Tuesday, October 27.

FIRST DIVISION.

[Lord Low, Ordinary.

SHOTTS IRON COMPANY *v.* DEMPSTERS.

Arbitration—Reference Clause in Agreement—Exclusion of Action.

An iron company agreed to lease some of their ground for the erection of chemical works. The agreement contained a stipulation that "any disputes arising in regard to the import and effect of any clause in this agreement, or as to the obligations and rights of either party under the same, or as to the mode of carrying the same into effect," should be submitted to the amicable decision of M, and that in the event of any question to be decided by the arbiter involving a disputed interpretation of the agreement, "or of any subsidiary arrangement made by the parties for carrying the same into effect," the arbiter might be required to consult counsel.

The iron company raised an action against their lessees for payment of a sum which they alleged to be due to them as the cost of removing and re-erecting certain of their workshops under a clause in the agreement which provided that where it became necessary for the pursuers to remove any of their workshops in order to furnish the ground required for the defenders' works, the defenders should bear the cost of removing and re-erecting the same.

The defenders disputed the accuracy of the pursuers' claim; and further, founding upon a clause in the agreement which provided that the pursuers should supply the defenders with pit water for their works, and that the defenders should provide the pipes for carrying such water to their works, they averred that when the agreement was entered into it was understood that the mode of carrying the same into effect was to be by giving a permanent supply from the H pit, but that the pursuers having ceased to work that pit had offered them a new supply from another pit some distance off, and that they were entitled to be reimbursed for the expense incurred by them in connecting their works with the new supply. They pleaded that the action was excluded by the clause of reference in the agreement.

Held (1) that as far as regarded the pursuers' claim, the subjects of dispute fell within the reference clause of the agreement; but (2) that as regarded the defenders' counter claim they did not, that claim being founded, not upon the agreement, but upon an understanding collateral thereto.

This was an action brought by the Shotts Iron Company against Robert and John Dempster, engineers and manufacturers of gas plant at Newton Heath, Manchester, for payment of the sum of £802, 10s. 2d.

The pursuers founded upon an agreement entered into between them and the pursuers on 27th June and 4th July 1890, relating to the erection of a chemical work by the defenders at Shotts, and to the supply thereto of the gases produced in blast furnaces belonging to the pursuers, and particularly upon clause 10 of said agreement, whereby it was agreed that the pursuers should let to the defenders the necessary ground for the erection of the said chemical work, and that if it should be necessary for the pursuers to remove any of their workshops or plant then in use in order to provide said ground, the cost of such removal, and of the erection of the workshops and plant elsewhere, should be paid by the defenders.

The pursuers averred that in accordance with the said agreement they had let to the defenders a plot of ground at Shotts Ironworks, on which the defenders had erected a chemical work, and that in order to provide the necessary ground for the defenders' works it had been necessary for them to remove some of their workshops and plant, and erect them elsewhere at a cost of £1130, 13s. 9d.; that the defenders had taken over certain premises at an agreed-on price of £320, and that the pursuers had supplied goods to and done work for the defenders conform to accounts amounting to £829, 8s. 9d.—in all, £2280, 2s. 6d.; that to account of this sum the defenders had paid two sums of £1000 and £500 respectively, and that the balance of £780, 2s. 6d. still remained unpaid, which with the sum of £22, 7s. 8d. of interest on the pursuers' outlays, so far as unpaid by the defenders, made a total of £802, 10s. 2d. due by them to the pursuers.

The defenders denied that they were due the sum claimed, and in separate statement of facts averred—"(Stat. 1) By said article 10 (of the agreement) it was understood by the parties that the defenders should only reimburse the pursuers for the mere outlays necessitated by their operations, and in providing the defenders with a suitable site under the said agreement. Instead, however, of merely removing their buildings, and re-erecting them on another site, the defenders have not used the old material of the buildings, but have used and charged for entirely new material. In this way they have much improved their plant and enhanced the value of their buildings, and they now seek to charge the defenders, in the account sued on, with the cost of the improved value of their works." In statements two and three the defenders specified certain particulars in which they alleged that the account was overcharged. In stat. 4 they averred—"By article 13 of said agreement it is provided that 'the first parties (the pursuers) shall supply to the second parties (the defenders) pit water for their works. The second party shall provide the pipes, drains, or other means for carrying the water from the pit to their

works.' . . . When the said agreement was entered into between the parties, it was understood that the mode of carrying the same into effect was to be by giving a permanent water supply from the 'Hall' pit owned by the pursuers. This is the only pit near the site allotted by the pursuers to the defenders under article 10 of said agreement, and it was the only pit which was pointed out to the defenders at the time of entering upon the said agreement as belonging to the pursuers. Relying on the 'Hall' pit being the permanent source of their supply, and in implement of their arrangement with the pursuers, the defenders at great cost laid the necessary pipes connecting with their workings, and built a reservoir for the storage of the water. The pursuers were all along well aware of the work being done by the defenders, and of their understanding relative to the source of water supply, and the pursuers fully approved of the defenders' actings. In the month of February 1891 the defenders received intimation that the pursuers intended to cease working said pit, and that therefore the water supply from that quarter would cease, although the defenders had got no use of the water connection with said pit. The pursuers further stated that arrangements were being made for having water supplied from No. 1 Calderhead Pit, some distance off, which the defenders learned for the first time belonged also to the pursuers. . . . The defenders, in order to prevent their operations from being discontinued, but under protest and subject to the reservation of their whole rights, laid the necessary pipes to connect their works with the said pit, and in doing so have expended a sum of about £150, for which they claim to be reimbursed by the pursuers and to set off against the sums now claimed by the pursuers."

The defenders further founded upon the following articles of the agreement—"Article 29. In the event of any differences or disputes arising in regard to the import and effect of any clause in this agreement, or as to the obligations and rights of either party under the same, or as to the mode of carrying the same into effect, the same, and all questions hereby referred to arbitration, or to an arbiter, and all valuations to be made under these presents, are hereby submitted and referred to the amicable decision, final sentence, and decree-arbitral of Andrew M'Cosh, of Messrs Baird & Company, ironmasters, Glasgow, whom failing George Neilson, of the Summerlie Iron Company, Glasgow, whom also failing John Addie of Langloan Coal Company, Glasgow." "In the event of any question to be decided by such arbiter, involving a disputed construction or interpretation of this agreement, or of any of its provisions, or of any subsidiary arrangement made by the parties for carrying this agreement into effect, or of any legal question being involved, it shall be competent to either party to require the said arbiter to consult the Right Honourable John Blair Balfour, advocate, whom failing Sir Charles Pearson, advocate, and the parties shall be entitled to be heard before the said John Blair Balfour, whom failing the said Sir Charles Pearson."

The pursuers pleaded, *inter alia*—"(5) The defenders' statements are irrelevant."

The defenders pleaded, *inter alia*—"(2) The action is excluded by the clause of reference quoted in statement 5; (3) Compensation, in respect of the sums due to the defenders by the pursuers as condescended on in the defenders' statement."

On 8th August 1891 the Lord Ordinary (Low) pronounced this interlocutor:—"Finds that, with the exception of the claim for the payment of (1) the sum of £829, 8s. 9d., and (2) the sum of £320, which it is admitted by counsel for the defenders are not disputed, the claims of the pursuers stated in the record, and the defences against these claims stated in the first, second, and third articles of the defenders' statement of facts raise questions which fall within the arbitration clause in the contract libelled: To this extent sustains the second plea-in-law for the defenders, and remits to Mr Andrew M'Cosh, of Messrs Baird & Company, ironmasters, Glasgow, the arbiter first named in the said contract or agreement, to determine the said questions, and continues the cause in so far as the said questions are concerned, till his decree-arbitral shall be in process: Finds that the counter claim of the defenders set forth in article fourth of the statement of facts does not fall within the said arbitration clause, and that the averments of the defenders contained in the said article are not relevant to be remitted to probation: Therefore to that extent and effect sustains the fifth plea-in-law for the pursuers, and repels the third plea-in-law for the defenders, and decerns: Reserving all questions of expenses."

"*Opinion.*—In this case the pursuers sue the defenders for the sum of £802, 10s. 2d., being the balance which they allege to be unpaid of certain sums, amounting in all to £2280, 2s. 6d., in which the defenders are indebted to them.

"The sum of £2280, 2s. 6d. is composed first of two sums of £320 and £829, 8s. 7d., being the amounts due to the pursuers for work done and goods supplied by them to defenders; and secondly, of a sum of £1130, 13s. 9d., being the alleged cost of removal and re-erection of workshops and plant incurred by the pursuers and payable by the defenders under the agreement of 4th June and 27th July 1890, narrated in the record.

"The defenders do not dispute liability for the first two sums, and the question between the parties relates entirely to the sum of £1130, 13s. 9d.

"By the agreement to which I have referred, the pursuers undertook to let to the defenders ground for the erection of chemical works. The ground was to be situated at the pursuers' works at Shotts, and adjoining their blast furnaces there, and by article 10th of the agreement it was agreed that if it was necessary to remove

any of the pursuers' workshops or plant, in order to provide the ground, the cost of such removal, and of the re-erection of the workshops and plant elsewhere should be paid by the defenders to the pursuers. The £1130, 13s. 9d. is alleged to be the cost of removal and re-erection under this clause.

"The defenders do not dispute their liability to pay for removal and re-erection of plant and workshops under the 10th article of the agreement, but upon the grounds set forth in articles 1, 2, and 3 of their statement of facts they maintain that the sum charged by the pursuers is excessive, in respect that it includes the cost of work not falling under the agreement at all, and that some of the items are overcharged.

"The defenders also, in article 4 of their statement of facts, state a counter claim against the pursuers for a sum which they allege to be due to them in consequence of the pursuers' actings in regard to a water supply for their works. I shall consider this claim afterwards; but in the first place I shall deal with the case as it stands upon the pursuers' claim, and the defence stated in the first three articles of the defenders' statement.

"The point which was argued before me was, whether the questions raised in regard to the £1130, with which I am now dealing, do or do not fall under the arbitration clause of the contract.

"I am of opinion that they do fall under that clause. The arbitration clause is not, in my opinion, limited to disputes in regard to questions arising during the execution of the works. All disputes or differences arising 'in regard to the import and effect of any clause in this agreement, or as to the obligations and rights of either party under the same,' are referred to the arbiters named. The present dispute is in regard to the import and effect of the 10th article of the agreement, and to the rights and obligations of the parties under that clause. I am therefore of opinion that the case, so far as regards the pursuers' claim and the defences with which I am now dealing, must be remitted to the arbiters.

"The defenders' counter claim, which is contained in the 4th article of their statement of facts, appears to be of the nature of a claim of danages, and the defenders contended alternatively that the matter should be referred to the arbiters or a proof allowed.

"In my opinion the arbitration clause does not cover a claim for damages, and I think that in the end this was not seriously disputed. In regard to the motion for a proof, I do not think that the defenders have stated a relevant case. I do not know, and it was not made clear to me, what is the ground in law upon which the claim is based. By the 13th article of the agreement it is provided that the pursuers shall supply pit water to the defenders, and that the defenders shall supply the pipes and means of storage. The defenders do not say that the pursuers have not supplied them with pit water, but they aver that when the agreement was entered into it was 'understood' that a permanent water supply was to be given from the 'Hall' pit, and that that was the only pit which was pointed out to them as belonging to the pursuers. The complaint is that the pursuers have stopped working the 'Hall' pit, and that the defenders have been put to great cost in laying pipes to another pit. *Prima facie*, the pursuers have fulfilled the obligation undertaken by them in the contract, because there is no averment that the water supply is insufficient. Further, there is no particular pit specified in the agreement, and no obligation laid upon the pursuers to continue to work any pit in order that a water supply may be given from that pit. In these circumstances the defenders would, in my judgment, require to state specifically the grounds upon which their claim is made. Is it founded upon an implied term in the contract, or upon fraud or deceit; or is the claim laid upon representation inducing the contract, which would entitle the defenders to have the clause in regard to the water supply reduced? The defenders' statements throw no light upon these points, and therefore I am of opinion that I must hold them to be irrelevant."

The pursuers lodged a reclaiming-note, in which subsequently they did not insist, but the defenders took advantage of the reclaiming-note in order to bring the judgment of the Lord Ordinary, so far as adverse to them, under review.

Argued for the defenders—The defenders' counter-claim was not one of damages. It was for the expense of connecting the defenders' works with the new water supply. The defenders' contention was that this expense was laid by the agreement in the first instance on the defenders, but that in the event of the source of supply being changed, it was implied in the contract that the expense should be on the pursuers. The defenders did not found on breach of contract, but on an obligation in the contract. The question involved in their claim, therefore, arose on a construction of a clause of the agreement or on the mode of carrying the same into effect, or on a subsidiary arrangement made by the parties for carrying the same into effect, and fell under the arbitration clause—*Mackay* v. *Parochial Board of Barry*, June 22, 1883, 10 R. 1046; *Levy & Company* v. *Thomsons*, July 10, 1883, 10 R. 1134.

Argued for the pursuers—The counter claim of the defenders on their own averment was based, not on the agreement, but on an understanding collateral to the agreement. It further was a claim of damages for breach of that understanding. The defenders' argument came to this, that a party to an agreement with a clause of reference of this kind could bring any dispute between him and the other party within the clause of reference, by the mere allegation that it arose under the agreement. It had often been held that an arbiter could not assess damages unless such a power were expressly given him—*M'Alpine* v. *Lanarkshire and Ayrshire*

Railway Company, November 26, 1889, 17 R. 113, *per* Lord President, 121; *Tough* v. *Dumbarton Waterworks Commissioners*, December 20, 1872, 11 Macph. 236; *Pearson* v. *Oswald*, February 4, 1889, 21 D. 419, and there was no authority for the contrary view. *Levy & Company* v. *Thomsons* was a special case. The arbiter in that case was not called upon to assess damages, but merely to say whether the defenders were to blame for not delivering the vessels which they had contracted to build at the time specified in the contract. In the event of the arbiter finding that the delay was due to the fault of the defenders, the amount of the damage was fixed by the contract.

At advising—

LORD PRESIDENT — This case requires some attention, but I have come to the conclusion that the judgment of the Lord Ordinary is right.

The first question we have to consider is, whether the claim made by the defenders, as laid, is within the class of questions which under the agreement between the parties are submitted to arbitration? For that purpose, on the question of jurisdiction, it becomes necessary to examine the statements in regard to the claim made by the defenders on record in order to ascertain on what it truly purports to rest. Analysing these statements in the light of the explanations which have been given, I have come to the conclusion that they do not set out a claim relating to the "obligations and rights" of either party under the agreement, or "to the mode of carrying the same into effect." On the contrary, the claim purports to rest on the understanding and actings of parties outside of and collateral to the agreement in question. Accordingly the conclusion at which I arrive is, that the defenders' claim, in its subject-matter and in regard to the rights upon which it is said to rest, does not raise a difference or dispute arising as to any obligation or right of either party under the agreement or as to the mode of carrying the same into effect, and therefore I am prepared to agree with the conclusion of the Lord Ordinary, that it is not a claim of the class specified in the reference clause of the contract, and accordingly not a claim to be submitted to arbitration along with the claims made by the pursuers.

If it is not a claim to go to arbitration, it is a claim standing on record for the decision of the Court, and it is necessary for us to consider its quality. On this point I agree with the Lord Ordinary again. I think no legal claim has been stated on record for payment of this sum of £150. The view urged by the defenders excludes the claim as one of damages, and I am of opinion that there is no extraneous arrangement well averred, and that the claim does not arise under the contract.

LORD ADAM—I am of the same opinion. I am at the same time far from thinking that where an agreement contains a clause of reference such as we have here, questions which one party maintains depend upon the construction of the agreement may not be referred to the decision of the arbiter named in the agreement, and that because the Court thinks that on one view of it a claim does not fall within the contract, they are therefore entitled to exclude the arbiter's jurisdiction, but it must be relevantly averred that the claim does fall within the contract. That is what we desiderate here. Here the averment is contained in statement 4 of the defenders' statement of facts, and is to the effect that the claim arises out of a collateral arrangement altogether. The statement begins by setting forth a clause of the agreement, and then goes on to say that "when the said agreement was entered into between the parties, it was understood that the mode of carrying the same into effect was to be," &c. That is not an averment of an obligation or right arising under the agreement. There is no question properly averred here as arising under the agreement to be sent to the arbiter, and I therefore think that the Lord Ordinary is right.

I also think that the defenders' counter claim is not relevantly averred so as to be admitted to probation. There seems to me to be no relevant averment under the contract of an obligation laid upon the pursuers to furnish a supply of water from any particular pit.

LORD M'LAREN—The parties acquiesce in the Lord Ordinary's finding that the pursuers' claims fall under the arbitration clause of the agreement, and the only question raised on the reclaiming-note is, whether the principle of that decision applies to the counter claim made by the defenders. I agree with the opinion expressed by your Lordship, and at the same time wish to make it clear that in coming to this opinion we are not departing in any way from the principle of putting a liberal construction upon the reference clauses of contracts, but are deciding a question of pleading arising on the record now before us.

From the facts stated it appears that the defenders took a lease of ground from the pursuers for the erection of chemical works. Under clause 13 of the agreement between the parties the pursuers were bound to supply the defenders with pit water for their works. The clause does not profess to give the defenders a right to water from any particular pit, and that is not surprising, because it is in the nature of the business of mining that pits cease to be worked, and indeed that is exactly what has happened in this case. The supply was given from the Hall pit originally, but in consequence of the workings having been stopped in that pit a change became necessary, and a supply from another pit was given the defenders. If the defenders had come to Court admitting that the contract had been executed, but stating that a dispute had arisen as to which party was to pay for something done under the contract, I should have been disposed to think that

the difference between the parties fell under the reference clause of the contract, because it would have referred to the mode of carrying out the contract. But the hypothesis of the defenders' case is quite different. It virtually consists of an allegation of breach of contract, because it rests upon equitable considerations or the carrying out of an understanding not contained in the written agreement.

I agree accordingly that the defenders' counter claim is not within the reference clause of the contract, and that if relevantly stated it would have to be dealt with otherwise than by arbitration. The Lord Ordinary's view is that the claim is not relevantly stated, and the defenders have not asked leave to amend. Standing the record as it does, it appears to me that the judgment of the Lord Ordinary is right and should be affirmed.

LORD KINNEAR was absent.

The Court adhered.

Counsel for the Pursuers—Asher, Q.C.—C. S. Dickson. Agents—Drummond & Reid, W.S.

Counsel for the Defenders—Ure—Deas. Agents—Simpson & Marwick, S.S.C.

HIGH COURT OF JUSTICIARY.

Monday, November 2.

(Before the Lord Justice-Clerk, Lord Adam, and Lord Kincairney.)

M'DONALD *v.* DUFF.

Justiciary Cases — Education (Scotland) Act 1872 (35 *and* 36 *Vict. cap.* 62), *sec.* 70—*Education (Scotland) Act* 1883 (46 *and* 47 *Vict. cap.* 56), *sec.* 9—*Attendance Order.*

In a complaint charging a parent with contravening the Education (Scotland) Acts 1872 to 1883, in respect he had failed "to discharge the duty of providing efficient elementary education" for his child, and praying, in the event of conviction, for penalties under section 70 of the Education (Scotland) Act 1872, the Sheriff found that the accused had "failed to secure the regular attendance of his child at a public or inspected school," and pronounced an attendance order under the Education (Scotland) Act 1883, sec. 9.

Held (1) that the complaint was competent, (2) that it was incompetent for the Sheriff under such a complaint to pronounce an attendance order under the Act of 1883, and order *quashed.*

This was an appeal on case stated at the instance of John M'Donald, accountant, Tain, against George Duff, farm servant, Plaids, Tain, against a judgment of the Sheriff-Substitute of Ross and Cromarty and Sutherland, finding that the said George Duff had failed to secure the regular attendance of Margaret Duff, his child, at some public or inspected school after due warning, and therefore ordaining the said child to attend the Tain Public School every time the said school was open, and during the whole time the same was open for the instruction of children of similar age, including the day fixed by Her Majesty's Inspector for his annual visit.

The case set forth that "the appellant—the person appointed by the School Board of the parish of Tain to prosecute in terms of the Education (Scotland) Acts, 1872 to 1883 — prosecuted the respondent before the Sheriff of Ross and Cromarty and Sutherland on a complaint charging the respondent with contravening the Education (Scotland) Acts, 1872 to 1883, in so far as respondent had, for a period of at least one month immediately preceding the 8th day of July 1891, without reasonable excuse, failed to discharge the duty of providing, as required by said Acts, sufficient elementary education in reading, writing, and arithmetic for his child Margaret Duff, aged thirteen years. The punishment craved in event of conviction was that the respondent should be adjudged to suffer the penalties provided by the Education (Scotland) Act 1872, and be found liable in expenses. The respondent pleaded guilty, and the Sheriff-Substitute having considered the whole circumstances, refused to fine or imprison the respondent in terms of the 70th section of the Education (Scotland) Act 1872, but pronounced an 'attendance order,' the penalty provided by the 9th section of the Education (Scotland) Act 1883."

The questions of law for the opinion of the High Court of Justiciary were—"(1) Is it competent for a school board, in a complaint under the Education (Scotland) Acts, 1872 to 1883, to conclude only for the penalties under the Education (Scotland) Act 1872? (2) If it is, is it in the power of the Sheriff, under such a complaint, to pronounce an attendance order in terms of the Education (Scotland) Act 1883?"

The Education (Scotland) Act 1872 (35 and 36 Vict. cap. 62), provides by section 70 that the school board may summon defaulting parents before them, and if not satisfied with their explanations or undertaking, "it shall be lawful to and shall be duty of the school board to certify in writing that he has been and is grossly and without reasonable excuse failing to discharge the duty of providing elementary education for his child or children, and on such certificate being transmitted to the procurator-fiscal of the county in which the parent resides, or other person appointed by the school board, he shall prosecute such parent before the sheriff of the county for such failure of duty as is in the certificate specified, and on conviction the parent shall be liable to a penalty not exceeding twenty shillings, or to imprisonment not exceeding fourteen days."

The Education (Scotland) Act 1883 (46 and 47 Vict. c. 56), provides, sec. 9—"If the parent of any child without reasonable excuse neglects to provide efficient elemen-