Counsel for the Appellants—Wilson, K.C. D. Anderson. Agents—Davidson & Syme, W.S.

Counsel for the Respondent — Dundas, K.C.—Younger. Agents—Fraser, Stodart, & Ballingall, W.S.

HOUSE OF LORDS.

Monday, July 29.

(Before the Lord Chancellor (Halsbury), Lord Macnaghten, Lord James of Hereford, Lord Brampton, Lord Robertson, and Lord Lindley.)

JOHN PATERSON & SON, LIMITED *v.* CORPORATION OF GLASGOW.

(*Ante*, July 17, 1900, 37 S.L.R. 961, and 2 F. 1201.)

Arbitration—Decree-Arbitral—Reduction—Informal Arbitration—Ultra fines compromissi—Right of Party to have Legal Assistance—Arbiter Proceeding on Personal Skill and Local Knowledge—Gross Sum Awarded where Separate Claims Referred.

A firm of contractors undertook a contract to construct a sewer for the Corporation of Glasgow at certain scheduled rates. During the progress of the work it was found impossible owing to the nature of the soil to drive a tunnel by the ordinary method. The contractors were then instructed to continue the work by means of the air-pressure system, which was more costly, and the Corporation agreed to refer the question of the amount to be paid to them "in respect of the extra cost incurred by the necessary adoption of the said system of air-pressure" to a certain arbiter who was a civil engineer in Glasgow. No formal submission was entered into. The parties subsequently agreed to submit to the arbiter certain items of the contractors' account, other than those relating to the use of air-pressure, which they were unable to adjust. After hearing parties and examining the accounts and making certain measurements, the arbiter issued a note of proposed findings at which he had arrived without hearing evidence, but intimated that, although he did not consider it essential he was prepared to hear proof if desired. Thereafter he made an order for proof, and in a note appended thereto he added — "Both parties having distinctly agreed that they were not to be represented by law-agents, the arbiter cannot now see his way to allow this arrangement to be broken unless mutually agreed upon." In the proceedings up to this time the parties had not been represented by law-agents. The contractors refused to accept a proof upon these conditions, and denied that they had entered into such an arrangement. The arbiter thereupon cancelled the order for proof, and issued a note of proposed findings, in which he awarded a gross sum "as the total amount due in respect of the work done by the claimants in connection with this contract." After allowing time for representations the arbiter issued a formal decree-arbitral. The findings and the decree-arbitral did not show what sums were respectively awarded in respect of the use of air-pressure and in respect of the disputed items of the account.

In an action by the contractors for reduction of the decree-arbitral upon the ground (1) that the arbiter had refused to hear evidence as to the actual cost of using air-pressure; (2) that he had proceeded *ultra fines compromissi* by finding what was a reasonable sum to be allowed for the use of air-pressure instead of determining the actual extra cost of using it; (3) that the decree-arbitral did not distinguish between the amount allowed for the use of air-pressure and for the other disputed items; and (4) that he had acted illegally in refusing to hear proof except on condition that parties should not be represented by law-agents—*held* (*rev.* judgment of the Second Division, and restoring judgment of the Lord Ordinary, Kyllachy) that the defenders were entitled to absolvitor, in respect that this was an informal arbitration in which the matter in dispute was referred to the personal skill and local knowledge of the arbiter, and in which proof was not essential; that in the circumstances the arbiter was entitled to refuse to allow parties to be represented by law-agents—the understanding between parties acted on up to that time being that law-agents were not to be employed, and the question of whether law-agents should be allowed in an arbitration being one of procedure for the consideration of the arbiter; and that although he gave an opportunity of making representations against his proposed findings, no request was made to him by the contractors to divide the amount of the award into separate items.

This case is reported *ante ut supra.*

The Corporation of Glasgow, the defenders and respondents in the Court of Session, appealed to the House of Lords.

At delivering judgment—

LORD CHANCELLOR—With all respect for the Inner House, I think they have not given sufficient effect to the evidence that was before them as to what the actual contract between these parties was. The story is in itself a simple one. The Corporation of Glasgow entered into a contract for the making of certain sewers in their streets. The date of that contract is not immaterial—it was in 1893. During the progress of the work, between January

1893 and January 1894, it was found that some difficulties arose in the execution of the contract according to the mode which it was assumed on both sides when the original contract was made should be pursued. The contractors stated that in their view it was impossible to continue by reason of the nature of the soil the execution of the works in the manner originally contemplated. As a consequence there was a correspondence between the contractors and the Corporation, and as a matter of fact it was arranged, subject to certain words which I will consider in a moment, that what was called the air-pressure system should be adopted, which undoubtedly would involve an extra cost upon the contractors if that system was pursued.

Originally the contention appears to have been that the contractors were bound by the contract to execute the work as well as they could under the terms of the contract, that the Corporation had got them fixed by a contract which they were bound to fulfil, and therefore there was no original obligation upon the Corporation to make any allowance for the extra cost which had become necessary, but after correspondence between the parties an agreement appears to have been come to. The date should be observed, because the dates of the original contract and the intervention of Mr Copland are separated by a whole year, which becomes important upon further consideration of what happened thereupon. In a minute of the 3rd August 1894 we find—"After carful consideration of the whole circumstances the Sub-Committee agreed to recommend that the request made by Messrs Paterson & Son be, without prejudice to the rights and claims of the Commissioners, complied with, and that, as this payment is in respect of and applicable to the extra cost incurred by Messrs Paterson & Son in executing their contract by means of the system of air-pressure found by them to be necessary, Mr W. R. Copland be appointed arbitrator in the matter of the amount to be paid to Messrs Paterson & Son in respect of the extra cost incurred by the necessary adoption of the said system of air-pressure—the cost of such arbitration to be borne equally by Messrs Paterson & Son and the Commissioners."

I may say in passing, with reference to another argument put forward on the part of the respondents, that that document is "approved" on the "17th of August 1894" by the Corporation; so that in respect of the authority to enter into this contract being brought home to the Corporation, it really is not necessary to proceed further. There is the deliberate adoption by the Corporation of this bargain.

The work proceeds and is apparently executed, and then comes the question which has given rise to this appeal. After a considerable delay, the arbitrator so selected hears the parties and is occupied in going into the accounts and ascertaining the amount due between the parties in the manner which was arranged by the parties themselves at the time, in order that he should have before him the materials upon which he should make his award. That appears to have been in the contemplation of both parties on the three days during which they were occupied—that was in November 1898.

It is said now that the award which was then made or proposed to be made is to be set aside because the arbitrator refused to allow further proof to be given. In the view that I take of the matter the answer to that is a very simple one—that it is not true. He never refused to hear them. He offered to hear them; but the parties declined on two occasions to attend a meeting which he had arranged, because he insisted upon preserving an arrangement which he had entered into by the consent of both parties to refuse to hear professional advisers instead of the parties themselves.

I confess I had very great difficulty in following the reasoning of the learned Judges who reversed the judgment of Lord Kyllachy. They say, in more than one passage in their judgments—two of them at least,—that there was no evidence of any such agreement. To my mind the agreement is proved beyond doubt or question, and I cannot but think that there must have been some omission to bring before their Lordships the evidence upon which that agreement rests. It is abundantly proved, I think, both in the correspondence and by verbal statement. At page 89 Messrs Paterson & Son, Limited in answer to a suggestion by Mr Whyte, that professional assistance should be called in because a new point had arisen and a point of law was involved, write thus—"We have yours of yesterday's date with pressed copy of letter from Mr Whyte, and in reply beg to say that the other matters in dispute, besides the compressed air, were excluded at the time by the Corporation themselves from the reference as then existing." On that matter I may say in passing that that was perfectly true, but at a subsequent date there is clear evidence of remitting all matters in dispute between the parties. The letter goes on—"A considerable time ago, on the suggestion of Mr Whyte, we agreed that the matter of the compressed air should be referred to you to adjust between us"—that is between Mr Whyte and themselves—"without the formalities of a legal arbitration, and with a view to an amicable settlement so as to save legal and other expenses. We would like to know now if Mr Whyte departs from this position, because, if so, we must reconsider the whole matter and the terms of its submission."

I am wholly unable to imagine a more complete answer to the suggestion that there was no such agreement. So far from there being no such agreement, the person who now insists upon it at that time in answer to a request by Mr Whyte that legal assistance might be permitted, says—one can read between the lines of such a letter, and what it means is this—If you depart from the arrangement we have

made—that is to say, the arrangement to treat this as an amicable settlement and a reference without trusting to the legal forms of arbitration—we shall reconsider our position. It actually means this, that we shall decline to go on with the arbitration at all, and cancel our submission to arbitration. That is the meaning of it. How in the face of that letter it can be suggested—apart from the verbal evidence which states it beyond all dispute and question on the one side, and is hardly denied on the other, that there is no evidence of such an agreement, I am wholly unable to understand. I can only say that to my mind the agreement is positively proved without the smallest doubt. Under these circumstances it is untrue to say that the arbitrator has refused to hear any evidence. What he has refused to do is to depart from an arrangement which all the parties had agreed to. Under the circumstances I think he was perfectly right in saying, "I am not going to depart from that: the agreement by which I was made arbitrator was on the express understanding that there was to be no legal assistance. I, as being a person familiar with this sort of thing, was to deal with and settle the whole matter without either the expense or the practical delay which sometimes occur in arbitrations conducted in legal form."

That seems to me to determine the question whether or not upon the mere refusal, which was the ground mainly put forward, there was any reason why this award should be set aside. It appears to me, on the contrary, that the arbitrator has done that which the parties agreed that he should do. If he had not done it he would have departed from that which the parties had agreed upon in the first instance; indeed, on that ground his award might very readily have been set aside, because then he would have been acting without the consent of the parties and taking a course which they had agreed should not be pursued.

But then comes another question—it is said on the face of this award upon the admitted facts the arbitrator has not pursued the course which was agreed upon between the parties—that he has departed from the arrangement in this respect, that he has not either inspected or had proof of, or in any way entered into the question of the amount to be paid by the one to the other in respect of the measure of value, the cost of labour and material which has been expended in the extra cost of this compressed air system. Upon that point to my mind the question is a very simple one. The whole object and purpose of referring the dispute to a person like Mr Copland was, that with his technical knowledge of those elements which make up the amount which is to be paid by the one to the other for this extra work, which in truth is the measure of value, he was to have the materials before him which the parties thought proper to produce. The answer to my mind is this, that he has taken—I do not care whether you call it the basis or whether you call it the mode of ascertaining the amount—I do not care what you call it—what he did was this, for three days he heard the parties upon all the matters relevant to that question which he had to consider, together with his technical knowledge and his own local knowledge of what the proper sums to be charged were, and it is not suggested that at the end of the third day anybody ever said that he was to have another meeting to consider his award, or another meeting to hear the parties. On the contrary, the hypothesis on both sides was that they had both been heard out, and when he makes his intended award known to the parties, then, and not till then, is this question raised, that he was bound to have another meeting and to have legal assistance provided upon both sides.

It seems to me, therefore, that every part of the case which has been put forward on the part of the respondents is answered. There was such an agreement as the appellants insist upon; the arbitrator proceeded I think substantially in the way that it was intended he should proceed, applying his technical knowledge to technical matters which were within his knowledge, and applying his local knowledge of the particular place where this work was to be done. He having done that, it appears to me it is far too late for the parties now to complain, the award having been made—or rather it having been published—what the award would be, and to claim that they should now have a new arbitration and commence these proceedings afresh. It seems to me that it would entirely destroy the value of any arbitration if that could be allowed; it would be a very bad precedent, and certainly would prevent people from entering into any such arbitrations, which are often carried on with great advantage to the parties, and without the expense attending a regular litigation. At any rate, so far as your Lordships are concerned, I think we are all agreed that it is impossible to say that there is any misconduct here. I confess that I rather protest against the Scottish term "misconduct," which at first sight seems to imply corruption: it seems to me a very inappropriate word, but by judicial decision the Scottish Courts have included under it any mistake committed by an arbitrator in the mode of carrying on an arbitration. It appears to me that there has been no misconduct in any sense in this case. The arbitrator has arrived at the conclusion which he has arrived at upon the materials on which the parties themselves contemplated he would arrive at it, and the whole object of having an arbitration conducted in this fashion by a man of skill without the formal procedure of a legal arbitration was to induce him to do the very thing he has done—apply his own technical knowledge in the consideration of the books and accounts placed before him, knowing, as he must have known if he was the person both parties assumed him to be, what was the appropriate price of labour in such work as this, and the nature of the work. I know it has been said he never had this sort of work to do

before. I do not know that there is any magic in this particular work. He knew work of this nature if he had never been engaged in it. It appears to me that that is one of the sort of things that people say after they have lost their cause—that the person who adjudicated upon it was not sufficiently acquainted with the subject-matter. The answer is, you have chosen him, and you must take his decision whether it is good or bad. That is indeed a complete answer to all the arguments which have been addressed to us on the part of the respondents. We are not ascertaining now whether this award was right or wrong—with that question we have nothing to do. I should think it is probably right; but what we are deciding here is, whether there has been anything in the course of this arbitration, and in the award made under it, which justifies any Court in sending it back or setting it aside. My view is that all the evidence is satisfactory to prove that the arbitrator has regularly and properly proceeded in the way it was expected he should proceed, and he has arrived at the conclusion in the way which both parties contemplated, and by the means by which both parties contemplated he would arrive at the conclusion.

Under these circumstances there is no reason why this arbitration and the award should not proceed to its proper consummation, and I move your Lordships that the interlocutor of the Inner House be recalled and the original judgment of Lord Kyllachy restored, and that the respondents should pay to the appellants the costs both here and below.

LORD MACNAGHTEN—I am of the same opinion. I think the award must be upheld, and I entirely agree with the reasons which have been given by the noble and learned Lord on the woolsack.

LORD JAMES OF HEREFORD—I concur.

LORD BRAMPTON—I concur.

LORD ROBERTSON—I cannot help thinking that the objections to this award are all more or less directly traceable to a misconstruction of the minute of reference. It has been assumed that what the arbiter had got to do under the first reference was to ascertain what had been the extra cost, or as the Lord Justice-Clerk puts it, the reasonable extra cost of the air-pressure. This is in my judgment a misreading of the reference. The extra cost incurred was merely the consideration in respect of which a sum to be fixed by the arbiter was to be paid to the respondents. In this view the question of the actual expenditure by the respondents sinks into a position of very subordinate importance. What the arbiter said in effect was this—"I will assume, as you say it, that you expended all that money, but it was extravagant expenditure, and I decline to take it as affording any reliable criterion of what ought to be given." In so proceeding I think the arbiter was within his duties.

Now, if this be correct, the question upon which evidence was ultimately proposed was not the main issue, but had only a very indirect bearing on the result. It follows from this, first, that there was no duty on the part of the arbiter under the reference to find what had actually been spent, and second, that the question about agents in any evidence about actual expenditure becomes one of the most incidental procedure. But then it is said that the parties have by their pleadings committed themselves to a different view. I do not think that the terms of the rather inartificial pleadings support this contention. I read the admitted part of the respondents' pleadings as a statement of historical fact that the appellants agreed to the work being proceeded with on a time and material basis. But then this applies to a period anterior to the minute of reference, and it cannot alter the subject-matter agreed to be referred. And if it does not avail for this it has no further effect in the controversy.

The next objection to the terms of the award seems to me wholly untenable. The arbiter had by the reference of 1894 to deal with the question of air-pressure, and by the reference of 1898 he had to deal with what are called the remaining items of difference. Now, the identification of the remaining items of difference took place in a way proposed by the respondents themselves, viz., by the appellants lodging the account, and along with it a statement of the items in that account which they disputed. There is not the slightest ground in fact for supposing that the arbiter dealt with any but the disputed items, and there is most certainly no legal presumption that he did so.

Then as regards the complaint that the arbiter has not separated the amount which he has allowed for the compressed air from the amount which he has allowed for the remaining items of difference, I think that, even on the strictest view of his duties, he was not bound to do so unless he was asked, the reference of 1898 and the proceedings of parties having merged or consolidated the two references. And the respondents' leading witness says in so many words that "neither by representation nor request, direct or indirect, was Mr Copland asked to distinguish the amounts in his decree which were applicable to the compressed air contract and to the general contract". On the other hand Mr Copland himself tells us that he had the materials at hand enabling him to satisfy such request had it ever been made. These facts become the more striking when we know that, according to a frequent practice in Scotland, the arbiter issued a memorandum of his proposed findings and the respondents made no request to know how much applied to either reference.

The other and more important objection as to law-agents is, I think, very judiciously handled by Lord Kyllachy. *Prima facie* it is for the arbiter to decide questions of procedure. Lord Rutherfurd Clark, whose precise and guarded statements of law have a special authority, says (in *Holmes*, 17 R. 656)—"All the incidental questions which

arise in the course of procedure are as much referred to his sole judgment as the final decision." Now, there is no stereotyped rule as to who are to practice before arbiters generally, or before any arbiter in particular. While for permanent courts of justice this matter is settled by permanent rules, each arbiter must settle it according to the subject-matter which he has in hand, and the resulting considerations of convenience and justice. In some references to exclude lawyers would be unjust, in others to admit them would be absurd. Their presence at one stage of an arbitration might be useful, and at another stage of the same arbitration might be confusing. But in the present instance Mr Copland considered that he found the rule for this arbitration settled by the concurrent action of the parties themselves, and governed himself accordingly. I think he was right in so holding, but even if I thought that the parties were not bound to this course, I do not see any ground for the interference of the law courts with an order as to the conduct of an inquiry into what I hold to have been merely one head of information as to the main question and not the main question. In no view have we here a contravention of any of these general conditions which are necessary for doing justice, which form the only limitations on the procedure of voluntary tribunals which are not imposed by the express agreement of those who set them up. There are innumerable arbitrations in Scotland about matters agricultural and commercial in which things are gone about in a rough and ready way, and it would be subversive of good faith and of social convenience if courts of law were to exact of such tribunals a kind of procedure which in many cases would be unnecessary and inappropriate.

LORD LINDLEY—I have nothing to add. The two judgments which have been delivered cover the whole ground.

Appeal *allowed*, judgment appealed from *reversed*, and judgment of Lord Kyllachy, Ordinary, *restored*, with costs both in the House of Lords and in the Court below.

Counsel for the Pursuers (Reclaimers and Respondents)—Salvesen, K.C. — Guy. Agents—Lloyd George, Roberts, & Co., for Alex. Morison & Co., W.S.

Counsel for the Defenders (Respondents and Appellants)—Shaw, K.C.—Lees. Agents —Martin & Leslie, for Campbell & Smith, S.S.C.