

The House of Lords 'ordered and adjudged, that the appeal be dismissed, and the interlocutors complained of affirmed.' April 26. 1825.

LORD GIFFORD.—My Lords, In the case of Morrison against Robertson, which was heard before your Lordships in the course of the last week, I intimated my intention of moving your Lordships to proceed to judgment on the present morning. I have since considered that case, and the arguments adduced at your Lordships' Bar, to which reference was made; and after very anxious consideration of this case, I must confess it does appear to me that the question is reduced to this, whether or not this award can be impeached on the ground of an error on the part of the arbitrators, or a point of law in the principle on which they have decided? It does not appear to me that the mistake they have committed is one which ranks with what are denominated errors of calculations, but that, if there be an error, it is that which has arisen in their minds on the application of the law to the principles on which they have decided; and as I find that it is a fixed principle in the law of Scotland, that an award of arbitrators cannot be impeached on that ground, it would therefore be very dangerous for your Lordships to come to a decision which would at all touch upon that principle, which is so fully established. Having come therefore to the conclusion that the interlocutors of the Court of Session are right, I would move your Lordships for an affirmance of those interlocutors; but it is not my intention to propose in this case the giving any costs. I shall merely propose to your Lordships the affirmance of the interlocutors.

Appellants' Authorities.—Steele, June 22. 1809, (F. C.)

Respondent's Authorities.—I. Bankton, 23. ; 22. Reg. ; 1695, 25. ; 4. Ersk. 3. 35. ; Hardie, Dec. 18. 1724, (664.); Williamson, Dec. 12. 1739, (665.); Heddrington, June 21. 1771, (No. 3. App. Arb.); Kirkaldy, June 10. 1809, (F. C.); Grant, June 23. 1820.

MONCREIFF and WEBSTER—J. RICHARDSON,—Solicitors.

JOHN AITCHISON, Appellant.

MAGISTRATES of GLASGOW, Respondents.

No. 18.

Landlord and Tenant—River—Advertisement.—A landlord of several mills on a stream of water having advertised them for lease, and represented that they had an abundant and regular supply of water; and a party having taken one of the inferior mills, without any special stipulation as to the water; and the landlord having let the upper mill, under the condition that the tenant of it should keep his sluices open at least three hours in the day;—Held, (affirming the judgment of the Court of Session),

That the tenant of the lower mill was not entitled to withhold payment of his rent, or to claim damages from the landlord, on the ground of having, by the above condition, been deprived of a sufficient supply of water; reserving his claim of damages against the tenant of the upper mill, if he any had.

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2D DIVISION.
Lords Craigie,
Reston, and
Cringletie.

THE Magistrates of Glasgow are proprietors of four mills, situated on a stream called the Molendinar-burn, which has its source in Hoganfield-loch, and, after passing under the walls of the ancient Cathedral of Glasgow, discharges itself into the river Clyde. These mills are known by the names of the Provan-mill, (which is the nearest to Hoganfield-loch); the Town-mill, which is a little farther down the stream; the File or Iron-mill, which is still lower; and the Subdean-mill, which is the lowest. The Provan-mill had, in this way, the complete command of the water, the File and Subdean-mills being entirely dependent upon it; but the Town-mill had a reservoir capable of containing about 240,000 cubic feet of water. From 1755 the Provan-mill had been let under a stipulation, ‘that in every
‘twenty-four hours he, the said tacksman and his servants, shall
‘open and draw the sluices three hours, whether the tacksman
‘have grinding or not, for the service of the mills below him.’ In 1809 all the mills were out of lease; and the Magistrates then inserted two advertisements in the newspapers, offering, in the one, leases of the Provan-mill and the Town-mill, which were represented as having an abundant supply of water; and in the other, of the File-mill and Subdean-mill, each for 19 years. The advertisement relative to the File and Subdean-mills was thus expressed:—‘There are to be let, for 19 years from the
‘term of Whitsunday next, all and whole the mill adjoining the
‘Fir Park, known by the name of the Subdean-mill; also the
‘mill known by the name of the File or Iron-mill. These mills,
‘belonging to the town of Glasgow, are situated on the banks of
‘the Molendinar-burn, have powerful falls, and command, at all
‘times, an abundant supply of water. There is about half an
‘acre of ground attached to the File-mill. Both properties are
‘to undergo considerable repairs, and from their vicinity to the
‘city, and easy access, the tenants of these subjects may always
‘expect as much work as they are able to perform. The terms
‘of set will be seen in the hands of the town-clerks.’ On the 14th April, (being a few days after the publication of this advertisement), Aitchison made the following offer for the File-mill, which had been formerly let at a rent of L.20:—‘I hereby make
‘offer to take a lease of the File-mill and ground for 19 years
‘from Whitsunday first, as they presently stand, at the rent of

‘ L. 70 sterling; and, in lieu of repairs, to have the first year’s rent allowed me, towards erecting a water-wheel and clearing out the mill-race.’ On the following day he sent to the Magistrates another offer, which was thus expressed:—‘ In case my offer for the File-mill is not accepted, I am willing to take a lease of the Subdean-mill and ground for 19 years;’ and he farther stated, that ‘ I have made these offers on condition that I shall have liberty to grind all sorts of grain free of sucken or dues to the Town mills; also the miller at Provan is bound to let out a daily supply of water from the lochs when the mill is not going regularly.’ The former of these offers was accepted by the Magistrates, on the 21st, in these terms:—‘ We accept of the within offer of L. 70 for the File-mill per annum, and to give up the first year’s rent towards erecting a water-wheel, and leaving the water-wheel on the property at the end of the lease; Mr. Aitchison finding security to the satisfaction of the committee.’ The Provan-mill was taken by a person of the name of Millar; the Town-mill by one Wright; and the Subdean-mill by Tassie and Company; and each of these persons, as well as Aitchison, entered into possession in virtue of missives. A lease was thereafter granted of the Provan-mill to Millar, in which it was stipulated, that he should ‘ open and draw, and allow to remain open, the sluices of his dams and lades hereby set, whether he is grinding or not, for the service of the mills below the said Provan-mill, and that during any three hours in the course of every twenty-four hours which the Magistrates of Glasgow, for the time being, shall think most proper.’ A lease was proposed to be granted of the Town-mill to Wright, containing a clause that he should be bound ‘ to open and draw, and allow to remain open, the north sluice of the dam and lades of the premises set, regularly every day, whether working or not, for the supply of the mills below;’ but Millar refused to subscribe this lease, as no such unlimited obligation was imposed on the tenant of the Provan-mill. A lease was also offered for the signature of Aitchison, containing an obligation to the same effect; but he in like manner refused to sign it, unless a declaration were inserted, ‘ that the tacksmen of the Provan-mill and Town-mill shall be held to let down their water, in a regular manner, every lawful day during working hours.’ Tassie and Company subscribed a lease of the Subdean or lowest mill, without any such stipulation.

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Repeated complaints were made by Aitchison to the Magistrates, that he was unable to carry on his operations in conse-

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quence of the water which was sent down from the upper mills being insufficient, and he therefore refused to pay any rent. In 1813 the Magistrates presented a petition to the Sheriff of Lanarkshire, praying for warrant of sequestration ‘until caution be found for payment of the rents due and to become due;’ and to ordain him to execute and subscribe a regular tack, with sufficient caution; and failing thereof, to grant warrant of ejection. On the other hand, Aitchison brought an action concluding for damages, and to find him entitled, ‘as tacksman of the said mill, to the command of an abundant supply of water at all times during his lease, and decern the said defenders immediately to procure the said supply; and grant a regular lease with an obligation to that effect.’ In the former of these actions the Sheriff ordained Aitchison ‘to execute and subscribe a regular tack of the mill in question, with sufficient caution;’ and in the other action, he assoilzied the Magistrates. And thereafter, on advising a petition by Aitchison, he pronounced this judgment:—‘Finds, that the advertisement for letting the town’s mills, founded on by the pursuer, did not supersede the duty incumbent on him of examining and making inquiry into the state and circumstances of the subjects previous to his offer, and that it must necessarily be presumed that he did so, and was satisfied: Finds, that the agreement for a lease of the Malt or File-mill was constituted betwixt the parties, by the offer dated 14th April 1809, which is accepted on the back by the Convener of the Committee for Mills on the 21st of April following, and by such of the pursuer’s subsequent missives as were accepted by the said committee; but finds, that the pursuer’s letter of the 15th of April 1809, which relates to the Subdean-mill, was not accepted by the committee, nor the proposed conditions therein agreed to by them: And in respect it does not appear that the lease of Provan-mill, entered into betwixt the defenders and James Miller, contains any clause injurious to the pursuer’s right to the water at common law, but is averred to be framed in the same terms as the lease of that mill has always been heretofore, which last point the pursuer does not controvert, finds, that the pursuer has no relevant claim against the defenders for or on account of any alleged deficiency of or irregularity in letting down the water; and therefore assoilzies them simpliciter from this action, as well the conclusion for damages as that for execution of a lease, seeing that a lease, made out in terms of the missives of agreement, has been subscribed by the defenders, and is lodged in process, ready for being executed

‘ by the pursuer: Reserves to the pursuer all claims he may have May 4. 1825.
 ‘ against the tenants or occupiers of the superior mills, for the
 ‘ illegal or improper use of the water, if he is advised to insti-
 ‘ tute the same, and to them their defences as accords; and with
 ‘ this explanation, and these findings, adheres to the interlocutor
 ‘ complained of, and decerns.’ Both cases were then brought
 into the Court of Session by advocacy, and having come before
 Lord Craigie, he conjoined them, and ordained the Magistrates
 to produce certain documents, and to condescend as to certain
 allegations inferring acquiescence; and in reference to a statement
 which had been made by them, as to regulating the supply of
 water, he issued the following note:—‘ The Lord Ordinary would
 ‘ wish to know whether the Magistrates of Glasgow, when tak-
 ‘ ing the opinion of Messrs Rennie and Telford, made any
 ‘ inquiry as to the proper mode of regulating the supply of water
 ‘ to the different mills, so that it might be made as useful as
 ‘ possible. It likewise appears to the Lord Ordinary, that when
 ‘ the new tenants came to differ on this point, recourse ought to
 ‘ have been had to such opinions, instead of adopting, in the
 ‘ lease of Provan-mill, a rule which apparently had no recom-
 ‘ mendation but that of having been followed when the art of
 ‘ constructing mills and mill-lades was very little known or
 ‘ attended to; and although it would be improper at this time
 ‘ to produce opinions on the subject without authority from the
 ‘ Lord Ordinary, he thinks that the advocator should have an
 ‘ opportunity of stating what regulations ought to have been
 ‘ prescribed in the several leases for the general advantage.’
 Thereafter the case came before Lord Reston, who, after an
 interlocutor allowing a proof, which Aitchison represented
 against, pronounced this judgment:—‘ In respect that the
 ‘ condescendence for the Magistrates of Glasgow, on the plea
 ‘ of homologation and acquiescence, is vaguely expressed, and
 ‘ of doubtful relevancy; and that the Magistrates seem to
 ‘ concur with the representer in wishing a judgment on the
 ‘ rights of parties, independent of that plea, recalls the former
 ‘ interlocutor, advocates the cause, and finds that the four mills
 ‘ belonging to the Corporation of Glasgow, being all out of
 ‘ lease, they were offered to be let by an advertisement, bearing
 ‘ that they commanded at all times an abundant supply of water,
 ‘ and referring to terms of set in the town-clerk’s hands: Finds it
 ‘ admitted, that the terms here referred to were marked on a me-
 ‘ morandum, which bore, that the water would be let down
 ‘ regularly: Finds the clause in the Provan-mill lease, securing
 ‘ the water being let down to a mill (having no dam or reser-

May 4. 1825. ' voir) three hours in twenty-four, is not reasonable implement
 ' of the obligation arising from the memorandum; and that the
 ' pursuer, unless in so far as he may have virtually consented
 ' thereto, is entitled to any damages he can qualify from it, and
 ' allows him to lodge a condescence accordingly.' Against
 this judgment the Magistrates lodged a representation; but
 Lord Reston having died, the case was transferred to Lord
 Cringletie.

In the meanwhile the Magistrates had raised an action against
 Tassie and Company, for payment of rents, which they resisted
 on the same grounds as Aitchison, viz. that they did not receive
 a sufficient supply of water, which they alleged the Magistrates
 had bound themselves that they should have. On the other hand,
 Tassie and Company brought an action against the Magistrates,
 and Miller and Wright, the tenants of the upper mills, conclud-
 ing for a supply of water, and damages. In these actions a re-
 mit was made to Mr Jardine, engineer, to examine the premises
 and report; and he having done so, and a copy of his report
 having been lodged in the process between the Magistrates and
 Aitchison, Lord Cringletie pronounced this judgment:—' The
 ' Lord Ordinary having resumed consideration, is satisfied that
 ' the interlocutor complained of by said representation is partly
 ' founded on a mistake, in the then Lord Ordinary conceiving
 ' that the water necessary to drive the File-mill depended en-
 ' tirely on the regulation of the sluices of Hoganfield-loch and
 ' the Provan-mill, as by that interlocutor his Lordship finds,
 ' that the clause in the Provan-mill lease, securing the water
 ' being let down to a mill having no dam or reservoir three
 ' hours in twenty-four, is not reasonable implement of the obli-
 ' gation arising from the memorandum, on the faith of which
 ' Mr Aitchison took his lease. In this way his Lordship seems
 ' not to have been aware that the Town-mill is situated between
 ' the Provan-mill and the File-mill in question, and has a reser-
 ' voir containing 240,000 cubic feet of water, on the proper re-
 ' gulation of which must chiefly depend the supply of water to
 ' the mill in question: Finds, that there is no special regulation
 ' of the water in this last reservoir contained in the lease of the
 ' Town-mill; and, consequently, that if Mr Aitchison had any
 ' want of water for his mill, it arose from the impropriety of the
 ' management of the miller of the Town-mill, for which the Ma-
 ' gistrates of Glasgow are not responsible, as it was open to Mr
 ' Aitchison to complain of that miller withholding the water
 ' when the mill was not working; and when the mill was work-

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' ing, there could be no ground of complaint, as the water which
 ' drove the one mill passed on to the other: Finds, that from Mr
 ' Jardine's report it by no means appears, that the regulation in
 ' the lease of Provan-mill, viz. that the miller shall open the
 ' sluice of Hoganfield-loch three hours in the twenty-four, is
 ' improper, and inadequate to the supply of the other mills; for
 ' Mr Jardine does not report that the sluices should be longer
 ' open, but only recommends some regulations for giving greater
 ' effect to the opening of that sluice, and suggests a project for
 ' enlarging the quantity of water in Hoganfield-loch, which the
 ' Magistrates of Glasgow have found to be impracticable, on ac-
 ' count of their not being proprietors of the ground which would
 ' be covered by the additional water: Finds, therefore, on the
 ' whole, that Mr Aitchison has no reason to complain of the re-
 ' gulation in the lease of the Provan-mill: Finds further, that
 ' even if Mr Aitchison had reason to complain of that regulation,
 ' he has not relevantly condescended on any damages, or any
 ' grounds on which they could be ascertained; and therefore, on
 ' the whole, alters the interlocutors complained of by said repre-
 ' sentation, and remits both causes simpliciter to the Sheriff:
 ' Finds the Magistrates entitled to the expenses of the question
 ' about caution, and also to the expenses of the advocations, sub-
 ' ject to modification.' Against this judgment Aitchison reclaim-
 ' ed to the Inner-House; and, at the same time, the case between
 ' Tassie and Company, and the Magistrates and tenants of the
 ' upper mills, was reported to their Lordships. Both cases were
 ' advised upon the 16th May 1822; and in that of Tassie and
 ' Company their Lordships pronounced this judgment:—Find
 ' that the defender, James Miller, is bound by the stipulations
 ' contained in his lease of Provan-mill, to open and draw, and
 ' allow to remain open, the sluice in the dam of Hoganfield-loch,
 ' at least three hours in every twenty-four hours; and also to
 ' allow the passage from the reservoir of Provan-mill of a quan-
 ' tity of water, equal to that discharged during the said three
 ' hours from the Hoganfield-loch, beginning the said dis-
 ' charge from the reservoir of the Provan-mill as soon as the
 ' water therein is in a state to work the said mill, and continuing
 ' it without intermission, at the rate usually required to work the
 ' said mill, till the whole of the three hours' run from the loch is
 ' discharged, and that whether the mill be working or not:
 ' Find, that the said John Wright is bound to send down the
 ' water regularly for the supply of the Subdean-mill, whether the
 ' Town-mill be working or not, and decern accordingly; and

May 4. 1825. ‘ before answer as to damages, appoint the pursuers to give in a
 ‘ special condescence of the damages claimed by them; and
 ‘ reservé till the issue of the cause the consideration of all claims
 ‘ of expenses hinc inde.’ The case of Aitchison was then taken
 up, when their Lordships, ‘ in respect of the decision in the
 ‘ question between Walter Tassie and Company, and the Magis-
 ‘ trates of Glasgow and the tenants of Provan-mill and Town-
 ‘ mill, adhere to the interlocutor reclaimed against, and refuse
 ‘ the desire of the petition; and remit to the Lord Ordinary to
 ‘ hear Counsel for the parties as to the point of caution, and to
 ‘ do therein as to his Lordship shall seem just.’* Certain pro-
 ceedings then took place relative to the finding of caution, and
 decree was ultimately pronounced against Aitchison, ordaining
 him ‘ to execute and subscribe a valid tack of the mill in ques-
 ‘ tion, in terms of the second conclusion of the original complaint;
 ‘ along with a sufficient cautioner, bound jointly along with him
 ‘ for the prestations incumbent on him;’ also for a certain sum
 of rent, and expenses of process. Having been charged in
 terms of this decree, he presented a bill of suspension, on the
 ground that his estates had been sequestrated under the Bank-
 rupt Act in 1812, and that he had obtained a discharge in 1813;
 so that all previous claims, including these rents, were discharg-
 ed. Lord Cringletie refused the bill, in respect of the final de-
 crees of the Court, and that Aitchison had, subsequent to the
 date of the discharge, subscribed a bond of caution; and to this
 judgment the Court adhered on the 7th June 1823, in respect
 no caution was offered.†

Aitchison appealed.

Appellant.—The advertisements held forth to the appellant
 that he was to have a proper supply of water, and on this faith
 he took the lease of the mill. Accordingly, in the offer of the
 15th of April, he expressly mentioned, that both offers were made
 on the condition that the miller at the Provan-mill should let out
 a regular and daily supply of water. Notwithstanding this, the
 respondents entered into an agreement with that tenant, by which
 he was not compellable to keep his sluices open more than three
 hours in the day, which was quite insufficient for the supply of
 the inferior mills. As the appellant, therefore, has not received
 implement of this important condition, he is not liable in rent;

* See 1. Shaw and Ballantine, Nos. 553. and 554.

† 2. Shaw and Dunlop, No. 357.

and, on the contrary, is entitled to damages from the respondents. May 4. 1825.

Respondents.—Advertisements are mere recommendatory notices, and are never understood to form the bargain between the parties, but only to induce intending offerers to make inquiries. Accordingly the appellant made inquiries, and, in his offer for the File-mill, he proposed to take it and the adjacent ground ‘as they presently stand,’ without any stipulation whatever in regard to any regulation for the supply of water. The existing regulation at the time, and for many years previously, was precisely the same as that which was inserted in the lease to Miller. The respondents, in that lease, stipulated that Miller should keep his sluices open for at least three hours in the day; and if the appellant could shew that he was entitled to compel Miller to keep them open for a longer period, there was nothing in the clause to prevent him doing so.

The House of Lords ‘ordered and adjudged, that the appeal be dismissed, and the interlocutors complained of affirmed.’

SPOTTISWOODE and ROBERTSON—J. DUTHIE,—Solicitors.

HUGH DEWAR and Others, Trustees of JOHN M'KINNON CAMPBELL, Appellants.—*Sol.-Gen. Wetherell—Adam.* No. 19.

Mrs ELIZABETH CAMPBELL or M'KINNON, Respondent.
Abercrombie—Keay.

Fee or Liferent—Clause.—A lady who was heir of provision to certain estates, having by her contract of marriage, in the event of succeeding to them, disposed them, ‘under the reservation of her own and her husband’s liferent right and use thereof,’ ‘to and in favour of the heir-male of this marriage;’ and having succeeded to them;—Held, in a question between her and the heir-male of the marriage, (affirming the judgment of the Court of Session), That she was fiar of the estates.

IN 1751 Archibald Campbell, proprietor in fee-simple of the lands of Ormaig and Blairintibbert, disposed them, by a contract of marriage between his daughter Catherine and John Campbell, to them ‘in conjunct fee and liferent, but for his liferent use allenary, and after their decease to the heirs-male to be lawfully procreated of their bodies of the said intended marriage, which failing, to the heirs-female to be procreated thereof,’ in

May 5. 1825.

2D DIVISION.
Lord Pitmilley.