The Court pronounced the following interlocutor:—

"The Lords having considered the reclaiming-note against the interlocutor of Lord Pearson dated 26th November 1902, and heard counsel for the parties—In respect it was stated by the reclaimer that the reclaiming-note was presented for the purpose of submitting to review the interlocutor of 21st August 1902, Find that the latter interlocutor could only be reclaimed against in accordance with the provisions of section 6 of the Distribution of Business (Scotland) Act 1857, and not having been so reclaimed against is final; and it having been stated by the reclaimer that they have no objection to the said interlocutor of 26th November 1902, Adhere to the said interlocutor, and decern: Find the respondents John Barr's trustees entitled to the expenses of the reclaiming-note, and remit the account thereof to the Auditor to tax and to report, and find no expenses due to or by the Accountant of Court."

Counsel for the Petitioner and Reclaimer—Craigie — Graham Stewart. Agents—Clark & Macdonald, S.S.C.

Counsel for the Respondents Barr's Trustees—Mackenzie, K.C.—Galbraith Miller. Agents—Macrae, Flett, & Rennie, W.S.

Counsel for the Accountant of Court—Blackburn. Agent—Thomas Carmichael, S.S.C.

Tuesday, May 26.

SECOND DIVISION.

[Lord Pearson, Ordinary.

HALLIDAY *v.* DUKE OF HAMILTON'S TRUSTEES.

Arbitration — Arbiter — Disqualification — Arbiter Engineer to One of the Parties — Opinion Expressed by Arbiter as Engineer in Reply to his Employers.

A contract for the erection of a pier contained an arbitration clause whereby the contractor and his employers agreed to refer any question arising out of the contract to the employers' engineer as arbiter. A question arose under the contract, with regard to which the employers' engineer expressed a definite opinion in reply to his employers, who had consulted him in the course of negotiations with the contractor for the settlement of his claim. Thereafter the contractor raised an action against his employers for the determination of the question at issue. The defenders pleaded that the question fell to be determined by the arbiter appointed under the contract. The pursuer maintained that the arbiter appointed under the contract had so acted and expressed himself with regard to the question that he was disqualified from acting in the capacity of arbiter. *Held* (*aff.* judgment of Lord Pearson) that the arbiter was not disqualified.

This was an action at the instance of George Halliday, contractor, Rothesay, against the trustees of the Duke of Hamilton for payment of, *inter alia*, £960 alleged to be due to him for certain extra work done by him in connection with the construction of a pier.

The defenders founded upon an arbitration clause in the contract for the construction of the pier.

The pursuer in reply maintained that the arbiters named were disqualified.

By contract dated 24th and 25th January 1898, entered into between the pursuer and the defenders' factor and commissioner, the pursuer contracted to build a pier at Whiting Bay, in the island of Arran, for the defenders, conform to plans prepared by Messrs Stevenson, civil engineers, Edinburgh.

The contract contained an arbitration clause in the following terms:—"In the event of any question, dispute, or difference arising, either during the progress of said works or after the completion thereof, between the parties hereto, regarding the work, or as to the true intent and meaning of these presents, or the construction of the said plans, specifications, and schedule, or as to the price to be paid for any work not contained in the said schedule, or as to any other matter in connection with this contract, the same shall be and are hereby referred to the decision of David Alan Stevenson, civil engineer, Edinburgh, whom failing to Charles Alexander Stevenson, also civil engineer there, as sole arbiter, whose awards, interim or final, shall be final and binding upon the parties hereto." The arbiters named were the partners of the firm of D. & C. Stevenson, the defenders' engineers. It was declared by the contract that Messrs Stevenson should have power to increase or diminish the quantities, and to make any alterations in the works they might from time to time deem necessary, such alteration or deviation from the quantities to be valued at the schedule rates, or in the event of these not being applicable, rates fixed by the engineers, and to be added to or deducted from the contract price, which was £5430.

During the progress of the work of building the pier difficulties were unexpectedly encountered owing to the presence of rock on the site of the pier at a point where, according to the plans and specifications appended to the contract, the sea bottom was represented as consisting of material suitable for having certain piles driven into it. It being impossible to drive the piles where the rock occurred, the pursuer obtained instructions as to the mode in which they were to be fixed from Messrs Stevenson, the defenders' engineers, who granted a certificate therefor as for extra work.

On the completion of the pier, the pursuer, in terms of the contract, rendered to Messrs Stevenson an account, in which,

inter alia, £960, 10s. was charged for extra work in connection with the fixing of the piles referred to and the loss thereby caused.

A correspondence followed between the pursuer and Messrs Stevenson, in the course of which Messrs Stevenson wrote on 14th September 1899 in the following terms:— . . . "We enclose an account made out in terms of the contract and the measurements supplied to us by the inspector. . . . We shall, of course, be quite prepared to hear you on any point connected with this account." . . . In the account framed by Messrs Stevenson they proposed to allow only the sum of £21, 15s. 3d. for the extra work in fixing the piles, for which the pursuer charged £960, 10s.

On 21st September they again wrote— . . . "As we mentioned in our letter of the 14th inst., we are quite prepared to hear what you have to say on the different items of the account, and if you will kindly point out where your measurements and those of the inspector differ we shall be glad to consider the matter."

The correspondence continued until 15th December 1899, at which date Messrs Stevenson wrote to the pursuer that his account was then before his employers, the present defenders' agents.

On 20th December 1899 the pursuer wrote to the defenders' agents with his account and explanations and notes.

On 29th December 1899 the defenders' agents wrote to the pursuer stating that they could not admit his claim as made by him, and enclosing a suggested joint-letter by the pursuer and the trustees' commissioner referring the matter in dispute to Mr Stevenson.

This joint-letter was not signed by the pursuer, and nothing further of importance was done till 20th December 1900, when the defenders' agents had a meeting with the pursuer and his agents, at which Mr Halliday explained the grounds of his claim. On the same date the defenders' agents wrote to Messrs Stevenson informing them of the meeting which had taken place. In this letter they stated that the meeting had been with a view to arriving at an amicable settlement of accounts. They also stated that the pursuer (1) contended that the claim for extras was not referable to Mr Stevenson; (2) alleged that he had been told there was no rock to be contended with; and (3) maintained that delay and extra expense had been caused by the discovery of rock. They concluded by requesting to know what Messrs Stevenson had to say upon these points.

In reply they received a letter from Messrs Stevenson, dated 22nd December, in which they said that the reference clause seemed to them to be so wide as to cover any possible question that might arise under the contract. They also gave a statement of what according to them had occurred with regard to the rock and the fastening of the piles, and, referring to the extra work for which the pursuer had charged £960, 10s., they stated, "The whole cost for time and material, according to the inspector's notes taken at the time, amounts to £21, 15s. 3d. With regard to the length of time that the pintling took to do, it did not exceed three weeks, and this is just the time that it would have taken had the piles been driven, so that there was no delay owing to this alteration, as proved by the rate at which the work proceeded after the rock was passed and driving resumed. With regard to Mr Halliday's statement that our assistant Mr Dick verbally informed him that there was no rock to contend with, that statement is possibly correct, though we do not know, as such was our own impression from the borings made, but under the specification the contractor was bound to satisfy himself 'on all matters relating to the work,' as will be seen in the first paragraph of the general stipulations of the specification, and he cannot, we think, escape on this ground."

The pursuer's agents, having received a copy of Messrs Stevenson's letter of 22nd December to the defenders' agents, communicated it to the pursuer, and on 31st January 1901, wrote to the defenders' agents enclosing a narrative by the pursuer of the operations in respect of which the disputed account was rendered. On 5th February the defenders' agents sent the pursuer's "narrative" to Messrs Stevenson for their consideration.

On 22nd February 1901 the defenders' agents wrote to the pursuer's agents in the following terms,—"With further reference to your letter of 31st ulto., we have now obtained our engineer's opinion on the 'narrative' of Mr Halliday which accompanied it, as contained in a letter from them of yesterday's date, a copy of which we enclose along with copy of the engineer's notes therein referred to. We are prepared to settle with Mr Halliday on the terms proposed by the engineers."

In the letter of which a copy was enclosed, Messrs Stevenson, replying to the defenders' agents' letter enclosing the pursuer's "narrative," disputed various statements and contentions therein, and concluded as follows:—"Messrs Gill & Pringle say that Mr Halliday has a just claim for extra expenditure caused by the discovery of rock on the site of the pier. That might be so if it were the case that there was extra expenditure, but Mr Halliday's account contains items not for work but for mythical expenses, which should not be paid for. . . . We enclose two plans, which show over what a short portion of the pier it was necessary to batt the piles, and which portion was executed as speedily as any of the rest of the pier, and for which we hold the contractor should be paid only £21, 15s. 3d., or possibly with a further sum of £22, 1s., and a small sum for lighting, in place of his utterly exorbitant figure of £960." They also enclosed certain "notes" on the pursuer's account, which were chiefly to the effect that as there was no loss of time due to rock, the pursuer's claim, which was chiefly based on such loss of time, fell, as to the greater part thereof, to be disallowed.

On 5th July 1901 the pursuer raised the present action, in which he set forth the facts above narrated.

The pursuer, founding on the expressions of opinion in Messrs Stevenson's letters, pleaded as follows:—"(4) The defenders are not entitled to plead the reference clause in respect (*a*) the claims made do not fall under said clause; (*b*) the arbiter to whom the determination of questions under said clause was referred has disqualified himself from acting in the capacity of arbiter."

The defenders pleaded—"4. The work claimed for by the pursuer not being work to which schedule rates are applicable—(1) the pursuer is not in any event entitled to be paid therefor except at such rates as may be fixed by the engineers named in the contract; (2) the action should be sisted until the rates to be so paid to the pursuer shall have been fixed by the said engineers. 5. In respect the question between the parties as to the pursuer's right to payment, and as to the amount due to the pursuer, if any, for the work condescended on, falls in terms of the contract to be determined by the arbiter appointed therein, the present action should be sisted until the arbiter's determination thereof has been obtained."

On 8th January 1903 the Lord Ordinary (PEARSON) pronounced the following interlocutor:—"Finds that the arbiter has not disqualified himself from acting, and to this extent and effect repels the fourth plea-in-law for pursuer: Sists this process *in hoc statu:* Grants leave to reclaim."

"*Opinion.*—. . . The pursuer's case is that the ground was represented on the plans as being suitable for pile-driving; that on inquiry at the engineers' office before making the tender he was assured that there was no rock to interfere with the driving of piles, although the engineers (it is alleged) had not taken means to satisfy themselves as to this, and that in fact it was found, shortly after the work was begun, that there was rock into which piles could not be driven, and that this caused serious delay and expense." [*His Lordship then referred to the arbitration clause contained in the contract, quoted supra.*]

"The defenders plead this reference clause as entitling them to have the action sisted until the arbiter's determination of the questions in dispute has been obtained. The pursuer replies that the defenders are not entitled to plead the reference clause against the claims now made, and that on two grounds—(1) that these claims do not fall within the clause, and (2) that the arbiter has disqualified himself from acting. . . .

"The argument was mainly directed to the second ground of objection stated by the pursuer—namely, that the arbiter is disqualified,—and the question I have to decide is whether upon the pursuer's averments and the letters produced and founded on the pursuer has made a relevant statement of disqualification." . . .

On 20th and 22nd December 1900 and 21st February 1901, letters passed between the defenders and their engineers on which the pursuer founds as showing that the engineers' firm (the two partners of which are the arbiters in succession) have advised the defenders in their opposition to the pursuer's claims, 'and have so acted and expressed themselves in relation thereto that they could not give the pursuer's contention impartial consideration.' Now, I note, in the first place, that the pursuer does not aver that, even at this comparatively late date, the arbiter had been asked by either party to take up the reference under the contract as regards any specific question or dispute. In the next place, it is clear from the letters founded on that matters were still in the stage of negotiation. The letter of 20th December from the defenders' agents expressly bears that the occasion for writing it was that they had had a meeting by arrangement with the pursuer and his agents 'with a view to arriving at an amicable settlement of accounts.' It would be unfortunate if parties in the position of the defenders, who as a body of trustees could not be expected to be fully acquainted with the facts, were precluded from communicating with their engineers on such topics even after the completion of the works. The letter discloses a legitimate occasion for communicating with their engineers as such, and the main object of it was to ascertain certain facts (1) as to assurances said to have been given by the engineers' assistant to the pursuer; and (2) as to delay and expense alleged to have been caused by finding rock where it was not expected. The letter amounts to a statement that upon these allegations of fact the pursuer maintained that the greater part of his extra claims was for work executed outside the contract, and therefore not referable to the arbiter; and the agents, with a view to proceeding with the negotiations for settlement, ask the engineers what they have to say 'upon the various points which Mr Halliday stated, and which we here repeat.' The reply of Messrs Stevenson, which is the important matter, deals (1) with the scope of the arbitration clause, and (2) with the facts as regards the rock. They state that the reference clause seemed to them so wide as to cover any possible question that might arise under the contract. I think they might well have refrained from expressing any opinion on that matter; but the important consideration is, that it is a matter on which the arbiter is not final, and which indeed is ultimately not a matter for him but for a court of law. The expression of an opinion upon that is quite different from forming and expressing an opinion upon the merits of questions which have arisen touching money claims. They then proceed to deal with the facts as regards the rock; and while these are stated somewhat argumentatively, the statement does not appear to me to go beyond the requirements of the occasion on which they were consulted. The last three or four lines of it indeed contain argument and an expression

of opinion. But while this might well have been omitted, I cannot hold that taking the letter as a whole it shows that the engineers were actuated by any bias beyond what must have been in the contemplation of both contracting parties from the beginning, or that they would not approach the subject with an open mind if they were called on to deal with it judicially.

"The only other letter specially founded on is the engineers' letter of 21st February 1901. The defenders' agents had sent to the engineers a 'narrative' by Mr Halliday, who appears from the letter to have narrated, from his point of view, the facts bearing on the work, which he maintained was outside the contract. The engineers, in their reply, take up his statements one by one, and give their view of the facts, many of which were within their own knowledge, and few, if any, of which could be supposed to be within the knowledge of the trustees; and the same remarks apply to the 'notes' which accompanied their letter. They do indeed state conclusions from their view of the facts, and state them strongly. But they are conclusions which seem to follow of necessity from their view of the facts; such as, that there being in fact, and upon the daily progress record, no loss of time due to the finding of rock, nothing could possibly be due on that head as for loss of time. Even this would have been better omitted. But it appears to me that all this consultation with the engineers, involving as it did expressions of fact and of expert opinion, was no more than must have been contemplated by both contracting parties as open to the engineers' employers for their guidance in the negotiation. This was certainly the view entertained by the defenders, and they seem to have communicated to the pursuer copies of the engineers' letters, in due course, without any idea on either side that, if the negotiations failed, the arbiters would be found to have disqualified themselves.

"On these grounds, though the case is in some respects a narrow one, I hold that the communications founded on were made upon legitimate occasion; that they were made by Messrs Stevenson not as arbiters but as the defenders' engineers and known advisers, for their guidance in the negotiations for a settlement; and that the letters do not bear the construction sought to be put upon them by the pursuer. My judgment is really upon the relevancy of the pursuer's averments as to disqualification, which are founded mainly upon the letters; for if I had taken a different view of the letters, it might still have been necessary for the pursuer to lead some evidence, unless parties had agreed upon a minute of admissions. But in view of the opinion I have expressed, I think the proper interlocutor will be to repel the second part of the pursuer's fourth plea, and to sist the action. Questions under the first part of that plea may arise for decision; and if they do the sist may be recalled in order that they may be disposed of. But as I have already indicated, it would be premature to deal with them at this stage.

"The cases to which I was referred on the subject of the disqualification of arbiters were—*Scott*, 6 R. 616; *Mackay*, 10 R. 1046; *M'Lauchlan*, 8 S.L.T. No. 226, p. 279; *Jackson*, 1893, 1 Ch. 238; *Eckersley*, 1894, 2 Q.B. 667; *Ives*, 1894, 2 Ch. 478; and *Nuttall*, 8 T.L.R. 513."

The pursuer reclaimed—In the Inner House the pursuer admitted that his claim fell within the arbitration clause, but on the question of disqualification of the arbiters named in the contract argued—The arbiters had written letters expressing an opinion which committed them and disqualified them. When their work as engineers was done they ought not to have expressed any opinion as to a matter which they might be asked to consider as arbiters; this rule was exemplified in the cases of *M'Lauchlan & Brown* v. *Morrison*, December 1, 1902, 8 S.L.T. No. 226, and *Nuttall* v. *Mayor, &c., of Manchester* (1892), 8 T.L.R. 513. The action should be allowed to proceed.

Counsel for the respondents were not called upon.

LORD JUSTICE-CLERK—I do not think there are sufficient grounds for altering the interlocutor pronounced by the Lord Ordinary. The decision of the question must depend on the particular circumstances of the particular case.

If under a clause of reference, entered into by a contractor and his employers, it is agreed that the employers' engineer shall be the arbiter in any question as to work done by or money due to the contractor, in such a case there cannot be such absolute abstention from communication betweeen the employers and the party named as arbiter as in the case of a reference to an independent arbiter. In this case, when the contractor comes forward with a claim for a certain sum of money due to him, it is the most natural thing possible for the employers to inquire of their engineers what view they take of the work done by the contractor and the account rendered by him; because if the engineers were satisfied that the claim was proper there would be no need for arbitration; and an engineer who expresses a general opinion, not ultroneously but in answer to his employers, cannot I think be excluded on that account from acting as arbiter. If the employers proceed to arbitration, then the engineer, as arbiter, must receive all competent evidence which the contractor thinks proper to bring before him and give an honest opinion upon it. The fact that he has expressed an opinion as an engineer before receiving the evidence does not prevent him from afterwards applying his mind judicially to the questions at issue in the light of the evidence adduced. On the whole matter I think the conclusion arrived at by the Lord Ordinary is right.

LORD YOUNG—I am of the same opinion and I have never had any doubt in this case. If we were to decide otherwise there would be an end to references to architects

in building contracts or to engineers in engineering contracts in which they had acted as architects or engineers to either of the parties to the contract. In cases such as the present, where the person named as arbiter in the contract is at the same time adviser to one of the parties to the contract, questions have sometimes arisen as to whether such a person is the one best fitted to act as arbiter. But on the whole it has been found most convenient that he should so act. Take the common case of a man having a house built under the orders and directions of the architect who has prepared the plans. When accounts are presented to the employer by those engaged in the building, he shows them to the architect in order to get his opinion as to whether they are correctly charged, and the fact that the architect prepared the plans does not prevent his giving fair and unbiassed advice as to the cost of carrying them out. The present case is exactly similar. The plans and specifications for the works in question were prepared by Messrs Stevenson, the engineers employed by the defenders for the work, and one of the partners of that firm was nominated to be the arbiter between the pursuer and the defenders in any disputes arising between the parties in connection with the contract between them. When the pursuer presented his account for work done the defenders took the advice of the engineers who had seen the work executed. In this they acted rightly, and the engineers who had been asked for their opinion were perfectly justified in giving it. Nor does the fact that they did so at all disqualify them from subsequently acting as arbiters between the parties, especially as, so far from consulting Messrs Stevenson privately and behind the back of the pursuer, the defenders at once communicated the engineers' opinion to the pursuer and gave him an opportunity of stating and explaining his own position. I quite recognise that objections may in certain cases be taken to the same person acting in the dual capacity of arbiter and private adviser, but I do not think that any such objections arise in the present case.

LORD TRAYNER—I am of the same opinion. I should certainly be disposed to exclude from the office of arbiter anyone who had put himself in the position of having already decided the question in dispute before the reference had been finally made, but in this case I think there is no reasonable ground whatever for excluding the Messrs Stevenson. I do not think that anything in their letters indicates a want of open mind on their part. They did not enter into the matter ultroneously; they were applied to by their employers for certain information regarding the pursuer's claim, which they gave. In so far as the letters before us are concerned I can find nothing to suggest that they are not prepared to deal with any question brought before them with a perfectly open mind—nothing to indicate that if they came to think that any opinion which they had expressed was wrong they would not decide accordingly.

LORD MONCREIFF concurred.

The Court adhered.

Counsel for the Pursuer and Reclaimer Campbell, K.C.—Hunter. Agents—Gill & Pringle, S.S.C.

Counsel for the Defenders and Respondents—Ure, K.C.—Cullen. Agents—Tods, Murray, & Jamieson, W.S.

Tuesday, June 2.

FIRST DIVISION.

MAGISTRATES OF EDINBURGH *v.* INLAND REVENUE.

Revenue — Inhabited-House Duty — Inhabited House—Fire Station—48 *Geo. III.* c. 55, *Sched. B, Rule III.*

A fire station consisted of a firemaster's house, houses for firemen, a gymnasium and duty room, a stable, and places for keeping the fire-engine and accessories. There was inter-communication between the whole buildings. *Held* that the fire station was assessable as an inhabited house under the provisions of Rule III. in Schedule B of 48 Geo. III. c. 55.

Revenue—Inhabited-House Duty—Exemptions — Building Occupied for Trade or Profit—Fire Station— Customs and Inland Revenue Act 1878 (41 *Vict. c.* 15), *sec.* 13.

The Customs and Inland Revenue Act 1878, sec. 13, exempts from inhabited house duty all houses and tenements occupied "solely for the purpose of any trade or business, or of any profession or calling by which the occupier seeks a livelihood or profit." *Held* that this exemption did not apply to a fire station in the occupation of a town council, in respect that the town council did not there carry on a trade or business by which they sought their livelihood or profit.

Revenue—Inhabited-House Duty—Exemptions—Houses with Rental of Less than £20—Houses in Fire Station Occupied by Firemen—Customs and Inland Revenue Act 1890 (53 *Vict. c.* 8), *sec.* 26 (2)—*Customs and Inland Revenue Act* 1891 (54 *and* 55 *Vict. c.* 25), *sec.* 4 (1).

The Customs and Inland Revenue Act 1890, sec. 26 (2), as amended by the Customs and Inland Revenue Act 1891, sec. 4, provides for the exemption from inhabited-house duty of "any house originally built or adapted by additions or alterations and used for the sole purpose of providing separate dwellings, where the annual value of each dwelling shall not amount to twenty pounds." *Held* that the exemption did not apply to houses under £20 annual value forming part of a building designed for and used as a fire station, and occupied by the firemen in connection with their duties.