

Thursday, February 22.

FIRST DIVISION.

[Lord Ormidale, Ordinary.]

BLACK v. JOHN WILLIAMS &
COMPANY (WISHAW), LIMITED.

Arbitration—Award—Reduction—Examination of Witnesses Outwith the Presence of Parties.

An arbiter in order to ascertain whether an employer had assented to work being done by a contractor in a certain way questioned two of the contractor's employees outwith his presence, and the employer's manager outwith the presence of both parties, neither party having representatives present. *Held* that the procedure was irregular, but that in the absence of any evidence of injustice it did not vitiate the award.

Observations (per the Lord President) on the duties of an arbiter in an informally conducted arbitration.

William Black, plasterer, Wishaw, *pursuer*, brought an action against John Williams & Company (Wishaw), Limited, and William M'Ghie, plasterer, Hamilton, *defenders*, concluding for reduction of an award pronounced by the defender William M'Ghie in a submission constituted by minute of agreement and reference between the pursuer and the defenders John Williams & Company (Wishaw), Limited.

The *facts*, so far as material to this report, appear from the following paragraphs of the opinion of the Lord President—"The question in this reclaiming note relates to the validity of an award pronounced in a reference which was initiated by a regular and formal minute of submission, but the proceedings in which were of the simplest and most informal character. A plasterer had undertaken by written offer to do all the rough casting pointed out to him at the employer's premises with English cement, also to pick all walls and erect all scaffolds for a certain price. When the work was finished the employer expressed his dissatisfaction with it, and the result was the submission to a master plasterer of the question whether the job was or was not a satisfactory one. The award is objected to on the ground that the arbiter examined two witnesses outwith the presence of one of the parties and another witness outwith the presence of both of them. . . ."

" . . . The complaint in the present case arises out of what occurred at the one and only meeting which took place in connection with the arbitration, and which was held on the site at which the work was performed. The arbiter examined the work done, parties being present without being represented by law agents. He was impressed with the inadequacy of the work in respect of its thinness, and a number of openings were made in order to ascertain what the nature of the work was. It was found to consist of only one preliminary coat—not of two such coats—and a dash-coat. Upon one other question, and upon it alone, the

arbiter found it necessary to inform his mind by evidence of a kind more formal than that which was obtained from the statements of parties made in the course of examining the work. It related to the point whether part of the work which had been executed with coke breeze instead of with granite chips had been so executed with the knowledge and assent of the employers. It was a wet day and for that reason, and apparently for none other, he went into the employer's office instead of examining the witnesses in the open air. He was accompanied in the first instance by the employer and the contractor. Finding that they were not agreed on the point whether authority had been given for the use of coke breeze instead of granite chips the arbiter expressed his intention to question the contractor's son and foreman and also the employer's manager on the subject. He considered it expedient to examine these persons outwith the presence of their respective masters, and therefore before calling in the contractor's son and foreman he requested the contractor to go outside. After examining them—which he did personally, but in the presence of the employer who was still in the room—he requested the employer to go outside and then called in and examined his manager, no one being present except the arbiter himself. To be quite logical in carrying out this procedure the contractor should have been brought in again when the employer went out—but this is a minor point. The result of the evidence thus obtained was to show conclusively that the manager acting on behalf of the employer had authorised the use of the coke breeze, and the only point to which the examination of the witnesses had been directed was thus solved favourably to the contractor. There the incident ended."

On 16th February 1922 the Lord Ordinary (ORMIDALE) reduced the award on grounds other than those dealt with in the present report.

Opinion (so far as material to this report)—" . . . The first ground on which reduction of the award is sought is thus stated on record (condescendence 4) by the pursuer—"Thereafter certain procedure took place under the said minute of agreement and reference, in the course of which evidence was heard by the arbiter at a diet held by him at the works of the defenders, the said John Williams & Company (Wishaw), Limited. At this diet, although Mr Williams, one of the directors of the defenders' company who attended the proceedings and led evidence on behalf of the company, was present along with other representatives of the said defenders throughout the whole proceedings, the evidence both of the witnesses for the said defenders and of the witnesses adduced by the pursuer was heard by the arbiter outwith the presence of the pursuer or of any representative on his behalf. The pursuer was in attendance at the works along with his witnesses, but he was afforded no opportunity of being present when the other evidence was being taken." This averment is not precisely accu-

rate. As a matter of fact what happened was this—After an inspection of the rough casting the pursuer was called into a room in the offices of the defenders and there examined by the arbiter in presence of Mr Williams, a director and the representative of the defenders. At the close of his examination he was told to go out, Mr Williams remaining, and his son William Black junior was called in and examined. He was then told to go out, and Robert Currie Wilson, the pursuer's foreman, was called in and examined, Mr Williams still being present. After he had gone out Mr Williams stated that he would like Mr Russell, the defender's secretary, to be examined. Mr Williams was then told to go out, and the arbiter then examined Mr Russell outwith the presence of any third party.

“The arbiter explains that ‘the first people I examined were Mr Williams and Mr Black. I examined them together. (Q) How did you examine them?—(A) It was practically an interrogation between parties—questioned the one against the other’; and further, ‘I desired to examine the son in the absence of his employer. . . . (Q) Were you cross-questioning “Wilson” and Mr Black’s son against Mr Williams?—(A) Yes, Mr Williams was there when these two men were being examined.’

“In my opinion the arbiter, to be consistent, ought at the conclusion of the pursuer's examination either to have told Mr Williams to go out along with the pursuer or to have retained the pursuer in the room. The correct procedure would have been to have required both the pursuer and Mr Williams to remain in the room during the examination of all the witnesses. It is contrary to good practice to examine witnesses outwith the presence of both parties, and as a general rule to examine witnesses in the presence of only one of the parties is fatal to an award.

“The procedure was therefore irregular. I am not prepared, however, to hold that the award was thereby invalidated. The only subject-matter of the proof that was led was the use of char or coke breeze in place of granite shivers, and this question was decided by the arbiter in favour of the pursuer, who cannot therefore complain that substantial justice was not done. It is true that he says that sand was also mentioned, but I am satisfied that he is confusing what passed outside during the inspection of the rough casting and what passed in the room. I regard the evidence of Mr Williams as to what the witnesses were examined about as altogether inaccurate and unreliable. . . .”

The defenders John Williams & Company (Wishaw), Limited, reclaimed, and argued with reference to the question of the irregularity of the arbiter's procedure—The mere fact that the parties or their agents were not present at the examination of the witnesses was not fatal to the award. An arbiter had a wide discretion, and could do what was irregular so long as no injustice was done. Thus he was entitled to obtain information in the way he thought suitable

and was not bound to allow a proof—*Ledingham v. Elphinstone*, 1859, 22 D. 245—nor to put witnesses on oath—*Cochrane v. Guthrie*, 1861, 23 D. 865—and might receive information from one of the parties in the absence of the other—*Campbell v. M'Holm*, 1863, 2 Macph. 271, per Lord President at p. 284, Lord Ormisdale at p. 277, and Lord Deas at p. 281; *Barr v. Wilson's Trustee*, 1852, 15 D. 21, per Lord President at p. 26; *Miller v. Millar*, 1855, 17 D. 689, per Lord Wood at p. 717, and Lord Curriehill at p. 728; *Alston v. Chappell*, 1839, 2 D. 249. There was no evidence of injustice here. Further, the parties were aware of what was being done and could have objected at the time. The cases founded on by the pursuer could not be safely applied here. In *Drew v. Drew & Leburn*, 1855, 2 Macq. 1, and *Dobson v. Groves*, [1844] 6 Q.B. 637, 14 L.J.Q.B. 17, something underhand had been done. In the other cases the parties had had no means of knowing what the arbiter was doing.

Argued for the pursuer and respondent on the question of irregularity of procedure—The fact that the arbiter had taken evidence outwith the presence of the parties was sufficient to entitle the pursuer to refuse to accept the award, and the Lord Ordinary should have reduced the award on that ground. That the pursuer might not have been prejudiced was not a proper ground of judgment—*Ramsden v. Jacobs*, [1922] 1 K.B. 640; *Dobson v. Groves (cit.)*; *Harvey v. Shelton*, (1844) 7 Beav. 455; *Drew v. Drew & Leburn*, 1855, 2 Macq. 1; *Langmuir v. Sloan*, 1840, 2 D. 877; Bell on Arbitration (2nd ed.), secs. 273 and 274. The pursuer was not bound to challenge the procedure at the time—*Earl of Dunmore v. M'Inturner*, 1835, 13 S. 356. The cases *Campbell v. M'Holm (cit.)* and *Barr v. Wilson's Trustee (cit.)* were very special, and did not support the conduct of the arbiter here. In *Drew v. Drew & Leburn* reduction would have been granted but for waiver.

LORD PRESIDENT—[After the paragraph first quoted above]—When two parties agree to submit their differences to the adjudication of a third, and when that third party consents to give his services for the determination of those differences, the result is to set up a conventional tribunal which stands in a very peculiar and, in some respects, a very difficult position. On the one hand, an arbiter carries on his shoulders all the obligations of justice which rest upon a regularly constituted court of law. On the other hand, he is dispensed—in his own discretion—from the observance of those well-tried forms of procedure which in the case of an ordinary court provide the instruments by which the judicial function is performed and the means whereby the circumstances of the dispute are adequately and fairly ascertained, and which also afford to the parties invaluable safeguards and guarantees for the full and fair presentation of their contentions. When an arbitration is informally conducted, the arbiter is deprived of these aids to a just and even-handed inquiry into the disputes submitted to him; yet he is all

the time under the strictest obligation to see that the proceedings, however informal, are so conducted that the substantial conditions of what Lord Justice-Clerk Boyle in *Earl of Dunmore v. M'Inturner*, 13 S. 356, describes as "fair justice between man and man" are never infringed. It follows that with regard to the duties of an arbiter in the conduct of a submission, including a matter so important as that of hearing witnesses, it is impossible to lay down absolute or universal general rules, breach of which by an arbiter will necessarily make his award invalid. The question must be one of circumstances, and the test to be applied is whether the proceedings were truly and essentially consistent with "fair justice between man and man," or whether, on the other hand, they were such as to permit of any possibility of injustice. For the test, owing to its very generality, must be rigorously applied. A certain lack of clean-cut precision seems to characterise the statement of the principles regulating the arbiter's conduct of a submission in the third book of Bell on Arbitration, but it is obvious, in view of the considerations to which I have just referred, that those principles can only be stated with a certain amount of flexibility. They are not on that account any the more easy to apply; but that is another matter.

[Here followed the second paragraph quoted above.]

This procedure has been deservedly criticised, and might easily have been fatal to the award. There is perhaps no principle applicable to the conduct of a submission less flexible than that which discountenances the examination of witnesses outwith the presence of the parties or their representatives—*Drew v. Drew & Leburn*, (1855) 2 Macq. 1—and, if I thought that any possibility of injustice to the contractor's interests had resulted from the departure from it which occurred in this case, I should have been for setting aside the award. But it is clear from the proof that the arbiter's conduct was perfectly straightforward and above-board, and that his conscientiousness in the matter was above doubt. Nextly he cannot be said to have erred in desiring to have the parties' employees examined outwith the presence of their masters. This is done, for perfectly natural and legitimate reasons, in courts of law in circumstances not dissimilar to those by which the arbiter found himself confronted. The difficulty to which the course adopted led was created by the fact that neither of the parties' solicitors were present to represent them when they left the room. Lastly, not only was the examination strictly limited to the single point of the employer's authority for the use of the coke breeze, but the result was that the contractor, who now seeks to avail himself of the incident in order to attack the award, was completely successful so far as that point was concerned. I am unable to see any possibility of injustice in what was actually done, although I think the proper and the only safe course for the arbiter in the circumstances would have been either to forego the advantage he

sought to obtain (in the interests of the parties themselves) by questioning their servants outwith their presence, or to put off the examination until their solicitors could have been present to represent them. In view of such authorities as *Barr v. Macnaughton*, (1852) 15 D. 21, and *Campbell v. M'Holm*, (1863) 2 Macph. 271, I am not prepared to disagree with the Lord Ordinary upon this matter, or to upset a submission which was conducted with perfect honesty and integrity, and without, as it happened, giving either party the slightest ground for complaint of injustice. [*His Lordship then dealt with a question which is not reported.*]

LORD SKERRINGTON—The pursuer's counsel explained that their client considered that he had suffered material injustice from the award upon three grounds. I am not surprised that your Lordship made no reference to the first ground because I regard it as unsubstantial, but it is my duty to mention it.

[*His Lordship dealt with this ground of objection and continued*].—The second ground of complaint was that the arbiter required the pursuer to leave the room while evidence was being led upon a question of fact. That is a grave objection, but the Lord Ordinary took the view that it was not fatal in this particular case seeing that the award was in favour of the pursuer as regards the sole question to which the evidence was directed. This consideration would not, in my judgment, have sufficed to save the award if the conduct of the arbiter or his attitude towards the pursuer had been such as to create a reasonable doubt as to his impartiality. It was proved, however, that the arbiter acted as he did because he considered that the evidence of the pursuer's son and of his foreman would be more satisfactory if given outwith the presence of the pursuer. Where he went wrong was in overlooking the fact that if he asked the pursuer to leave the room there would be neither counsel nor solicitor nor any other person present who had the right and the duty to protect the pursuer's interests during the leading of the evidence. The arbiter's error being due to inadvertence and not to caprice or any bad motive I am not prepared to hold that it disqualified him from doing even-handed justice between the parties as regards the other and separable matters which he had to decide. In coming to this conclusion I think that I am giving effect to the spirit of what was decided in the cases of *Barr v. Macnaughton* (15 D. 21) and *Campbell v. M'Holm* (2 Macph. 271), though, of course, the standpoint from which questions of this kind are considered at the present day is not the same as it was at the date of these decisions. Standing these decisions, however, I do not think that the law bearing upon this matter, at any rate as administered in Scotland, can be put any higher or more absolutely than it was stated by your Lordship. We were not asked to reconsider these decisions.

[*After dealing with the pursuer's third ground of objection his Lordship continued*]

—I agree with the judgment which your Lordship proposes.

LORD CULLEN—I concur.

LORD SANDS did not hear the case.

The Court recalled the interlocutor of the Lord Ordinary and assoiized the defenders.

Counsel for Pursuer and Respondent—Wark, K.C.—King. Agents—Dove, Lockhart, & Smart, S.S.C.

Counsel for Defenders and Reclaimers—MacRobert, K.C.—Black. Agents—Macpherson & Mackay, W.S.

Thursday, March 1.

SECOND DIVISION.

[Sheriff Court at Glasgow.

PACIFIC STEAM NAVIGATION COMPANY (OWNERS OF S.S. "BOGOTA")
v. ANGLO-NEWFOUNDLAND DEVELOPMENT COMPANY, LIMITED (OWNERS OF S.S. "ALCONDA").

Ship—Collision—Contributory Negligence—Clyde Navigation Bye-laws, Nos. 3, 18, 19—Vessel Emerging from Dock—Failure to Give Sound Signal—“Under her Own Steam”—“Crossing.”

The Clyde Navigation Bye-laws provide, *inter alia*—“3. When a steam vessel or a dredger is turning round, or for any reason is not under command and cannot get out of the way of an approaching vessel, which but for this it would be her duty to get out of the way of, . . . she shall signify the same by four or more blasts of the steam whistle in rapid succession, or by like strokes of her bell, and it shall be the duty of the approaching vessel to keep out of the way of the steam vessel or dredger so situated. . . . 18. Vessels coming out of dock shall signify the same by a prolonged blast of the steam whistle, of not less than five seconds' duration, and in cases where a vessel is not under steam, the tug boat in attendance shall make the same signal. 19. Every steam vessel under her own steam crossing from one side of the river towards the other side shall keep out of the way of vessels navigating up and down the river. . . .”

A steamer was being drawn out of a graving dock, situated on the Clyde, stern first by a tug, and when two-thirds out of the dock with the tug about mid-channel she sighted another steamer three-quarters of a mile away coming up the river under her own steam with two tugs attached. The former steamer had steam in her boilers but was not using it and did not intend to use it until she had been straightened out in the river. On sighting the approaching steamer she gave four blasts of the steam whistle in rapid succession, twice

repeated, instead of a prolonged blast as required by rule 18 of the Clyde Navigation Bye-laws in the case of vessels coming out of dock, and continued her turning movement. The second vessel neither stopped nor slackened speed, and a collision occurred between the two vessels at the entrance to the graving dock. In counter claims for damages between them, in which a proof was taken, *held* (1) (*diss.* Lord Ormidale) that rule 19 did not apply to the steamer which was being drawn out of the dock, in respect that she was not “under her own steam” and was not “crossing from one side of the river towards the other side”; (2) that the vessel which was coming up the river was at fault in not stopping or slackening speed; and (3) that the steamer which was being drawn out of the dock did not by her failure to give a prolonged blast in any way contribute to the collision.

Opinions (*per* the Lord Justice-Clerk and Lord Hunter) that the steamer emerging from the dock was “turning round” within the meaning of rule 3; (*per* Lord Anderson and Lord Ormidale) that she could not be said to be “turning round” or “not under command” within the meaning of that rule; and (*per* the Lord Justice-Clerk, Lord Hunter, and Lord Anderson) that having given a blocking signal she was entitled to complete her manœuvre, and that the other vessel was bound to give way.

Ship—Process—Evidence—Inadmissibility of Evidence Involving Questions of Nautical Skill and Experience where Nautical Assessors Assisting Court.

Opinion (*per* Lord Hunter) that in Admiralty cases where the Court has the assistance of nautical assessors, evidence involving questions of nautical skill and experience is not admissible.

The Pacific Steam Navigation Company, Liverpool, *pursuers*, brought an action in the Sheriff Court at Glasgow against the Anglo-Newfoundland Development Company, Limited, Newfoundland, *defenders*, for payment of £5000 with interest as damages for loss arising out of a collision in the Clyde between the “Bogota,” a steamer belonging to the pursuers, and the “Alconda,” a steamer belonging to the defenders.

In order to avoid the arrestment of their vessel the defenders agreed to prorogate the jurisdiction of the Sheriff Court.

The facts of the case appear from the findings in fact of the Second Division as set forth in their interlocutor of 1st March 1923 (*infra*)—“1. That the ‘Bogota,’ a steamer of 415 feet over all in length and 52·4 feet in breadth belonging to the pursuers, on the afternoon of Friday, 9th December 1921, had occasion to leave Elderslie Graving Dock and proceed up the river eastwards to Prince’s Dock on the south bank. 2. That the said graving dock is on the north bank of the river Clyde, and is inclined to it westwards at an angle of about 30 degrees. 3.