further, especially in view of the fact that the competency of the proposed procedure is challenged. I shall dismiss the action on the ground that my jurisdiction is excluded by the terms of the conditions of contract and that defender’s award brings out no sum due to pursuer, and if pursuer thinks right he can bring a reduction of the award.

“Apart from the view I have taken, I question the relevancy of the averments made in the minute.

“I hardly see the possibility of proving that the falseness and corruption alleged were more than the natural desire of a man to look after his own interests, combined with mistakes in opinion or even of fact, which afforded no ground for altering an arbiter’s award. Then with reference to the other objection, while it is quite true that an arbiter has no power to award damages unless expressly given him, it is

difficult to say that the fixing a sum to be deducted in respect of the defective condition of the walls fell outside of what an arbiter in such a reference was intended to do, while article 16 of the conditions of contract might quite well be construed as giving the arbiter the power which he exercised in fixing £50 on account of delay."

The pursuer appealed and argued—(1) The alleged conditions of contract were no part of the contract, or at least article 15 was not. They were not referred to in the offer, and though the letter of acceptance referred to signing conditions of contract, it was "in the usual way." That meant the ordinary conditions of a building contract, not a condition like article 15, which entirely altered the contract. The signing not at the date of the contract but two months subsequently was merely for the purpose of identification, and not as signifying acceptance of what was in the document. (2) Article 15 could not receive effect, because it was one the Court would not enforce as being contrary to the first essential of arbitration, *i.e.*, having an impartial person as arbiter—*M'Dougall v. Laird & Sons*, November 16, 1894, 22 R. 71, at p. 74, 32 S.L.R. 52. A party could not be judge in his own cause—*Smith v. Liverpool, London, & Globe Insurance Company*, July 15, 1887, 14 R. 931, 24 S.L.R. 672. The case of *E. Montrose v. Scot*, March 13, 1639, M. 14,155, only decided that once a definite dispute had arisen parties might agree to settle it in any way they chose. (3) Even if article 15 stood, the defender had disqualified himself from acting as arbiter by having adopted the position of party to the dispute—*M'Dougall v. Laird & Sons*, *cit. sup.*; *M'Lauchlan & Brown v. Morrison*, December 1, 1900, 8 S.L.T. 226, p. 279; *Dickson v. Grant*, February 17, 1870, 8 Macph. 566, 7 S.L.R. 317.

Argued for the respondent—(1) These conditions were a material part of the contract, for the acceptance was conditional on their being signed, and the pursuer must be held to have known their contents as he had ample opportunity of making himself conversant therewith. The date of signing was of no moment. (2) Article 15 was good. Two parties might refer to one of them the matter in dispute—*Bell on Arbitration*, 2nd ed., p. 137—*E. Montrose v. Scot*, *cit. sup.* They could also refer all questions which might arise to one who it was known must have an interest, and the only requisite was that his interest should be known at the time of choice—*Johnston v. Cheape*, July 8, 1817, 5 Dow, 247. This was also the law in England—*Ives & Barker v. Willans* (1894), 2 Ch. 478, at p. 491; *Jackson v. Barry Railway Company* (1893), 1 Ch. 238. (3) The defender had not disqualified himself by adopting the position of a party to the dispute. He was already a party when he was chosen, and of necessity he would have to take a part and give evidence in any action. An arbiter was not disqualified because he having another duty to perform had performed it—*Scott v. Parochial Board of Carlisle*, February 1, 1879, 6 R. 616, 16 S.L.R. 435. What did

disqualify was when an arbiter did something not contemplated and so altered his position—*Jackson v. Barry Railway Company*, *cit. sup.*; *Nuttall v. Mayor of Manchester* (1892), 8 T.L.R. 513.

At advising—

LORD PRESIDENT—In this action the pursuer, who is a builder in Aberdeen, sues the defender, who is a civil engineer and architect there, for payment of £113, 11s. 6d., which he alleges to be the balance due to him in respect of the mason-work of two houses in Aberdeen which he built for the defender. The defender denies that this sum is due by him to the pursuer, alleging that he is entitled to deductions amounting to £71, 6s. from any claim which the pursuer might otherwise have against him, and also maintaining that the pursuer is liable to him in £50 of damages for delay in completing his contract, and for £100 of damages in respect of defective workmanship. The defender contends that, in the result, instead of his being indebted to the pursuer, there is a balance of £90, 16s. 4d. due by the pursuer to him. The defender further maintains that the Court has no power to determine the claims of the pursuer and him against each other, in respect that by the terms of the contract between them the settlement of all such claims was referred to his sole and final decision.

Such being the contentions of the parties respectively, it is essential to ascertain in the first instance what were the terms of the contract really entered into between them. The first letter which passed between them is an offer addressed by the pursuer to the defender, dated 13th September 1899, to execute the mason-work of the two houses in question, "in accordance with plans, specifications, and schedule of quantities prepared by you, for the sum of £588, 9s." The next document is another offer by the pursuer, dated 29th September 1899, to execute the work for a less price, *viz.*, £550, this having apparently been the figure of another offerer who after making an offer found that he could not undertake the work. It is to be observed that in neither of these offers is any reference made to any "conditions of contract." In reply to the pursuer's second offer the defender on 29th September 1899 wrote a letter to the pursuer accepting the offer to execute the work for £550, "subject to your signing the plans, specifications, and conditions of contract in the usual way." This is the first mention of "conditions of contract," so that if they introduced new terms the acceptance did not meet the offer and the parties were not *ad idem*. It was certainly an unsatisfactory and unbusinesslike proceeding to introduce into the acceptance of an offer new terms of so serious a character as those contained in the "conditions of contract" without calling the attention of the pursuer to the nature of these new terms.

On 27th October 1899, nearly two months after the contract, such as it was, had been entered into, and after a considerable amount of the mason work had been executed by the pursuer, the defender wrote

to the pursuer—"I notice that you have not yet signed the plans, specifications, and general conditions of contract for the above houses. You might call here and get this done as early as possible." Here for the first time mention is made of "general" conditions of contract, a variation of language which should have been avoided if it was intended to describe the same thing as that which had been previously mentioned. Nothing appears to have followed on this letter, and after the lapse of another month the defender, on 27th November 1899, wrote to the pursuer—"Although I have written you requesting you to sign the plans and conditions of contract for these houses, in terms of your offer and my acceptance of same, I notice that you have not done so." I have already pointed out that neither of the pursuer's offers refer to any conditions of contract. The defender then mentions that the conditions and plans are lying at his office for signature, and that he will feel obliged if the pursuer will call at his earliest convenience and get them signed. The pursuer signed a schedule of quantities of mason-work of the two houses in question which made reference to general conditions of contract, but it does not appear on what date he did so.

The pursuer, however, did, on a date not precisely ascertained, but apparently about the end of November, or about two months after the conclusion of the contract, sign the document described as "general conditions of contract" in the defender's office. These conditions consist of five loose lithographed sheets, upon none of which except the last does any signature appear. The 15th article of these conditions is in the following terms—"In case of any dispute arising between the proprietor and the contractor having relation to or arising out of the contract during the work or after completion, whether with reference to the execution of any part of the work, as to the true intent and meaning of these presents, or the settlement of accounts, or to anything else, whether executorial or non-executorial, the same shall be referred to Alexander Melville, C.E. and architect, Aberdeen, whose decision will be final and binding on all parties without further appeal." And the 17th and last of these conditions as they now stand is in the following terms—"It is specially conditioned that the architect shall not be disqualified by being the employer."

The first sixteen of these conditions are lithographed, and the 17th is interpolated in manuscript. There is a sharp conflict of evidence as to whether the 17th condition had already been written in when the pursuer signed, but upon a careful consideration of the evidence I do not think it is proved that it had then been written in, and I therefore consider that the pursuer is not bound by it. Probably, however, this is not very material, as the 15th condition purports to make the defender the final referee upon any question which may arise in the execution of the work or the settlement of the money claims between the parties, and although he is not named in

the first part of the condition, the words used there being "the proprietor," the pursuer was aware that the mason-work was being executed for him, and I am therefore of opinion that it must be taken as against the pursuer that the article expressed a reference to the defender of the matters therein mentioned. The whole thing was, however, gone about in such an unbusiness-like way that it is not surprising that it has led to misunderstanding and litigation.

The first and most important question raised is, whether a reference by a person in the position of the pursuer executing contract work for another person in the position of the defender can, according to the law of Scotland, validly make the latter the final judge of all such questions as are mentioned in article 15; or, in other words, whether one of two contracting parties can make the other the sole and final arbiter of all the rights and liabilities which may arise to or by them respectively under the contract. There is very little authority in the law of Scotland on the subject, but I think it has been generally understood that such a reference may be valid. In the case of *E. Montrose v. Scot*, March 13, 1639, M. 14,155, it was held that a reference by the seller to the purchaser of a heritable subject of the price which should be paid for it was valid, and the buyer having determined the price the sale was found good. The seller there pleaded that "it is against the law, and expressly prohibited in law, that any should be arbiter *in re sua*," but the report bears that "this allegiance was repelled, and the price determined by the buyer, upon this reference made to him by the seller, was allowed as good, and found not disagreeable to the laws and practice of this kingdom." While this decision might perhaps be explained and justified on other grounds, it appears that it was treated by the parties and by the reporters as having raised a question as to a proper reference or arbitration, and it has never, so far as I know, been questioned or overruled. Bankton, i. 23, 14, says—"Even a submission to the debtor himself is sustained in our law, in which case he must determine a just consideration to be given to the other party, and the decree is liable to reduction upon iniquity, not being within the regulations 1695." Under the Roman law a person might submit to his opponent the determination of a question between them on the ground that no wrong was done to a person who willingly and with full knowledge consented to this. "Non enim volenti, scienti, ac conscienti, potest injuria videri facta." I think the conclusion to be deduced from the authorities is, that although an arbiter has an interest in the subject of the reference well known to the parties before they enter into the submission, the award is good notwithstanding this interest; in other words, that it is only a concealed or unknown interest which invalidates an award. If therefore a person chooses to make another with whom he is contracting the final judge of all questions which may arise between them under the contract, it is difficult to see

any reason of public policy which should lead to effect being refused to such a contract.

I understand that such a reference is also valid according to the law of England. In the latest edition (the 8th) of Russell on Arbitration, p. 81, the learned author says—"It has been said that a party cannot be a judge in his own cause, but if his opponent consent to his deciding the question between them the Court will not allow an objection afterwards though he decide it in his own favour," and he refers to decisions in support of this statement.

While therefore I cannot say that the question as to the validity of the reference is altogether free from doubt, and however unwise and improvident the pursuer may have been in leaving himself entirely in the hands of the defender as to what he should receive or as to whether he should receive anything under the contract, it does not appear to me that any sufficient reason has been established for refusing to allow the contract to receive effect according to its terms. The circumstance that the contract not only allowed the defender to price or value the work but in effect to award damages for delay in the execution of the work or other alleged non-compliance with the conditions of the contract, may further illustrate the unwisdom of the defender in entering into the contract, but it does not, in my judgment, form a sufficient ground for our refusing to enforce it according to its terms.

The pursuer further maintained that the defender's award should not receive effect because the defender had, as the pursuer alleges, prejudged the questions between them by taking a part adverse to the pursuer, so that his (the defender's) mind could not be any longer open to decide the questions between them impartially, and reference was made to cases such as *Dickson v. Grant*, 8 Macph. 566; *M'Dougall v. Laird & Sons*, 22 R. 71; and *M'Lauchlan & Brown v. Morrison*, December 1, 1900, 8 S.L.T. 279, in which architects or engineers or employers who had been nominated arbiters in questions or disputes between them (the employers) and their contractors, or auctioneers who had been made arbiters of questions which might arise between sellers and purchasers, were held disqualified in consequence of their having given evidence for the employers or taken up some other position which showed that they had made up their minds in regard to the questions which they might be called upon to decide. These cases, however, do not appear to me to support the view that the defender had, in the circumstances which occurred, become disqualified from deciding the matters in dispute between him and the pursuer. By calling the defender into Court the pursuer made it necessary for him to defend himself, which he could only do by stating all the positions and pleas which he maintained in regard to the whole matters in controversy between them. The act of stating defences and supporting them by evidence when so convened was in my view a very different thing from an arbiter volun-

tarily becoming a witness in regard to matters in dispute between the parties who had nominated him to decide any questions which had arisen or which might arise between them. The fact of the defender giving evidence in a cause to which he had been so convened by the pursuer has not, in my judgment, the same effect as if he had voluntarily become a witness in a litigation between third parties to which he had not been called as a defender.

For these reasons I am of opinion that the course adopted by the Sheriff-Substitute is correct, and that his judgments should be in substance affirmed.

LORD ADAM—I concur.

LORD M'LAREN—I have had some doubt about this case, but have ultimately come to agree with your Lordships.

I think that if the point had been open I should have had great difficulty in seeing that one of the parties to a dispute could be in that neutral and impartial position in which he was qualified to undertake the duties of an arbiter, and I may say that I do not on this question attach much weight to those decisions which have since received confirmation by statute, in which it was determined that a reference to the opinion of the seller or purchaser would be a valid mode of determining the price of the subject of sale. That is really the ascertainment of a specific fact—of the proper sale price according to the market value of the day of a commodity, and while opinions might differ to a small extent in such a question, there could practically be no serious injustice if a reference to the judgment of the party were confined within the proper limits of ascertaining what was the fair price. But it would be a very large extension of the principle of that decision to hold that a reference of future disputes, either of all disputes or of disputes relating to a certain contract, was to be made to one of the parties to the dispute. But we have to deal with a series of decisions in which references of this character have been sustained when made to persons identified in the closest manner with one of the parties to the contract. I do not refer to such cases as contracts containing a clause of reference to a consulting engineer, who may be a man in a large and independent practice and independent of the person whose work he is supervising, and not likely to be influenced or biased by the fact of this employment. But, then, the case has gone a great deal further, and a reference to an engineer or surveyor whose bread depends on the goodwill of one of the parties to the contract has been sustained as a good reference, always subject to this, that if he was acting in such a manner as to show that he was a partisan he might be displaced. Now, when we add to this the fact that in an English book of great authority it is stated that according to the law of England a reference to a party himself is good, I am unable to draw a distinction between the present case and those that have been already decided.

I must say that I cannot help feeling that this is a very inconsistent kind of reference, but of course if it is abused the party who is injured is not without redress, because if a party decides manifestly against the law or the facts in favour of himself his award would be liable to reduction on the same ground as the award of a third party would be who had identified himself with one of the interests in the subject of dispute.

LORD KINNEAR—I concur.

The Court pronounced this interlocutor—

“Find in terms of the findings in fact and in law in the interlocutors of the Sheriff-Substitute dated 11th March and 14th June 1901: Refuse the appeal: Of new dismiss the action: Find the respondent, defender, entitled to the expenses of the appeal,” &c.

Counsel for the Appellant—Campbell, K.C.—T. B. Morison. Agents—Mackay & Young, W.S.

Counsel for the Respondent—Jameson, K.C.—Crole. Agent—W. B. Rainnie, S.S.C.

Friday, February 28.

FIRST DIVISION.

THE SCOTCH EDUCATION DEPARTMENT v. THE SCHOOL BOARD OF THE BURGH OF PORT-GLASGOW.

School—Parliamentary Grant—Additional Grant—School Rate—Education (Scotland) Act 1872 (35 and 36 Vict. c. 62), sec. 67—Education (Scotland) Act 1897 (60 and 61 Vict. c. 62), sec. 1.

In a question between the Scotch Education Department and a School Board with reference to the amount payable to the school board as additional grant under section 1 of the Education (Scotland) Act 1897, held that the “school rate” upon which that amount fell to be calculated was not, as maintained by the Education Department, such rate per pound as when multiplied by the amount of the valuation roll in pounds would give the amount demanded by the School Board from the rates to make good their deficiency, but, as maintained by the School Board, the slightly larger rate per pound which owing to the exemption of certain property from occupiers’ rates had to be actually levied as the nominal rate in order to produce the sum required by the School Board.

This was a special case to which the parties were (1) The Scotch Education Department, constituted under the Education (Scotland) Act 1872 and the Secretary for Scotland Act 1885, and (2) The School Board of the Burgh of Port-Glasgow.

The question at issue between the parties was as to the sum at which the “school rate” fell to be taken for the purpose of calculating the additional grant under section 1 of the Education (Scotland) Act 1897.

The Education (Scotland) Act 1872 (35 and 36 Vict. c. 62) enacts as follows:—Section 44—“The school board of each parish and burgh shall annually . . . certify to the parochial board or other authority charged with the duty of levying the assessment for relief of the poor in such parish or burgh the amount of the deficiency in the school fund required to be provided by means of a local rate, and the said parochial board or other authority is hereby authorised and required to add the same under the name of ‘school rate’ to the next assessment for relief of the poor, and to lay on and assess the same, one-half upon the owners and the other half on the occupiers of all lands and heritages, and to levy and collect the same along with the assessment for relief of the poor when that assessment is so imposed and levied, and to pay over the amount to the school board; and where any burgh, parish, or school district with a school board under this Act shall include two or more parishes or parts of two or more parishes having separate parochial boards under the Act of the eighth and ninth years of the reign of Her present Majesty, cap. 83, the school board shall certify to the parochial boards of such parishes respectively the amount of the rate on each pound of rental which they shall lay on and collect as ‘school rate’ along with their several assessments for the relief of the poor within such burgh, parish, or school district for which the school board acts, . . . and the school rate shall in all cases be levied and collected in the same manner as poor’s assessment, and the laws applicable for the time to the imposition, collection, and recovery of poor’s assessment shall be applicable to the school rate.” Section 67—“Where in any parish or burgh a school rate of not less than threepence in the pound on the rateable value of such parish or burgh shall be levied, and the whole produce of such rate is less than twenty pounds or than seven shillings and sixpence per child of the number of children in average attendance at the public schools provided by the school board in such parish or burgh, such school board shall be entitled, in addition to the parliamentary grant in aid of the public schools provided by them, to such further sum out of moneys provided by Parliament as will, together with the produce of the rate, make up the sum of twenty pounds, or seven shillings and sixpence for each such child.”

The Education (Scotland) Act 1897 (60 and 61 Vict. c. 62), sec. 1, *inter alia*, enacts—“Section 67 of the Education (Scotland) Act 1872 shall have effect as if the sum of seven shillings and sixpence therein mentioned were increased by the sum of fourpence for every complete penny by which the school rate exceeded threepence, but not beyond a maximum of sixteen shillings and sixpence.”

In 1897 the second parties, in terms of section 44 of the Education (Scotland) Act 1872, certified to the Parish Council of Port-Glasgow that the amount of deficiency in the school fund for the year from Whitsunday 1897 to Whitsunday 1898 required to be