

conclusion at which your Lordship has arrived, and for the reasons you have given, which I consider it unnecessary to repeat. I only add that there is to my mind no legal difficulty created by the subsequent conveyance of part of the land to another feuar, because an effectual servitude may be created without any written constitution of the servitude, and the new feuar has the full benefit of the conveyance of the property of the land subject to a servitude right already created.

LORD PEARSON — I agree with Lord M'Laren's opinion.

The LORD PRESIDENT concurred.

On 20th March 1907 the Court found that under the terms of the feu contract libelled as explained by the subsequent actings of the parties the pursuer had a contract right to an access to her feu from a lane there described, and continued the cause with a view to the disposal of the conclusions for interdict and restoration.

On 27th May 1907 the Court pronounced this interlocutor:—

“Find and declare that the pursuer has a right of access between the south-east-by-east boundary of her feu described in the summons and Raploch Street, Larkhall, by means of a lane 20 feet in breadth which starts from a hedge situated at right angles to the south-east-by-east boundary of the plot of ground originally feued to Thomas Thomson, and extending said lane in a north-east-by-north direction to a point 784 feet 7 inches or thereby from the said hedge, and thence in a south-east-by-east direction to Raploch Street aforesaid, which lane is appropriated to the use of the pursuer and the other feuars and tenants of the defender Henry M. M. Hamilton, to whom like rights may have been or may hereafter be granted: Find and declare further that the pursuer and her tenants, servants, and dependants are entitled in all time coming to free ish and entry by and full use and enjoyment of the said lane as an access to and from the said feu and Raploch Street aforesaid: Interdict, prohibit, and discharge the compearing defenders from obstructing or encroaching on or interfering with the said lane in any way whereby the foresaid right of access may be impeded or obstructed, but reserving always to the defender Henry M. M. Hamilton the right to erect and maintain a gateway across that portion of the lane which runs in a south-east-by-east direction to Raploch Street, but that only in such a manner and subject to such conditions as not to interfere with the right of access above declared: Ordain the compearing defenders immediately to remove all gates, walls, fences, palings, or like obstructions erected by them or by their authority other than the gateway before referred

to, tending to interfere with or prevent the full and lawful use of the lane as an access by the pursuer and her foresaids, and decern: Remit the cause to the Lord Ordinary for further procedure, with power to him to decern for the expenses already found due.”

Counsel for Pursuer (Reclaimer)—Cullen, K.C. — Leadbetter. Agents — Ronald & Ritchie, S.S.C.

Counsel for Defenders (Respondents) — M'Lennan, K.C.—Wark. Agents—Campbell & Smith, S.S.C.

Saturday, June 1.

FIRST DIVISION.

[Lord Mackenzie, Ordinary.

STIRLING & KINNIBURGH v. HADDINGTON WESTERN DISTRICT COMMITTEE.

Arbitration — Contractual Arbitration — Interdict — “Any other Matter, Claim, Demand, or Obligation whatever arising out of or in Connection with the Contracts” — Question whether Docquet Signed by Engineers who under the Contract were to Certify Balance was a Final Adjustment.

A contract for the construction of water-works provided that “any question or dispute as to . . . or as to any other matter, claim, demand, or obligation whatever arising out of or in connection with” the contract should be referred to an arbiter. It also provided — “Within three months after the completion of the works the contractors shall be bound to render to” the other party “a final and completely detailed account of all works executed by them, . . . and within three months after receipt of the final account the engineer will certify payment of the balance, if any, due to the contractors.”

An account was duly rendered and an abstract of measurement of work was subsequently made up showing the value of the work done. To this abstract the following docquet signed by the engineers of both the parties was attached:—“The above abstract measurement is agreed between us as the value of work done as at 29th December 1904, and the works are certified to have been completed on 15th November 1904.”

The contractors having raised a suspension and interdict to prevent a reference being proceeded with on the ground that there was no question between the parties, the abstract being a final and conclusive adjustment, the other party denied that the abstract was or had been intended as a final adjustment, and averred that it was merely a memorandum of what the engineers would advise, and contained

items which their engineer had no power to settle.

Held that the reference must proceed, inasmuch as there was a question between the parties, and that question fell within the arbitration clause.

Stirling & Kinniburgh, contractors, 111 Union Street, Glasgow, brought a note of suspension and interdict against the Western District Committee of the County Council of the County of Haddington (hereinafter called the respondents), and also against William Allan Carter, C.E., Edinburgh. The complainers craved the Court to interdict the respondents from submitting to Carter any claims arising out of a contract for the construction of water-works for the supply of Prestonpans, &c., entered into between the complainers and the respondents, and also to interdict Carter from proceeding to consider or determine any questions arising out of said contract, and in particular all questions as to the extent or character of the works executed by the complainers under the contract, or the date of completion thereof, or the prices to be paid therefor.

The contract between the complainers and the respondents was entered into by the respondents issuing general conditions, specifications, and schedules of measurement for three contracts, and the complainers on 15th March 1902 giving a tender for one of said contracts, known as contract No. 1, which tender was on 5th April 1902 accepted by Messrs Thomson & Wright, C.E., on behalf of the respondents.

Article 51 of the general conditions provided—"Within three months after completion of the works the contractors shall be bound to render the committee a final and completely detailed account of all works executed by them, failing which the account will be held to be closed, and within three months after receipt of the final account the engineer will certify payment of the balance, if any, due to the contractors."

Article 52 provided—"Should any question or dispute arise as to the true intent and meaning of this specification and the relative plans, drawings, sections, schedules, and tenders, and the contracts following thereon, or as to the extent of the works intended to be performed thereunder, or as to the works having been duly and properly completed, or as to the expense of any additional work or deductions from that specified, or any alteration which may be more or less expensive than the work specified, or as to the measurements of the works as executed, or as to the extension of time for the completion of the works beyond the date mentioned, or as to liquidated and ascertained compensation payable by the contractors in the event of delay in completing the works, or as to any claim of damages at the instance of the contractors against the committee or the committee against the contractors, or as to any other matter, claim, demand, or obligation whatever arising out of or in connection with the contracts, the same

shall (except as hereinbefore specially provided) be referred to Mr William Allan Carter, M.Inst.C.E., 5 St Andrew Square, Edinburgh, whom failing, Mr William Archer Tait, C.E., Edinburgh; and the decision, interim or final, of the said arbiter shall be finally binding and conclusive on both parties; and the arbiter is hereby authorised and empowered to decern for such sum or sums, interim or final, as he may find to be due by the contractors to the committee or by the committee to the contractors, and also to decide all expenses, interim or final, and to decern therefor."

The complainers averred—" (Stat. 8) On their said tender being accepted the complainers at once proceeded to the execution of the contract work. . . . The whole of said works were constructed and completed by the complainers to the satisfaction of the engineer on 15th November 1904. (Stat. 9) From time to time during the progress of the works the said Mr William Robert Claud Wright as engineer for the District Committee, and Mr William B. Shaw, C.E., Glasgow, as engineer for the complainers, met and agreed on the quantities and prices of the works executed by the complainers. On the completion of said works, as aforesaid, Mr Wright and Mr Shaw had several meetings with a view to adjusting the balance due to the complainers, and at these meetings adjusted most of the quantities and prices not formerly agreed on. Mr Shaw duly reported his negotiations with Mr Wright to the complainers, and on 29th December 1904 they rendered to Mr Wright, in terms of article 51 of the general conditions, a final account of the work done by them, and asked him to fix an early day for the adjustment of the items not yet agreed on. (Stat. 10) Ultimately, on 1st March 1905, Mr Wright as engineer for said District Committee, and Mr Shaw as engineer for the complainers, met and fixed and adjusted on behalf of their respective constituents the total value of the work done by the complainers, and prepared an abstract thereof showing the total value of said work to be £22,087, 1s. They thereafter appended to said abstract and subscribed a docquet in the following terms:—*'Edinburgh, 1 March 1905. — The above abstract measurement is agreed between us as the value of works done as at 29 November 1904, and the works are certified to have been completed on 15 November 1904.'*"

The respondents averred—" (Ans. 10) Admitted that on 1st March, at Mr Shaw's request, Mr Wright met him in order to discuss the complainers' account. The abstract and docquet, which is incorrectly quoted, are referred to for their terms. *Quoad ultra* denied. Explained that the abstract in question not only involved a pecuniary amount and difficult questions of construction of the contract arising from the extended scope of the works, which, as matter of practice, no engineer would dispose of without reference to his principals, but was largely made up of items which, as matter of fact, it was entirely beyond the power of Mr Wright, as these respondents' engineer, to determine on their behalf, and

which they had given him no power to determine. In particular it included . . . It also included an allowance of £450 for certain claims of damages at the instance of the complainers which it was entirely beyond the power of the respondents' engineer to settle. In point of fact the respondents' engineer never meant to settle the said account on behalf of the respondents, and he so informed Mr Shaw. The document was not delivered to Mr Shaw for the purpose of being acted on, but was signed by the engineers as a mere memorandum of what they would respectively recommend their clients to accept. The respondents never heard of the said abstract and docket until 28th April 1905, when they at once repudiated it."

On 28th July 1905 Carter was asked to accept, and did accept, office as arbiter under the contract. Claims were thereafter lodged by both parties, and on 11th January 1906 a record was closed thereon. In the claim lodged by the District Committee they maintained that the complainers, who had been paid £20,900 to account of the sum due to them under contract No. 1 had been overpaid to the extent of £5826, 6s. 3d., and claimed an order for repayment of that sum. They further maintained that the works were not yet completed, and could not be held to be so until the reservoirs were filled and in working order. The complainers, on the other hand, maintained that the works were completed on 15th November 1904, as certified by the engineer, and that they were entitled to payment of £1187, 1s., being the balance between the sum of £22,087, 1s., agreed on as aforesaid, and the sum of £20,900 paid to them. After sundry procedure in the arbitration the complainers on 21st December 1906 presented the present note of suspension and interdict.

On 29th January 1907 the Lord Ordinary refused the note.

Opinion.—"The complainers here are the contractors for the works for the supply of water to Prestonpans and Tranent, and the respondents are the Western District Committee of the County Council of the County of Haddington, with whom they made the contract, and Mr Carter, C.E., the arbiter named in it. The complainers seek to interdict the District Committee from submitting to Mr Carter any questions or claims arising out of or in connection with the contract, and in particular all questions as to the extent or character of the works executed by the complainers under the said contract, or the date of completion thereof, or the prices to be paid in respect thereof, and from following up or proceeding with any claims submitted to Mr Carter. These claims arose in regard to the final adjustment of accounts between the parties. The contractors claimed payment of £1187, 1s., being the balance they said remained due on a sum of £22,087, 1s. The District Committee claimed repayment of £5826, 6s. 3d., by which they said the contractors had been overpaid.

"Considerable progress has already been

made in the arbitration proceedings. The first order by the arbiter was dated 29th July 1905. After a good deal of procedure the record was closed on 11th January 1906. The reference clause in the contract quoted below is very wide in its terms, and it was not disputed that the questions arising between the parties would have been appropriate for the determination of the arbiter under it were it not for the docketed account. The account brings out a figure of £22,087, 1s., and the docket on it is signed by Mr Wright, the engineer for the District Committee, and Mr Shaw, the contractors' engineer, and is in these terms— . . . [quoted *supra*] . . . The complainers at the outset in their pleadings tabled this account to the arbiter, and maintained that under the arbitration clause he had no authority to revise the accounts as finally adjusted. The District Committee, on the other hand, maintained in their pleadings that the alleged adjustment was not final but provisional, and that the docketed abstract was not in fact delivered as a binding document but as a mere record of what the subscribers thereof would recommend their clients to accept.

"The arbiter, after hearing argument, on 9th February 1906 ordered a proof, which was fixed for 8th March. On the morning of the proof the complainers lodged with the arbiter a protest in the following terms:—"Messrs Stirling & Kinniburgh desire to state that in appearing and taking part in the leading of evidence under the the arbiter's order of 9th February 1906 they do so under protest that the order itself is illegal and incompetent, and they reserve their whole rights and pleas as stated on record and orally before the arbiter; as also the whole rights and remedies competent to them in the premises unimpaired and unimpeded by any proceedings that may take place under the order in question. In respect whereof (Sgd.) Alex. Guild, W.S., agent for Messrs Stirling & Kinniburgh. Edinburgh, 8th March 1906." Proof was taken, and the arbiter heard parties. On 30th April he repelled the objections stated by the contractors to the competency of his dealing with the questions submitted by the District Committee on their merits. The view of the arbiter as expressed in his note was that the proof and documents produced and subsequent debate failed to satisfy him that Mr Wright intended or had power, express or implied, to commit his constituents (the Western District Committee) finally to the contents of the docketed abstract of final measurements. He therefore stated he was prepared to deal on their merits with the claims and contentions of the Western District Committee 'as regards (a) the date when the works should be deemed as complete, and the respondents' obligation of maintenance should be deemed to begin; (b) prices of work not regulated by the contract prices nor fixed in terms of clause 45 of specification; (c) time charges not fixed in terms of clause 47 of the specification; (d) damages; and (e) any

other matters of dispute between the parties competently falling within my jurisdiction as arbiter.'

"On 14th May 1906 the arbiter allowed a proof on a question of damages. Both parties were represented at the proof, and also took part in the subsequent stages of the arbitration down to the 28th of November 1906, when the arbiter ordained the contractors to lodge in process a statement showing their net disbursements in wages to the workmen actually engaged on time account in terms of art. 47 of the contract. On 5th and 11th December an extension was allowed the contractors for lodging this statement. On 21st December the present note of suspension and interdict was presented.

"Several questions were argued, some of which, had it been necessary to decide them, could not have been appropriately dealt with in the Bill Chamber. The question, however, whether it was within the competency of the arbiter to take up and determine the point decided by his order of 30th April 1906 may, I think, be determined upon the materials presently before me. The arbitration clause in the contract is contained in art. 52, and is as follows:—
... [quoted *supra*]. . . .

"As already stated, there is no dispute as to the competency of the arbiter to deal on the merits with the claims and contentions of the Western District Committee as regards the points specified in the note to his order of 30th April 1906 were it not for the account and the docquet upon it. The point here, therefore, is not the one which has been the subject of discussion in many decisions, as to whether a particular dispute fell within the terms of the arbitration clause. There is no question that if there is, as regards the matters above specified, a dispute between the contractors on the one hand and the Western District Committee on the other, this falls under the arbitration clause to be determined by the arbiter.

"The complainers' contention is that there is no dispute, and their argument in support of it was as follows:—They point to the terms of art. 51, which provides—
... [quoted *supra*] They argue that in this connection the committee means the engineer Mr Wright. They aver that on 29th December 1904 they rendered to Mr Wright, in terms of art. 51, a final account of the work done by them, and asked him to fix an early day for the adjustment of the items not yet agreed on; that Mr Wright, as engineer for the District Committee, and Mr Shaw, as engineer for the complainers, met and adjusted on behalf of their respective constituents the total value of the work done by the complainers, and prepared an abstract thereof showing the total value of the work to be £22,087, 1s.; and that they thereafter appended to the abstract and subscribed the docquet quoted above. The complainers say they do not object to what Mr Wright, as representing the District Committee, did. It therefore follows, they maintain, that there can be no dispute between them

and the District Committee, and that, unless there is a dispute, there is nothing for the arbiter to adjudicate upon. They say that the engineer was the authorised hand of the District Committee in this matter, and that if they wish to disavow what he has done there may be a dispute between them and their engineer, but not between them and the contractors. It would, they argue, be necessary for the District Committee first to reduce the docquet.

"What the effect of this argument might have been if the complainers had been able to aver that the matter had been carried through by the engineer in terms of art. 51 of the contract—whether in the circumstances the matter would then have fallen within the parenthesis in the arbitration clause, 'except as hereinbefore specially provided,' it is not necessary to determine. In point of fact the engineer has not granted a certificate in terms of art. 51, and there is a dispute between the District Committee and the contractors as to whether the engineer should issue such a certificate or not. The complainers make this clear on their averments in the note of suspension. They say that on 13th April 1905 Mr Wright promised them he would issue the final certificate for payment of the balance due to them on the contract No. 1 (the contract in question), that the District Committee urged him not to grant such a certificate, and that yielding to the pressure so applied he thereafter declined to do so. The case is therefore not one in which the contractors aver that the engineer has granted a certificate which is sufficient to oust the jurisdiction of the arbiter in regard to the matters covered by it, and that the arbiter has not given due weight to it. Their case is that no certificate has been granted, and therefore I am unable to see how they can invoke the provisions of art. 51 to bring the matter within the exception to the general powers of the arbiter under art. 52. It was not maintained that any of the items dealt with in the account related to matters in regard to which the engineer is made sole judge under the contract, *e.g.*, as regards quality of materials and workmanship under art. 23 and maintenance under art. 43.

"For these reasons I am of opinion that the whole proceedings of the arbiter having been within the powers committed to him by art. 52 of the contract, the note should be refused with expenses."

The complainers reclaimed, and argued—Under article 51 of the general conditions the complainers were bound to render a final account within three months of the date of the completion of the works, and the balance due was to be certified by the respondents' engineer. Here the engineer had certified the balance due. The docquet appended to the abstract of measurement of work was a certificate in the sense of article 51. This certificate was conclusive of the question what was the balance due. The respondents were not entitled to go behind the certificate of their own engineer,

and the complainers did not challenge his decision. There was therefore no question to go before the arbiter, and the Court should grant interdict.

Argued for the respondents—It was averred by the respondents that the abstract of measurement included items which the engineer had no power to adjust, and also that the abstract was not a final adjustment but only a statement by the engineers of the amounts which they were prepared to advise their clients to accept. The parties were therefore at issue on the question whether the abstract was conclusive. That was a question for the arbiter—*Duff v. Pirie*, November 14, 1893, 21 R. 80, 31 S.L.R. 118. Where there were questions for the arbiter the Court would not interfere with the conduct of the arbitration, or assume that the arbiter would exceed his jurisdiction—*The Licences Insurance Corporation and Guarantee Fund, Limited v. Shearer*, October 26, 1906, 44 S.L.R. 6, 1907, S.C. 10. Interdict should therefore be refused.

At advising—

LORD PRESIDENT—I agree with the result to which the Lord Ordinary has come. The arbitration clause between the parties is an arbitration clause of what may be called the most ample character. It is one of those which I think upon the cases covers all disputes, and not only disputes which may arise absolutely during the progress of the work. The argument presented to us depended upon this, that it was said by the complainers that there was really no dispute here at all, because all that they wished to do was to adhere to the measurement of the work which, under section 51 of the contract, fell to be made by the engineer, and which measurement was approved of by the document which we have before us, and which bears that the docquet upon it is dated 1st March 1905.

To a certain extent I was impressed with that argument, because I certainly thought that justice would not be done in a case like this if, as a matter of fact—the engineer having truly devoted his attention to the question of measurement—it was sought afterwards to rip up everything that he had done. But, then, what prevents me from giving effect to that argument is this, that the *de quo queritur*, or one of the *de quibus queritur*, is whether the engineer has truly put his mind to it in that sense. Parties are not at one as to what was truly done at the time when that account was docquetted; and, besides, the party on the other side points out with some force that that so-called measurement of the work was not only a measurement of the work, but also includes at least one sum as an allowance for claims which is not measurement at all but something of the nature of damages. Parties having gone before the arbiter on that matter, it seems to me there is a dispute pending before the arbiter, and it is impossible to take the whole matter away from the arbiter by means of an interdict. I, of course, do not prejudge the question of what the arbiter may do. It is

possible that the arbiter will act *ultra vires* but we never *ab ante* suspect the arbiter of doing that unless something is brought before us to make us think so. I think, therefore, the arbitration must go on, and I hope the arbiter will keep in view that on a just construction of the contract—as I hold—the measurement was to be done by the engineer, and anything done by the engineer ought not to be lightly interfered with.

LORD M'LAREN—I concur. I am satisfied with the judgment of the Lord Ordinary.

LORD KINNEAR—I am of the same opinion. The reclaimers' case clearly came to this, that there was no question between the parties to go before the arbiter, but it seems to me that there is quite clearly a question both as to the scope and the effect of the particular article in the specification, and as to what the engineer really did do. And since there is a dispute it must be decided by somebody, either by the Court or by the arbiter; and it is my clear opinion, with your Lordship, that it is a dispute which falls within the arbitration clause.

LORD PEARSON—I was much impressed by the argument for the reclaimers, but upon full consideration I am of the same opinion as your Lordship.

The Court adhered.

Counsel for Complainers—Clyde, K.C.—Hon. W. Watson. Agents—Guild & Guild, W.S.

Counsel for Respondents—Orr, K.C.—Constable. Agents—Buchan & Buchan, S.S.C.

Wednesday, June 5.

FIRST DIVISION.

(EXCHEQUER CAUSE.)

INLAND REVENUE *v.* THE WESTERN STEAMSHIP COMPANY, LIMITED.

Revenue—Income Tax—Profits—Deduction—Company only Partially Insuring and Accepting itself Remainder of Risk—Sum Transferred from Fund Accumulated out of Profits to Meet a Loss Sustained—Income Tax Act 1842 (5 and 6 Vict. cap. 35), sec. 100, Schedule (D), Case 1, Rule 3.

A shipping company which had a ship only partially insured with underwriters, accepting itself the remainder of the risk, and setting aside to an insurance fund out of its annual profits after deduction of income tax the premium which would have been paid to underwriters for undertaking such risk, claimed, on the loss of the ship, to deduct, in calculating the profits of the year for the purposes of the Income Tax Acts, the amount which it had had to transfer from such insurance fund to meet the loss incurred.