

counsel for the appellant referred to section 31 of the Act of 1908.

**LORD PRESIDENT**—As regards the expenses of the proceedings before us, there can be no doubt of course that the winning party must have them; but the Sheriff in answering the question put before him by the arbiter did not deal with the expenses, his view being that those expenses fell to be dealt with by the arbiter in respect of rule 14 of the second schedule, which directs that the expenses of and incidental to the arbitration shall be in the discretion of the arbiter.

I do not think that the Sheriff was right in that view, and I think he ought to have dealt with the expenses of the proceedings before him, and that upon this ground, that whenever you are told in an Act of Parliament that you may go by way of stated case to a court of law (which the Sheriff is), then the usual incidents of a court of law follow, one of which is that that court of law shall have a power of disposing of the expenses of the proceedings before it. It seems to me that the Sheriff is obviously very much better qualified to dispose of the expenses of what has been before him than the arbiter to whom the case goes back, and who can only judge by what his view of the result is. There might be things, for instance, in the conduct of the case of which he has no knowledge.

Accordingly I think that we should put that matter right, and that we should award the expenses of the proceedings before the Sheriff as well as the proceedings here. Of course the general expenses of the arbitration are a different matter and are in the determination of the arbiter.

**LORD KINNEAR**—I agree. I think that the rule is exactly what your Lordship has stated. In this statute it is enacted that either of the parties may apply to the Sheriff for the purpose of obtaining his decision upon a question of law, and upon such application being made the Sheriff is to direct the arbiter to state a special case for his opinion. Now I think with your Lordship, when Parliament directs a question to be taken before one of the ordinary courts of the country, it means that the Court shall dispose of such question according to the usual rules by which its procedure is regulated, and one of these is that the expenses of process must be awarded according to the discretion of the Judge. Unless the Sheriff's power of awarding expenses to a successful party before him is expressly taken away by the statute, I apprehend it must remain as part of his ordinary jurisdiction.

**LORD JOHNSTON**—I concur.

**LORD MACKENZIE**—I am of the same opinion. I would only add that the provision in rule 15 of the second schedule, which sets out the matters that the arbiter has to take into consideration in awarding expenses, certainly does not seem to support the view that the Legislature intended

tha he should have to do with the expenses of a special case stated under rule 9.

The Court pronounced an interlocutor sustaining the appeal and answering the question of law in the affirmative, and upon expenses the interlocutor was in the following terms—

“ . . . Find the appellant entitled to expenses both in this Court and in the Sheriff Court, and remit,” &c.

Counsel for the Appellant—Chree—Mair. Agents—Connell & Campbell, S.S.C.

Counsel for the Respondent—C. N. Johnston, K.C.—Pitman. Agents—J. & F. Anderson, W.S.

Tuesday, March 7.

## SECOND DIVISION.

[Sheriff Court at Edinburgh.]

**M'CONNELL & REID v. SMITH.**

*Contract—Sale—Condition of Contract—Reference to Arbitration—Notice.*

Flour was sold under contracts which were embodied in sale-notes. On each of the sale-notes there was printed a side-note (on the margin)—“Any dispute under this contract to be settled according to the rules of the Glasgow Flour Trade Association.” The rules of the association provided, *inter alia*, as follows—“All disputes of whatever kind, including claims of damages, disputes as to whether or not there is a concluded contract, and claims to reject goods arising out of transactions connected with the trade, shall be referred to two arbiters, one chosen by each party.” The purchaser was not a member of the association, nor were the rules thereof brought to his notice otherwise than by the side-note.

*Held* that the terms of the contract were not such as to give the purchaser reasonable notice that, in event of disputes arising thereunder, the ordinary jurisdiction of the Courts was ousted and procedure by way of arbitration substituted.

*Arbitration—Award—Incomplete Award—Action to Enforce Award—Competency.*

M sold flour to S by sale-notes, which by side-note provided for disputes being settled according to the rules of the Glasgow Flour Trade Association. S having refused to take delivery of certain portions of the flour in respect of disconformity to contract, M called upon him to refer the dispute between them to arbitration, and nominated an arbiter to act for himself. S having refused to appoint an arbiter to act on his behalf, M, as provided in the rules of the association, applied to it to appoint an arbiter to act for S, and the association having done so, the arbiters found that M was acting in accordance

with the contract in calling for arbitration, and that S having refused to arbitrate, M was entitled to claim against him for any loss he might sustain by the sale of the flour at public auction. In respect of said award M, on the averment that he had sold by auction the flour which S had refused to take delivery of, brought an action against S for the difference between the contract price of the said flour and the price realised on the sale by auction. S averred that no flour had been set aside for him by M, and that the flour alleged to have been sold by auction did not belong to him.

*Opinion* (per Lord Ardwall) that, as the question at issue between the parties had not been decided, the action was incompetent in so far as it sought to enforce an incomplete decret-arbitral.

M'Connell & Reid, flour importers, 19 Waterloo Street, Glasgow, brought an action against Robert Smith, 30 Canonmills, Edinburgh, in which they claimed (first) payment of (1) the sum of £124, 10s. 5d., being the amount of damages due to pursuers by defender for breach of contracts as ascertained in terms of an award by William Gilchrist and John Dunlop as arbiters; and (2) the sum of £3, 3s., being the expenses incurred by the pursuers in connection with the arbitration and award. The initial writ contained further craves which it is not necessary to specify.

The pursuers averred that they had sold the defender three consignments of flour at different dates, conform to sale-notes delivered by them to the defender. Each of the sale-notes contained on its margin a side-note, which is quoted in the rubric, providing for disputes being settled under the rules of the Glasgow Flour Trade Association. The rules of the Glasgow Flour Trade Association provided, *inter alia*, as follows—"All disputes of whatever kind, including claims of damages, disputes as to whether or not there is a concluded contract, and claims to reject goods arising out of transactions connected with the trade, shall be referred to two arbiters—one chosen by each party. If either of the parties refuses to name an arbiter, or neglect to appoint an arbiter timeously, the executive committee of the association shall, on the application of the other party, and payment by him of £1, 1s., appoint an arbiter to act for the party refusing or neglecting to appoint. . . . The arbiters shall appoint an oversman before proceeding to the determination of the reference, and if they fail within three business days after their appointment so to do, then, on the application of either party, the executive committee shall name an oversman."

The pursuers further averred that they had delivered to the defender quantities of flour in terms of the contracts, and that the defender, objecting that the flour was disconform to contract, had refused to take delivery of the balance thereof. "(Cond. 7) . . . The pursuers called upon the

defender to refer the question between them to arbitration in accordance with the terms of the said contracts, and thereafter nominated J. A. Dunlop, 25 Wellington Street, Glasgow, as their arbiter. The defender after considerable delay refused to appoint an arbiter. "(Cond. 8) On or about 2nd May 1910 the pursuers, in accordance with the said contracts, applied to the Glasgow Flour Trade Association to appoint an arbiter to act for the defender in the matter above set forth. The said application was duly intimated by the said association to the defender. On 9th May 1910 the said association appointed William Gilchrist, 93 Hope Street, Glasgow, as the defender's arbiter. (Cond. 9) On or about 18th May 1910 the said arbiters having duly appointed an oversman, and considered the question in dispute, issued an award in the following terms, which is herewith produced—'Complying with a request made by Messrs M'Connell & Reid, flour importers, 19 Waterloo Street, Glasgow, to the executive of the Glasgow Flour Trade Association to appoint an arbiter to act in settlement of a dispute between themselves and Mr Robert Smith, baker, Canonmills, Edinburgh, owing to the latter refusing to accept delivery of 232 140-lbs. bags of flour branded "Helpmate," and his refusing to arbitrate or make any other settlement, the executive appointed Mr William Gilchrist, President of the Association, to act in the interest of Mr Smith, Mr J. A. Dunlop, Wellington Street, Glasgow, being appointed to act in the interests of Messrs M'Connell & Reid. In the absence of any evidence having been submitted by Mr Smith—although asked for by Mr Gilchrist—the arbiters were obliged to base their decision upon copy of contract notes, and correspondence submitted them by Messrs M'Connell & Reid. On perusal of those contract notes, the arbiters find that the flour was sold by Messrs M'Connell & Reid to Mr Smith on the basis of the rules of the Glasgow Flour Trade Association, and as rule 18 of the association reads, . . . (quotes) . . . they find that Messrs M'Connell & Reid are acting in accordance with contract in calling for arbitration, and that Mr Smith—having refused to arbitrate—Messrs M'Connell & Reid are entitled to claim against him for any loss they may sustain on the sale of the flour by public auction, plus interest and store charges, after allowing for a reasonable time for taking delivery.' The said award was duly communicated to the defender by the said association. (Cond. 10) On 21st September 1910 the pursuers, after again calling upon the defender to take delivery of the balance of the flour sold to him as aforesaid, had the same sold by auction, when it realised the net sum of £74, 1s. 10d. (Cond. 12) The sum of £124, 10s. 5d. being the first sum sued for in the first place is the difference between £198, 12s. 3d., the contract price of the flour of which the defender refused delivery, and £74, 1s. 10d., the price realised for said flour as aforesaid. The sum of £3, 3s. being

the second sum sued for in the first place is the expense incurred by the pursuers in the said arbitration."

The defender, *inter alia*, averred—" (Ans. 2 and 3) Explained that the defender did not agree to the conditions purporting to refer to these rules, and contained in a side-note in small print in the left-hand side of said sale-notes. Such conditions were never, and are not incorporated into contracts made between the parties. The said sale notes were not authenticated in any way by either of the parties. (Ans. 10) . . . Believed and averred that no flour was set aside by the pursuers for the defender, and that the flour alleged to have been sold did not belong to the defender, and was not of the quality purchased by him per sample, but was an inferior lot."

The defender pleaded, *inter alia*—" (1) The averments in support of the initial writ being irrelevant, the action falls to be dismissed."

On 8th February 1911 the Sheriff-Substitute (GUY) pronounced this interlocutor—" . . . Sustains the first plea-in-law for the defender so far as directed against the averments of the pursuers in support of the first two heads of the first crave of the initial writ."

The pursuers appealed, and argued—The side-notes validly incorporated in the contract the rules of the Glasgow Flour Trade Association. It was apparent on the face of the contract that it contained a condition as to arbitration. This condition was therefore binding on the defender, who accepted the sale-notes without objection—*Lyons & Company v. Caledonian Railway Company*, 1909 S.C. 1185 (Lord Kinnear at 1192), 46 S.L.R. 848; *Watkins v. Rymill*, 1883, 10 Q.B.D. 178; *Harris v. The Great Western Railway Company*, 1876, L.R., 1 Q.B.D. 515; *Stewart, Brown, & Company v. Grime*, January 27, 1897, 24 R. 414, 31 S.L.R. 302. There were two well-known cases which were exceptions to the rule laid down above—*Henderson v. Stevenson*, November 25, 1873, 1 R. 215, 11 S.L.R. 98, and June 1, 1875, 2 R. (H.L.) 71, and *Parker v. The South Eastern Railway Company*, 1877, L.R., 2 C.P.D. 416. This was an informal arbitration *in re mercatoria*—*Hope v. Crookston Brothers*, June 6, 1890, 17 R. 868, 27 S.L.R. 709. Furthermore, the action was not incompetent because the arbiters had left one ministerial act to be done. It was no doubt true that the pursuers must still show by proof that they sold by auction the flour that had been sold to the defender, and that it realised a certain price. No judicial act, however, remained to be done by the arbiters; the whole question of liability had been settled; and it was quite competent to leave a purely ministerial act to be done after the publication of the award—*Thorp v. Cole and Others*, 1835, 2 C.M. and R. 367 (Parke (B.) at 380); *Irons' Law of Arbitration*, 200; *Russell on Arbitration* (8th edit.) 152. The arbiters had acted properly and in order, and their award was valid even although the defender (after receiving notice) was not present—*Mitchell v. Cable*, June 17, 1848, 10 D. 1297

(Lord Fullerton at 1309, and Lord Jeffrey at 1310); *Low v. Bankes*, June 2, 1836, 14 S. 869; *Parker on Arbitration*, 104; *Bell on the Law of Arbitration* (2nd edit.) 155.

The defender was not called on.

LORD DUNDAS—The first point which arises on this appeal—and indeed the only point if, as I think, its disposal is sufficient for the decision of the matter—is whether the terms of this contract are such as to give the defender reasonable and sufficient notice that one of its conditions is that if disputes arise they are to be referred to arbitration. This question seems to me to be determined by a consideration of the documents. The point made is that on each of the sale-notes there was printed a side-note (on the margin) in these words—"Any dispute under this contract is to be settled according to the rules of the Glasgow Flour Trade Association." The argument is that the side-note validly incorporates in the contract the constitution and rules of that association, and in particular rule 18, which reads—"All disputes of whatever kind, including claims of damages, disputes as to whether or not there is a concluded contract, and claims to reject goods arising out of transactions connected with the trade, shall be referred to two arbiters, one chosen by each party;" and then the rule goes on to prescribe the further machinery of the arbitration, which I need not refer to, though some of the features detailed in this and the succeeding rule are peculiar and remarkable.

The first observation I make is that I think it requires clear and distinct language to oust the ordinary jurisdiction of the courts and substitute procedure by way of arbitration. If such a bargain is to be made between parties (as of course it may be made), I consider it would require to be much more clearly expressed than anything we have here. A mere reference to the rules is to my mind quite insufficient to import such a condition into the contract. It is an important matter, and one that must be distinctly expressed, that a man should abandon his normal remedies at law. Mr Hamilton referred to various authorities, railway cases and the like; but I do not think these cases help his argument. In all of them there is this element, that the conditions said to be incorporated appeared on the back of the ticket or other document, or in a body of rules exposed on the walls of the premises in question, or at least easily accessible to inspection. The question may, I think, be put thus—Did those who found upon the condition take reasonable means to give the other party notice that it was a condition of the contract? I cannot hold that the pursuers took reasonable means to give the defender such notice. It is not said that the rules were ever sent to the defender or brought to his knowledge otherwise than by the side-note. Another case referred to was *Stewart, Brown, & Company v. Grime*, 1897, 24 R. 414. There it appeared on the face of the contract that all disputes were to be made the subject of reference. But

the question was raised whether or not a certain rule of the Beetroot Sugar Association was incorporated in the contract so as to bind the defender, who was not a member of it. The Court held that this rule was binding upon non-members, because the contract bore on its face to incorporate the rules of the association "as fully as if the same had been expressly inserted herein," and the defender had therefore accepted the rules as applying to him. That case therefore contained features quite sufficient to distinguish it from that now before us, and does not seem to assist the appellant's argument. I am of opinion that the present case discloses nothing on the face of the contract or otherwise sufficient to constitute due notice to the defender that a term of his bargain was that in the event of disputes he was to be deprived of the ordinary remedy of an appeal to the courts of law, and must go instead to arbitration in manner provided by the rules of the association.

If that is so, no other point arises as necessary for the disposal of this appeal; and I do not desire to express any opinion on the other matters so fully discussed by the learned Sheriff-Substitute and by counsel at our Bar.

LORD ARDWALL—I agree with what your Lordship has said. The case arises out of a sale of flour under sale-notes, each of which has printed at the side in small print this clause—"Any dispute under this contract to be settled according to the rules of the Glasgow Flour Trade Association." The first question is whether the defender, who is not a member of the association, is bound by this clause to refer any disputes which arise to arbitration. Now the rules deal with a variety of things, including the approval and rejection of goods, responsibility for the removal of goods, and so on. No copy of the rules was sent to the defender, and not being a member he knew nothing about them. He might well think that the clause in question was only intended to apply to contracts between members of the association. But I do not found my opinion on that point. It is enough to say that in my view the defender got no reasonable notice that he was giving up his common law rights to appeal to the courts of law, and was agreeing to submit to arbitration. That being so, I consider that there is nothing in this contract to bind the defender to submit to arbitration with regard to the matter in dispute. I also agree that this is sufficient for the decision of the case.

I should, however, like to add that this action seems to me incompetent in so far as it seeks to enforce an incomplete decree-arbitral. At the end of the day Mr Hamilton admitted that he was not in a position to ask for payment of the sum first concluded for in the initial writ. He admitted that before he could get decree for that sum he must show that the de-

fender was called upon to take the flour, that the pursuers sold the flour, and that it realised a certain sum. He also admitted that if he were allowed a proof of these facts the defender must also be allowed an opportunity of proving his averment that no flour was ever set aside for him by the pursuers, and the other averments in answer 10. It is clear from these admissions that the arbitration was never completed, and that the real question at issue between the parties was never decided. Accordingly it comes to this, that the Court is asked to pronounce a decree upon an award which is truly no award at all. We are in the extraordinary position that a decree conform to what is alleged to be an arbiter's award is sued for, while at the same time it is admitted that a proof is required before the alleged award can become a real award, or indeed a judgment of any kind upon the dispute between the parties. I never heard of such a proceeding. It seems an amazing proposition that we should be asked to pronounce findings giving effect so far to a so-called arbiter's award, and *quoad ultra* to allow proof upon the most vital facts in the case.

So, apart from the first ground, in which I concur, I should have had no hesitation in deciding the case upon this second ground also.

I reserve my opinion upon the other question, namely, whether the reference is invalidated by the provision in the rules of the association for a review of the arbiter's or oversman's award by a court of appeal. I think it is unnecessary to say anything upon that point.

LORD JUSTICE-CLERK—The ground upon which both of your Lordships have proceeded appears to me sufficient for the decision of the case. It is proposed that we should hold that a side notice appearing on the sale-notes to the effect that any disputes were to be settled according to the rules of the Glasgow Flour Trade Association is absolutely binding upon all parties who deal with any member of this association and ousts the ordinary jurisdiction of the courts of law. There is no averment that these rules were ever brought to the notice of any person who was not a member of the association. Moreover, it is not clearly expressed that these rules are imported into the contract between the parties. I do not consider that this case is ruled by the decisions quoted to us by the pursuer's counsel. The railway case—*Lyons & Company v. Caledonian Railway Company*, 1909 S.C. 1185, and the coach case—*Watkins v. Rymill*, 10 Q.B.D. 178, were in my opinion quite different. I do not say anything as to whether the side notice is binding upon members of the association.

LORD SALVESEN was absent.

The Court dismissed the appeal, affirmed the interlocutor appealed against, and remitted the cause to the Sheriff to proceed.

Counsel for the Pursuers (Reclaimers)—  
Sol.-Gen. Hunter, K.C.—Hamilton. Agents  
—Sharpe & Young, W.S.

Counsel for the Defender (Respondent)—  
Wilton—Chapel. Agents—Mackay &  
Young, W.S.

Tuesday, March 7.

SECOND DIVISION.

(BEFORE SEVEN JUDGES.)

[Sheriff Court at Edinburgh.]

BLACK v. HUMPHREY.

*Bankruptcy—Notour Bankruptcy—Statute  
—Constitution of Notour Bankruptcy  
where Imprisonment for Debt Incom-  
petent—Expiry of Charge without Pay-  
ment—Debtors (Scotland) Act 1880 (43 and  
44 Vict. cap. 34), sec. 6.*

Held by a majority of Seven Judges  
(*diss.* the Lord Justice-Clerk, Lords  
Ardwall and Salvesen) that the mode  
of constituting notour bankruptcy pro-  
vided by section 6 of the Debtors  
(Scotland) Act 1880 applied to all cases  
in which imprisonment was incom-  
petent under that Act, even although  
prior to the Act such cases were exempt  
from imprisonment, and applied there-  
fore to an individual against whom a  
decree for a debt not exceeding £8,  
6s. 8d. had been obtained.

*Paull v. Smith*, 1910 S.C. 1025, 47 S.L.R.  
878, followed and approved.

*Stewart's Trustee v. Salvesen & Com-  
pany*, June 12, 1900, 2 F. 983, 37 S.L.R.  
772, distinguished.

*Black v. Watson*, November 29, 1881,  
9 R. 167, 19 S.L.R. 141, commented on.

The Small Debt (Scotland) Act 1835 (5 and  
6 Will. IV, cap. 70) [since repealed by the  
Statute Law Revision Act 1891 (54 and 55  
Vict. cap. 67)] provided by section 1 that it  
should not be lawful to imprison any person  
on account of any civil debt which did  
not exceed the sum of £8, 6s. 8d. exclusive  
of interest and expenses thereon.

The Bankruptcy (Scotland) Act 1856 (19  
and 20 Vict. cap. 79) enacts—Section 7—  
“Notour bankruptcy shall be constituted  
by the following circumstances—(Second)  
By insolvency, concurring either (a) with  
a duly executed charge for payment, fol-  
lowed, where imprisonment is competent,  
by imprisonment, . . . or where imprison-  
ment is incompetent or impossible, by  
execution of arrestment of any of the  
debtor's effects not loosed or discharged  
for fifteen days, or by execution of point-  
ing of any of his moveables, or by decree  
of adjudication of any part of his heritable  
estate for payment or in security. . . .”

The Debtors (Scotland) Act 1880 (43 and  
44 Vict. cap. 34) enacts—Section 4—“With  
the exceptions hereinafter mentioned, no  
person shall, after the commencement of  
this Act, be apprehended or imprisoned  
on account of any civil debt. . . .” Section  
6—“In any case in which, under the provi-

sions of this Act, imprisonment is rendered  
incompetent, notour bankruptcy shall be  
constituted by insolvency concurring with a  
duly executed charge for payment, followed  
by the expiry of the days of charge without  
payment, or where a charge is not neces-  
sary or not competent, by insolvency  
concurring with an extracted decree for  
payment followed by the lapse of the days  
intervening prior to execution without  
payment having been made. Nothing in  
this section contained shall affect the pro-  
visions of section 7 of the Bankruptcy  
(Scotland) Act 1856.”

Robert Black, butcher, Edinburgh, a  
creditor of Miss Barbara Sutherland Hum-  
phrey, presented in the Sheriff Court at  
Edinburgh a petition for cessio of her  
estates.

The petition stated that the defender “is  
unable to pay her debts, and is notour  
bankrupt within the meaning of the  
Debtors (Scotland) Act 1880. Pursuer pro-  
duces herewith (1) extract decree of the  
Sheriff (Small Debt) Court, Edinburgh, in  
the action at his instance against the  
defender for payment of the sum of five  
pounds and twopence with nine shillings  
and tenpence of expenses, and execution  
of charge thereon, dated the 31st day of  
March 1910, which charge has now expired  
without payment of the debt having been  
made; and (2) report of pointing, also  
following upon said extract decree and  
expired charge executed upon and dated  
the 12th day of April 1910.

The goods pointed by pursuer were a  
travelling trunk, valued by the sworn  
appraisers at ls., two pieces of old carpets  
valued at 6d., twelve biscuit tins valued  
at ls., and an old lawn mower valued at 6d.  
Defender averred that the said goods either  
did not belong to her or were of no value  
and derelict.

Defender pleaded, *inter alia*—“(2) The  
pursuer having failed to point any goods  
belonging to the defender, the latter has  
not been rendered notour bankrupt. (3)  
*Separatim*.—The articles in the schedule  
founded on being of no value, the pointing  
is illusory and inept, and the defender has  
therefore not been rendered notour bank-  
rupt.”

On 15th July 1910 the Sheriff-Substitute  
(GUY) repelled the defences.

*Note*.—“. . . The other question is whether  
notour bankruptcy has been constituted.  
If an expired charge without payment is  
sufficient in itself to constitute notour  
bankruptcy, it would appear to be beyond  
dispute that notour bankruptcy has been  
constituted. The charge was given on 31st  
March 1910, and it is not disputed that it  
expired without payment. I read the case  
of *Harvie v. Smith*, 1908 S.C. 474, as deciding  
that an expired charge is in itself sufficient  
and as overruling the decision in *Black v.  
Watson*, 1881, 9 R. 167. I accordingly think  
it is irrelevant to inquire whether a point-  
ing took place at all, or whether the articles  
pointed belonged to the defender. . . .”

The defender appealed to the Court of  
Session, and on 4th November 1910 the  
Judges of the Second Division appointed