Solway, between high and low water-mark, on the portion of the complainer's salmon fishings of Newbie, known as the Powfoot and Howgarth Scaurs. This was a petition and complaint by Mr Mackenzie and his tenant in the fishings of Newbie, against Coulthart, Hill, and Birnie for breach of these interdicts. In the prayer of the petition the petitioners craved the Court "to find that the said respondents respectively, by their actings and proceedings above set forth and complained of, acted illegally, and have been guilty of a breach and violation of interdict granted by your Lordships as above set forth, and of contempt of the authority of your Lordships; and in respect thereof to inflict upon them such punishment, by imprisonment or otherwise, as to your Lordships shall seem necessary; and further, to find the said John Coulthart, William Hill, and John Birnie jointly and severally liable in the expenses of the petition and complaint, and of all proceedings to follow hereon."

No answers were lodged, but the respondents having appeared, denied that they had been guilty of the breaches of interdict complained of.

A proof was thereafter taken at Dumfries, at which Coulthart and Birnie appeared for themselves, but no appearance was made for the respondent Hill.

The Court pronounced the following decree.

"Find (1) that the respondent John Coulthart has broken the interdicts granted by the Second Division of the Court of Session on 1st and 3rd December 1881; (2) that the respondent William Hill has broken the interdicts granted by said Division of the Court on 3rd December 1881; and (3) that the respondent John Birnie has broken the interdict granted by said Division of the Court on 1st December 1881: Therefore decern and adjudge the respondents John Coulthart, William Hill, and John Birnie each to be imprisoned for the space of two months, and to be thereafter set at liberty; and for that purpose grant warrant to officers of Court to convey the said respondents from this bar to the prison of Edinburgh, thereafter to be dealt with in due course of law: Authorise the petitioners to remove the nets complained of at the expense of the respondents, and authorise execution to pass on a copy hereof certified by the Clerk of Court: Find the respondents liable in expenses," &c.

Counsel for the Petitioners—Johnstone. Agents—Hope, Mann, & Kirk, W.S.

Friday, June 21.

FIRST DIVISION.

[Lord Fraser, Ordinary.

ADAMS *v.* GREAT NORTH OF SCOTLAND RAILWAY COMPANY.

Arbitration—Contract—Reference—Disqualification.

The arbitration clause in a contract for the making of a railway provided that the arbiter should not be disqualified from acting by being or becoming consulting engineer to the railway company. *Held* that he was not barred from acting as arbiter by the fact that he had revised the specifications and schedules upon which the work which formed the subject of the arbitration was performed.

Process—Arbitration—Decree-Arbitral—Reduction.

In a reduction of a decree-arbitral on the ground that the arbiter had given decree for a larger sum in name of penalties than was claimed by the party in whose favour decree was granted, the latter offered to discharge the excess. The Court *held* that the proper remedy was to reduce the decree *quoad* the excess.

Arbitration—Decree-Arbitral—Reduction.

By the arbitration clause in a contract for the making of a railway it was provided that "all disputes and differences which have arisen or shall or may arise between the parties under or in reference to this contract, or in regard to the true intent, meaning, and construction of the same, or of the said specifications, conditions, and schedules, or as to what shall be considered carrying out the work in a proper, uniform, and regular manner, . . . or as to any other matter connected with or arising out of this contract, and generally all disputes and differences in any way connected with the construction of this contract, or arising out of the execution of or failure to execute properly the works hereby contracted for or not," should be submitted and referred to the final sentence and decree-arbitral of the arbiter named. The contractor was bound to complete the line of railway on 30th September 1884 under a liquidate penalty of £20 for every day's delay, but it was stipulated by the railway company that 400 yards of embankment forming part of the line should not be formed until another contractor had completed the east abutment of a bridge and the diversion of a river, or until he had received the written instructions of the engineer to proceed with the embankment. The line was not completed till 1st May 1886. The arbiter found that the contractor was liable in penalties for each day's delay (exclusive of Sundays) from 30th September 1884 to 1st May 1886. In an action of reduction of the decree-arbitral brought by the contractor, it was proved that the contractor had not got access to the ground on which the 400 yards of embankment was to be formed until February 1886. The arbiter stated that he was satisfied that there was no delay in consequence of the contractor not getting access to part of the ground till February 1886. The Court *held* that as the whole matter, including the construction of the contract, had been referred to the arbiter, the Act of Regulations prevented the Court from interfering with the arbiter's award, even on the ground of injustice.

By the Great North of Scotland (Buckie Extension) Railway Act 1882 the railway company were empowered to make a railway from Port-

soy to Elgin, and in November 1882 they advertised for tenders for the work divided into four sections. Of these the first and second sections were (1) from Portsoy to Portnockie, which was again subdivided into two sections, (*a*) from Portsoy to Tochieneal Station, and (*b*) from Tochieneal Station to Portnockie; and (2) from Portnockie to the river Spey, or the Buckie section.

Messrs W. & T. Adams, contractors, Callander, sent in tenders for both sections, which were accepted, the cost of the Portsoy section being £52,286, 19s. 7d., and of the Buckie section being £39,063, 17s. 9d. By the contracts for the construction of the two sections, dated in January 1883, which were entered into between the company as first party, and the Messrs Adams as second parties, the second parties bound themselves to complete the sections according to the specification, and the plans, sections, and drawings prepared by the company's engineer, or according to such altered or explanatory plans as might be furnished by the engineer during the progress of the works.

The contracts further provided—"And further, the said second party hereby bind and oblige themselves to commence said works as soon as they shall have been put in or offered possession of land to the extent that the said engineer shall consider necessary, and within six days after written notice to them, or any of them to do so; . . . and the said second party bind and oblige themselves and their foresaids to intimate to the said first party in writing when they are ready to commence said works, and any delay which may thereafter occur, if any, in giving the said second party possession of such lands as the engineer shall consider necessary for carrying on said works, shall not confer on the said second party a right to claim damages against the said first party, or to break this contract, but may be stated to the arbiter hereinafter named as a reason for not completing the said works within the time after specified, and if it shall appear to said arbiter that the said second party was prevented from completing the said works by that delay or by any stoppage from any cause not imputable to the said second party, the said arbiter shall be entitled to extend the time for completing the same for such period as he shall consider reasonable, but of the propriety of giving the said extension of time and the length thereof the said arbiter shall be sole judge."

The Messrs Adams bound themselves under the contracts to carry on the works regularly and uniformly, and to have the railway ready for traffic—the Portsoy to Tochieneal part of the Portsoy section on 30th September 1883, and the remainder of that section and the Buckie section on or before 30th September 1884, "or on or before such respective days thereafter as may be respectively fixed by the arbiter after named." In the event of delay on the part of the Messrs Adams, or of their not employing a sufficient number of workmen, horses, &c., it was provided that the company might apply to the arbiter for authority to employ workmen, provide plant and materials, &c., or to take the works out of the contractors' hands, all at the expense of the Messrs Adams—"And it is hereby further declared that the said second party shall be liable in all damages and extra expenses which may be incurred by or occasioned to the said first party by the said second party or their foresaids failing to complete the said works, or to have the same ready for opening by the times respectively hereinbefore stipulated; and as compensation for loss of profits to the company should the foresaid respective portions of the line not be in a state to be opened for public traffic by the times stipulated, it is hereby declared and agreed on that the said second party shall be bound to pay to the said first party the sum of £20 sterling as the liquidate and agreed on compensation for every day during which each of the foresaid respective portions of the line, or any part thereof, shall remain unfinished, or in a state not to admit of its being opened for public traffic, after the said 30th day of September 1883 and 30th day of September 1884 respectively, or such extended periods as the said arbiter may determine as aforesaid."

The contracts also contained the following clause—"And further, the said first and second parties hereto hereby submit and refer to the final sentence and decree-arbitral to be pronounced by Benjamin Hall Blyth, civil engineer in Edinburgh, whom failing by death or resignation to George Cunningham, civil engineer in Edinburgh, whom they hereby mutually nominate and appoint to be sole arbiter, all disputes and differences which have arisen or shall or may arise between them under or in reference to the contract, or in regard to the true intent, meaning, and construction of the same, or of the said specifications, conditions, and schedules, or as to what shall be considered carrying out the work in a proper, uniform, and regular manner, or regarding the nature of the materials used, or the expense of any additional work or deduction from that specified, or any alteration which may be made as aforesaid in the works hereby contracted for, and which may make them more or less expensive than those specified, or regarding the proper maintenance of the works, or the state and condition of the same, and the amount of the monthly payments to be made to account thereof, or as to any other matter connected with or arising out of this contract, and generally all disputes and differences in any way connected with the construction of this contract, or arising out of the execution of or failure to execute properly the works hereby contracted for or not: . . . Declaring that this submission shall not fall by the lapse of year and day, or by the death of any of the parties hereto, and that neither the said Benjamin Hall Blyth nor the said George Cunningham shall be disqualified from acting as arbiter by his being or becoming the said first party's principal or consulting engineer, or a shareholder in said company, or by his holding or being appointed to any other office or employment under the said first party, or by their being partners or connected with each other in business or otherwise; and that the said arbiter shall have power to award the expenses (including those to be incurred by himself) either in whole or in part which may be incurred under this submission, against such of the parties as he shall think fit."

The specification and conditions for the construction of the Buckie section contained the following clause:—"The portion of the embankment of the line, between pegs Nos. 892 and 899,

shall not be formed until the contractor for the bridge or viaduct over the river Spey has completed the works in connection with the erection of the east abutment of the bridge, the diversion of the river, and the erection of the protection walls embraced in the contract for the Spey Bridge, or until he has received the written instructions of the engineer or assistant-engineer to proceed with the formation of the said portion of the embankment." . . .

The contractors commenced operations, but they were somewhat dilatory in their proceedings, and complaints were made of this frequently to them. On 4th December 1883 the railway company, by their manager, applied to Mr Blyth, as arbiter, to authorise them to put on men and plant so as to carry out the works vigorously, all at the expense of the pursuers. In consequence of this appeal to him Mr Blyth visited the works, and in a letter dated 12th December 1883, addressed to the railway company's manager, he stated that no part of the work was completed, and he added that "it is evident from their present state that if they [the works] continue to be executed at the present rate of progress the first five miles cannot be finished before May 1884, and the remainder of the works until at least September 1885—or fully a year behind the contract time." Mr Blyth was very unwilling to take the strong step of putting men on the works at the contractor's expense, and suggested, that as the pursuers had promised to put on an increased force of men and waggons, that it would be for the best interest of all parties that the directors should obtain from the contractors a formal undertaking to do this, and that if they failed in their promise the application of the railway company might again be taken up.

Nothing further was done upon this application, but on 2nd December 1885 the railway company again made a formal application to the arbiter with complaint of delay, and calling upon him "forthwith to issue and pronounce the necessary order authorising and empowering them [the railway company] to provide, at the expense of the contractors, such additional workmen, horses, waggons, and other force, with all tools, implements, and materials requisite and necessary, and to continue to employ the same so as to ensure the completion of the whole of the works above referred to within the time above expressed." What the arbiter did upon this was to meet the parties, and upon the urgent entreaties of the Messrs Adams he was induced, upon their again giving an undertaking of greater diligence, to abstain from granting the prayer of the application of the railway company. The Messrs Adams accordingly wrote on 8th December 1885 as follows:—"With reference to the application by the Great North of Scotland Railway Company to you as arbiter, dated 2nd inst., discussed at the meeting before you to-day, we have now, as desired by you, to undertake to finish the works referred to in that application on or before 15th February next, unless prevented by some unforeseen occurrence. In order to do so we shall put and keep on the works as many men as can be practically done for the above end. In the event of our not by these means finishing at the above date, we will agree, if you deem it then necessary, to your giving effect to the application of the railway company."

To which the clerk to the submission, by Mr Blyth's directions, replied as follows, by letter addressed to the Messrs Adams' agents, Messrs Campbell & Somervell, W.S.:—"9th December 1885.—I am instructed by the arbiter to acknowledge receipt of Messrs Adams' letter to him of yesterday. The arbiter still has the Great North of Scotland Railway Company's application under consideration, and the manner in which he will ultimately deal with it will to a great extent depend upon the information he may receive within the next eight or ten days as to what, if any, steps are being taken by your clients with the view to the completion of the works on or before the 15th February next." The arbiter was not called upon by the railway company to issue the necessary order allowing them to put on additional men and plant.

So matters stood upon this footing until the works were completed. The first portion of the work, which ought to have been completed on 30th September 1883, was not completed till 1st April 1884, and the second portion of the work was not completed, as it ought to have been according to the contract, on 30th September 1884, but only on 1st April 1886.

Thereafter, disputes having arisen between the Messrs Adams and the company with reference to the settlement of their accounts under the contracts, an appeal was made to Mr Blyth under the reference clause. After various procedure, and the taking of evidence at considerable length, and the intimation of a note of the proposed findings, against which no representations were lodged by either party, Mr Blyth issued two decrees-arbitral—the one applicable to the Portsoy and the other to the Buckie contract. Under the first he found that the Messrs Adams were due to the company the sum of £7109, 13s. 6d., with interest from 7th November 1887, and under the second he found that they were due the sum of £5103, 14s. 6d., with interest from the same date, and he gave decree for payment of the two sums. The larger portion of the items charged against the Messrs Adams consisted of penalties or liquidated damages at the rate of £20 per day for loss caused to the company through the delay in completing the works beyond the date of completion specified in the contract—being 837 days at £20=£16,740.

The Messrs Adams thereafter brought an action of reduction of the two decrees-arbitral against the company.

The grounds of action appear from the following pleas by the pursuers:—"The decrees-arbitral specified in the summons ought to be reduced—1. Because the said Benjamin Hall Blyth, through the circumstances condescended on, was disabled from exercising an impartial judgment on the matters referred to him. 3. Because, prior to the date of the two contracts aforesaid, the said Benjamin Hall Blyth had, on the employment of the defenders, prepared for them the specifications and schedules forming part of the contracts, and containing statements as to the masonry of the bridges and viaducts calculated to mislead the pursuers, or having that effect, and the fact of his having been so employed was concealed by the defenders from the pursuers, and the pursuers were ignorant of it not only at the date of the contracts but also at the date when the decrees were pronounced. 4.

Because the decrees are *ultra fines compromissi*, in respect (*a*) that on a sound construction of the two contracts between the pursuers and the defenders condescended on, the said Benjamin Hall Blyth was not empowered, after the dates specified therein for the completion of the works, to extend the time for such completion; (*b*) that the said Benjamin Hall Blyth has found the defenders entitled to sums in name of compensation or liquidated damages, but in reality penalties, enormously in excess of the sum they claimed; and these matters imply corruption on the part of the said Benjamin Hall Blyth, and are not separable from the other findings in the decrees. 6. Because the Buckie section of the railway could not be completed till the bridge at Garmouth was nearly finished, and possession of the land necessary for connecting the bridge and the railway was not given by the defenders to the pursuers till February 1886; and in the decree applicable to the Buckie contract the said Benjamin Hall Blyth has nevertheless found the pursuers liable in compensation or liquidated damages for not completing the said section at the rate of £20 per day from 30th March 1885."

The pursuers stated, *inter alia*, that the amount allowed in name of penalty exceeded that claimed by the defenders to the extent of £5250. In regard to this matter the defenders stated—"Explained further, that under the clauses of reference in the contracts the parties referred to the arbiter all questions as to the true intent, meaning, and construction of the contracts, as well as all questions connected with the execution, or failure to execute the works to be constructed, and constituted him the sole judge between them on all questions of fact or law arising upon the construction or execution of the said contracts. In particular, he was entitled and bound to decide a question which arose between the parties as to the true intent, meaning, and construction of the clause providing for payment of liquidate and agreed on compensation at the rate of £20 *per diem* as compensation for loss of profits in event of failure by the contractors to have the works completed at the times specified in the contracts, or such other times as the arbiter might fix, in accordance with the power of extending the time conferred upon him. It was maintained to him by the pursuers that the payment provided for under the clause was of the nature of a penalty, and subject to modification; and by the defenders, on the contrary, that it was truly, as it bears to be, liquidated damages assessed by the parties as compensation for loss of profits. The claims lodged by the defenders are referred to, and it is explained that they have throughout maintained that compensation for loss of profits was due to them at the rate agreed on in the contracts for the whole period during which the contractors have been found to be in fault, although, desiring to treat the contractors with liberality, they, in accordance with the statements in their claim, were all along willing to accept a payment of compensation to the extent of one-half of the amount claimed as due under both contracts. The railway company do not propose, and have intimated to the pursuers that they do not intend to enforce payment of the sums decerned for in name of liquidated and agreed-on compensation to an extent exceeding the sum of £11,490, and they hereby offer to discharge their claims against the pursuers under the decrees-arbitral to the extent of the sum of £5250, being the amount decerned for as compensation for loss of profits in excess of the sum of £11,490 insisted upon in their claim, and to engross upon the said decrees minutes giving effect to this restriction."

In reference to their 6th plea the pursuers stated—(Cond. 11) "The aforesaid bridge across the river Spey at Garmouth, forming part of the Buckie Railway, was built by the firm of Blaikie Brothers under a contract with the defenders similar to those of the pursuers, and dated in the same month of January 1883 . . . Part of the pursuers' contract with the defenders was to connect the bridge with the Buckie section of the railway by an embankment, but it was impossible to do this, and so complete the Buckie section of the defenders' contracts till the bridge was finished. Messrs Blaikie Brothers had contracted to finish the bridge by the 31st July 1884, but they did not do so till the month of May 1886. It was not till the month of February 1886 that the pursuers were put in possession by the defenders of the land necessary for the formation of the aforesaid embankment. On 20th January 1886 the defenders' resident engineer addressed a letter to the pursuers, stating that he expected that the river Spey would be diverted in a week, provided the weather kept favourable, and that he trusted they were making all the preparations necessary for filling in the banking required. The material for the embankment had to be brought from Portgordon, a distance of three miles. It was thus impossible for the pursuers to have completed the works under their Buckie contract until two months or thereabouts after the said month of February 1886. No penalties have been claimed or exacted by the defenders from Blaikie Brothers in respect of their delay in finishing their contract. Notwithstanding, the said Benjamin Hall Blyth has, by the decree applicable to the Buckie contract, found the pursuers liable in the sum of £6800 in name of liquidated damages, being at the rate of £20 per day for the period from 30th March 1885 to 1st May 1886, and as if the bridge at Garmouth had been completed by the month of January 1885."

In answer the defenders, *inter alia*, denied that the completion of the works under the Buckie contract was in fact retarded or materially affected by the state of the works of the Spey Bridge, and explained that any question of delay so arising was by the contract submitted to the decision of the arbiter.

In reference to their third plea, the pursuers stated—(Cond. 12) "The said Benjamin Hall Blyth was employed by the defenders to prepare or revise the plans, specifications, and schedules of quantities upon which the pursuers tendered for the works, and to estimate the probable cost of the works for them. At the date when the pursuers entered into their contracts with the defenders they were ignorant of the fact of the said Benjamin Hall Blyth having been so employed, and they have only become aware of it since the said decrees-arbitral were pronounced . . . The pursuers believe and aver that in adjudicating upon their claim the said Benjamin Hall Blyth has permitted himself to be biassed and corrupted by the desire to save the defenders as much as possible from having to ex-

pend more money on the said railway than they had allowed for according to his estimate." (Cond. 13) "The specifications and schedules prepared or revised by the said Benjamin Hall Blyth were in many material points inconsistent, contradictory, and misleading. In particular, after the works were in progress the pursuers were required by the defenders' engineers to construct of ashlar masonry the abutments and other parts of the various bridges and viaducts on the line, whilst the specifications and schedules, on a sound construction of them, prescribed only rubble, which is a cheaper kind of masonry. In all the cases in which these circumstances occur the said Benjamin Hall Blyth has by the decree-arbitral disallowed the pursuers' claims for the difference between ashlar and rubble prices, which amounts to £10,000 or thereby. From the said schedules it appears that the pursuers in stating their rates of prices had allowed for these works on the footing that the masonry was only to be rubble masonry. There was a great deal of evidence led before the said Benjamin Hall Blyth, and argument submitted to him as to the meaning of the expressions used in the specifications and schedules to denote the masonry of which the bridges and viaducts were to be constructed. During the evidence and the argument the said Benjamin Hall Blyth concealed from the pursuers the fact that the expressions in question had been inserted in the specifications and schedules by himself, or had been revised and approved of by him. The pursuers have only discovered this since the said decrees-arbitral were pronounced. The question whether the pursuers were to be allowed ashlar prices or rubble prices for the masonry of the Cullen viaduct was the most important question in the reference, and if the pursuers had known that the said Benjamin Hall Blyth had prepared or revised for the defenders the specifications and schedules on the construction of the terms of which the question depended they would have declined to submit their claims to him. The pursuers further believe and aver that in adjudicating upon their claims the said Benjamin Hall Blyth has permitted himself to be biassed and corrupted by the desire to save the defenders from the consequences of his own negligence in preparing or revising the specifications and schedules."

The defenders in answer stated that the fact that Mr Blyth's firm were consulting engineers to the defenders was well known to the pursuers when the contracts were entered into, but they denied that Mr Blyth had ever prepared any estimate of the line of railway as finally authorised by Parliament, or that he prepared or revised the schedules of quantities issued to intending contractors on which the pursuers tendered, and they further stated—"Any difference as to the construction of the specifications and schedules was by the contract expressly and exclusively submitted to the judgment of the arbiter. Denied that the pursuers were required to construct or did construct the abutments, or any portion of any bridge or viaduct of ashlar masonry except where ashlar masonry is expressly required by the specifications. Denied that the masonry referred to in the condescendence and described by the pursuers as ashlar is truly ashlar masonry, and explained that it is in fact rubble masonry, rather inferior than superior to the quality stipulated for in the specifications, and that the arbiter's findings upon the items of claim falling under this head give effect to the contract of parties expressed in the specifications and schedules of prices."

The defenders pleaded, *inter alia*—"(1) The action is incompetent except in so far as founded on the cause or reason of corruption alleged against the arbiter, or upon any decerniture by him *ultra fines compromissi*. (2) The pursuers' statements are not relevant. (3) The defenders are entitled to absolvitor in respect that (*a*) the matters in dispute under the contracts in question were competently referred to the judgment of the said Benjamin Hall Blyth; (*b*) that nothing existed or has occurred to disqualify him from acting as arbiter therein; (*c*) that the allegations of corruption against the said arbiter are false and unfounded in fact. (4) The said decrees-arbitral being in conformity with the contracts of submission, having fully exhausted and not having exceeded the matters submitted, the reasons of reduction ought to be repelled, and the defenders found entitled to absolvitor, with expenses. (5) *Separatim*—Even assuming the arbiter to have exceeded his powers in decerning for liquidate compensation to an amount exceeding the restricted sum of £11,490, the amount decerned for in excess of the said sum of £11,490 is separable from the remainder of the awards, and the said decrees-arbitral should only be reduced *quoad excessum*."

The Lord Ordinary (Fraser) on 26th May 1888 allowed a proof, and in a reclaiming-note by the defenders the Court on 27th June following disallowed a proof by the pursuers of their averments in one article of the condescendence, and *quoad ultra* adhered.

The following evidence was given at the proof. Mr Blyth, the consulting engineer for the company, deponed—"In condescendence 11 there is a statement as to delay being caused by failure to give possession of the ground adjoining the Spey Bridge. That matter was mentioned in the course of the arbitration proceedings, but it certainly was not made a serious point of. Not only is that so, but I am satisfied there was no delay in consequence of their not getting that ground. My reasons for that opinion are these, that the contractors were not ready to use that ground until they got it. They never asked for the ground, and if they had asked for it and did not get it in time, it would have formed a ground for asking an extension of time, which they never did. (Q) And there was a larger power which authorised certain things to be cut out of the contract, was there not?—(A) The engineer might have done that without asking me. Any remedies they had, however, were not taken advantage of. (Q) If they had had that ground much sooner, would it have made any difference on the time when the line was opened?—(A) I don't believe they were ready to use it one day before they got it. They had the ground before they were ready to use it. . . . *Cross-examined.*—I am not in a position to say whether if the Messrs Adams had the whole of the Portsoy and Buckie contract up to the side of the river by the 30th September 1884 the line could have been opened a day sooner than it was. I think the bridge could have been built very much sooner if there had been anticipation of the

pursuers being ready to use it. The line throughout certainly could not have been opened until the bridge was built, but it could have been open to Fochabers Station. . . . I am aware that the pursuers were forbidden to use any portion of the ground between certain pegs until the contractor for the Spey Bridge had completed his works and of the other provisions in the contract bearing upon that matter. The contractors were obliged not to touch that matter until they got instructions to do so. They were not ready to use the ground, and in point of fact they never asked for it. So long as the river was flowing in its bed undiverted it was quite impossible for the pursuers or any other person to form the embankment to connect with the bridge." Mr W. Adams, one of the pursuers, deponed—"The Buckie contract extended from Portknockie to Spey Bridge. The specification with respect to it contains a clause that we are not to form that line between certain pegs until we are put in possession of the land, and authorised by the engineer to go on with the work. The portion of the works to which that applied would extend to between 300 and 400 yards. The Spey Bridge was built not by us, but by Blaikie Brothers, and it was built on the west side of the river on dry land. After it was built the river had to be diverted so as to flow below the newly made arch. Then the bed of the river had to be given to us for the purpose of forming an embankment, continuing the line on to the end of the bridge. (Q) So long as the river was not diverted, was it possible for any man to form such an embankment to the bridge?—(A) No. The specification indeed provides that we should not attempt anything of the kind, and it was quite impossible to do it. The bridge had to be finished by 31st July 1884. If it had been finished then, and we had got possession of the land, our work was to be finished by 30th September following, but the bridge was not finished in July 1884, and we did not get possession of the land until February 1886. . . . *Cross-examined.*—We were quite in time with our work at that end of the bridge. We had the banking run up and stopped up to the very end for nearly two years. (Q) Did you ever ask to get possession of the ground at the bridge to get on with the work?—(A) The river was running in it in full flow, and the bridge was not getting on at all, and it would have been perfectly absurd to ask for that. We were there daily, and saw how the thing stood. They would have laughed at us if we had asked for that. I cannot say whether we asked for the ground or not, but it is not likely we would do a ridiculous thing. I did not ask the engineer, or anybody representing the engineer, to dispense with the execution of this bit of work at Spey Bridge as the arbiters had power to do, for that would have been in my opinion a strange request. Suppose we had got possession of the ground at Spey Bridge earlier, it is not the case that the position of our other works was such that we could not possibly have finished the contract before the time when it actually was finished. The work to be done on that ground of which we desired possession was the last work that was done. . . . *Re-examined.*—I have explained that the portion of the line we had to build up to the Spey Bridge was the last work done under our contract, all the rest of the line being ready to be open. It had to stand ready to be open until the intervening little bit was finished. We had to pay £20 of penalty on each contract—that is, £40 a-day—until the work was finished. (Q) The stipulation in the clause says that you were not to go on with that bit of the work until ordered to do so by the engineer, until you were given possession of the ground, and until the river was diverted, but no time is specified. Did you understand you were agreeing to pay £20 a-day of penalty for about two years, except about three months before the finishing of the contract, if you did not get possession of the ground on which you were to do the work?—(A) No. (Q) The complaint is that they broke the contract, but that you have been subjected to the penalty for that period during which it was impossible for you to prevent delay?—(A) Exactly."

Certain letters were produced from (1) Mr Moffat, the general manager of the railway company, to Mr Blyth dated 20th November 1883, intimating that the pursuers were getting on very slowly with their contracts, and asking advice as to the course they should take, and (2) from Mr Blyth in answer dated 30th November—"I quite appreciate the unwillingness of your directors to make a formal application to me, but I do not see how I can advise them in any other capacity than that of arbiter without disqualifying myself from hereafter acting as such. I would therefore suggest that you should send me the contract, at the same time requesting me formally to accept the submission, and to call a meeting of the parties on the line. This I should at once do, and I am hopeful that I might be able to make Messrs Adams understand the necessity for conducting their works more energetically, and might induce them to do so without any further proceedings under the submission being required."

The further purport of the proof sufficiently appears from the opinion of the Lord Ordinary, who on 3rd November 1888 pronounced this interlocutor:—"Having taken the proof, heard counsel thereon, and considered the cause, Finds that under the decrees-arbitral sought to be reduced the arbiter has found the pursuers liable in penalties to the amount of £16,740: Finds that this sum was larger by £5250 than the penalties claimed by the defenders, and that therefore the decrees-arbitral are *ultra petita* to this extent: Reduces the same in so far as penalties are found due to the defenders more than £11,490: *Quoad ultra* assoilzies the defenders from the conclusions of the action: Finds no expenses due to or by either parties, &c.

"*Opinion.*— . . . The objections stated by the pursuers will be noticed *seriatim.*

"First. It is objected that Mr Blyth could not exercise an unbiassed judgment in the matter, because he was consulting engineer for the company. Now, it is settled law that the engineer of the company may be made the arbiter, and no objection can be taken to him because he is so—*Mackay* v. *Parochial Board of Barry*, 22nd June 1883, 10 R. 1046, and cases there referred to. And in this particular case it was specially stipulated that no objection was to be taken to Mr Blyth as arbiter because he was or might become consulting engineer for the company.

"Second. It is next objected that Mr Blyth could not be an impartial judge because he revised the specifications and schedules forming part of the contracts. The pursuers knew per-

fectly well that Mr Blyth was consulting engineer. This was stated in the contracts which they signed. As consulting engineer his duty was to look over the specifications and plans of the work to be done, and knowing this the pursuers agreed to his being arbiter.

"Third. It is objected that the arbiter was not entitled after the time specified for the completion of the works to extend the time for such completion. In the interest of the pursuers this is not a very intelligible objection. The arbiter found them entitled to an extension of six months as regards the completion of the second part of the works. This was a concession in their favour, and why they should object to it is not very manifest.

"Fourth. It is objected that the arbiter has found the defenders entitled to damages in excess of the sums that they claimed, and this objection to the extent of £5250 the Lord Ordinary holds to be well founded. The arbiter has given to the defenders damages *ultra petita*, and that is a good ground of reduction. Upon this point the railway company on the record make this statement—'The railway company do not propose, and have intimated to the pursuers that they do not intend to enforce payment of the sums decerned for in name of liquidated and agreed-on compensation to an extent exceeding the sum of £11,490, and they hereby offer to discharge their claims against the pursuers under the decree-arbitral to the extent of the sum of £5250, being the amount decerned for as compensation for loss of profits in excess of the sum of £11,490 insisted upon in their claim, and to engross upon the said decrees minutes giving effect to this restriction.' The Lord Ordinary does not think that this is the proper mode of getting rid of a decree-arbitral which decerns for more than is asked; the proper course is to reduce the decree *quoad* the excess.

"Fifth. It is said that the arbiter by his letter of 9th December 1885 extended the time for completion of the works until 15th February 1886, and that notwithstanding the extension of time he has awarded damages for the delay which had occurred, and which by such extension of time was condoned. The Lord Ordinary cannot read the correspondence which took place in this light. Delay had occurred, and the railway company had applied for power to put men and material on the work, and all the arbiter did was simply to abstain from granting the prayer of the application upon an undertaking that the works would be completed by the 15th of February 1886. He said nothing and did nothing as to the penalties already incurred under the contract for delay. There was here no extension of time as might have been allowed by the contract, but a simple reservation not to issue an order authorising the railway company to put men and material on the works at the pursuers' expense. The penalties were still running on.

"Sixth. The only remaining objection worthy of any notice is one regarding which the Lord Ordinary has found some difficulty. In the specification for the railway from Portknockie to the river Spey it is provided that 'the portion of the embankment of the line between pegs Nos. 892 and 899 shall not be formed until the contractor for the bridge or viaduct over the river Spey has completed the works in connection with the erection of the east abutment of bridge, the diversion of the river, and the erection of the protection walls embraced in the contract for the Spey Bridge, or until he has received the written instructions of the engineer or assistant engineer to proceed with the formation of the said portion of the embankment.' It is averred by the pursuers in regard to this matter that 'the aforesaid bridge across the river Spey at Garmouth, forming part of the Buckie Railway, was built by the firm of Blaikie Brothers under a contract with the defenders similar to those of the pursuers, and dated in the same month of January 1883, and in which the said Benjamin Hall Blyth was named arbiter. Part of the pursuers' contract with the defenders was to connect the bridge with the Buckie section of the railway by an embankment, but it was impossible to do this and so complete the Buckie section of the defenders' contracts till the bridge was finished. Messrs Blaikie Brothers had contracted to finish the bridge by the 31st July 1884, but they did not do so till the month of May 1886. It was not till the month of February 1886 that the pursuers were put in possession by the defenders of the land necessary for the formation of the aforesaid embankment. On 20th January 1886 the defenders' resident engineer addressed a letter to the pursuers, stating that he expected that the river Spey would be diverted in a week provided the weather kept favourable, and that he trusted they were making all the preparations necessary for filling in the banking required. . . Notwithstanding, the said Benjamin Hall Blyth has by the decree applicable to the Buckie contract found the pursuers liable in the sum of £6800 in name of liquidated damages, being at the rate of £20 per day for the period from 30th March 1885 to 1st May 1886, and as if the bridge at Garmouth had been completed by the month of January 1885.' It does seem hard that when the pursuers were absolutely prohibited from meddling with the embankment of the line between the pegs Nos. 892 to 899 until the contractor of the bridge over the Spey had completed the works in connection with the erection of the east abutment of bridge, &c., they should be made liable in damages for non-construction of the Buckie portion of the line seeing that these preliminary conditions were only fulfilled in February 1886. It is with some hesitation that the Lord Ordinary comes to the conclusion that this was a matter entirely within the competence of the arbiter. The Lord Ordinary does not say that he would have come to the same conclusion as the arbiter, but the arbiter had a right to decide as he did. His view was that the portion of the line joining on to the embankment was not forward, and therefore there was no delay caused by the non-completion of the Spey Bridge, but that the whole delay arose from the works for the line not being carried forward by the pursuers. If these works had been brought forward to the place for the embankment, and if a demand had been made for the diversion of the Spey, the case would have been different. As the matter stands, the Court have no right to interfere.

"Seventh, It is next objected that 'after the works were in progress the pursuers were required by the defenders' engineers to construct of ashlar masonry the abutments and other parts

of the various bridges and viaducts on the line, whilst the specifications and schedules, on a sound construction of them, prescribed only rubble, which is a cheaper kind of masonry. In all the cases in which these circumstances occur the said Benjamin Hall Blyth has by the decree-arbitral disallowed the pursuers' claim for the difference between ashlar and rubble prices, which amounts to £10,000 or thereby.' He was entitled to disallow them if such was his opinion on the construction of the specification, which is in the following terms—'The exposed faces of abutments of all under-line bridges above the top of foundations to be built of coursed rubble stones from twelve to fifteen inches in height.' The contention of the pursuers is that this means that they could make a course of masonry fifteen inches in height, composed of little pieces of stone half-an-inch thick. The contention of the defenders was that every stone must be twelve to fifteen inches in height, and this latter contention the arbiter adopted, which he was entitled to do as being the judge appointed to construe the contract and specifications.

"The result of the whole matter is that the defenders must be assoilzied from the conclusions of the action, except that there must be a partial reduction of the decree-arbitral, but with regard to expenses the Lord Ordinary must discriminate. In the first place, the pursuers have got rid of a liability for £5250; in the second place, there was a useless discussion on the relevancy, which was carried to the Inner House, and where the judgment of the Lord Ordinary was affirmed. Plainly the pursuers were entitled to expenses down to the interlocutor of the Inner House, and after that date—seeing that they have been successful upon the proof—the defenders ought to be found entitled to expenses, but substantial justice will be done by finding neither of the parties entitled to expenses."

The pursuers reclaimed, and argued—(1) The first plea—The letters which had passed between the railway company or their representative and the arbiter, and of which the pursuers were not cognisant, showed that the arbiter approached the performance of his duties as arbiter with his mind prejudiced against the pursuers. (2) The fourth plea—The arbiter ought either to have enforced the contract, and applied the penalty clauses which provided for the case of delay, or else to have declared the penalty clauses to be in the circumstances inapplicable. What he did was to extend the time allowed for the completion of the contract, and so to reform the contract, to which he afterwards reverted by enforcing penalties for delay. By agreeing to the extension of time the defenders must be held to have waived the penalty clauses in the contract, and to have betaken themselves to their common law right of damages—*M'Elroy & Sons* v. *Tharsis Sulphur and Copper Company*, November 17, 1877, 5 R. 161, *per* Lord Justice-Clerk (Moncreiff), 167; *Robertson* v. *Driver's Trustees*, March 2, 1881, 8 R. 555. Further, assuming that the penalty clauses were still enforceable, the Lord Ordinary had not met the justice of the case in the reduction which he had made on the amount of the award. The whole award must fall where admittedly penalties had been awarded greatly in excess of the claim made and the loss alleged to have been sustained. There was no previous case where the Court had sanctioned the principle of a partial reduction—*Napier* v. *Wood*, November 29, 1844, 7 D. 166. (3) The sixth plea—The award of penalties for the delays in connection with the Garmouth bridge were so grossly wrong as to amount to legal corruption on the part of the arbiter—*Edinburgh and Glasgow Railway Company* v. *Hill*, January 28, 1840, 2 D. 486, Lord Gillies, 494; *Alexander* v. *Bridge of Allan Water Company*, February 5, 1869, 7 Macph. 492. The Lord Ordinary indicated an opinion that the arbiter's view was unsound, and it practically came to this upon the evidence that penalties were awarded for delay in the completion of a contract the conditions of which prevented the pursuers from beginning it until after the period for which the arbiter had awarded penalties. This was a good ground for the reduction of the award—*Robertson* v. *Driver's Trustees*, March 2, 1881, 8 R. 555.

Argued for the defenders—(1) The pursuers' first plea—There was no concealment on the part of the arbiter. Before making his visit to the ground, on being called upon by the respondents to take up the reference, the arbiter sent the pursuers a copy of the application which had been made to him. They knew that the arbiter was the consulting engineer of the railway company, and that as engineer it was part of his duty to revise the specifications and schedules which formed part of the contract. (2) The fourth plea—The construction put upon the contract by the pursuers was very far-fetched. It was not an extension of time that was allowed by the arbiter for the completion of the work. The sole object was to get an undertaking from the contractor that the work would be finished by a particular time, and that the necessity for stronger measures might so be obviated. The idea of reforming the contract never occurred to anyone, and there was nothing in the proof to support such a view. The procedure throughout was perfectly regular and judicial. The cases of *M'Elroy* and *Robertson* were very different. No doubt, in order to found a right to penalties under the contract, there must be full implement by the person who sought to have it enforced; the Court would not allow the integrity of the contract to be broken. In *Robertson's* case it was held that the integrity of the contract had been broken, and the Court had no power to interfere to enforce it. In *M'Elroy's* case it was held that the fault alleged on the part of the person seeking to enforce the contract, which was said to debar him from pleading it, must be material and contributory to the result complained of. But the substitution of one date for another for the completion of the contracts was not such a bar, nor was it *ultra fines compromissi* of the arbiter so to extend the time. In *M'Elroy's* case there was no provision, as in this case, for an extension of time; besides, it was decided upon English precedents, and there was a later case decided in England which displaced the authority of these precedents—*Jones* v. *President and Fellows of St John's College, Cambridge*, 1870, 6 L.R., Q.B. 115. The evidence given by the pursuers—as to the grounds on which the arbiter had proceeded in making the award—must be laid aside, as these grounds could be ascertained only from

the arbiter himself — *City of Glasgow District Railway Company* v. *M'George, Cowan, & Galloway*, February 25, 1886, 13 R. 609. (3) The sixth plea—The arbiter had acted within his powers in all that he had done, and his judgment was quite competent. It was also right. The bridge at Garmouth over the Spey, and the term of its completion was not alluded to in the pursuers' contract. The sole question for the arbiter was what compensation was to be given for the delay, and in dealing with that he could not look at the contract for the building of the bridge. Cases where the implement by one party of a condition material to the fulfilment of a contract was rendered impossible by the actings of the other party were not in point—*cf. Mackintosh* v. *Midland Counties Railway Company*, July 9, 1845, 14 Meeson & Welsby, 548; *Dick & Stevenson* v. *Mackay*, May 21, 1880, 7 R. 788, *aff.* 8 R. (H. of L.) 37.

At advising—

Lord President—The Lord Ordinary in this case has reduced Mr Blyth's decree-arbitral in so far as he has decerned for penalties beyond the sum of £11,490 upon the ground that to that extent the award is *ultra vires*, and I do not understand it to be seriously disputed that he was quite right in taking that course. But there are a number of other objections to the decree-arbitral which he has not given effect to, and I think the only one that has created even an appearance of difficulty is that which is called the 6th objection. With regard to the others I do not think it necessary to take particular notice of them. I quite agree with the Lord Ordinary in the view that he has taken of all of them.

As regards the sixth, there is this great peculiarity that the arbiter has found penalties due for not executing work by the contractors in circumstances where it is alleged they were absolutely prohibited by the contract from executing these very works. Now, that objection depends upon a consideration of two things—in the first place, the evidence in regard to the execution or non-execution of that work, and in the second place, the construction of the contract. It is on the construction of the contract that it is alleged that the contractors were not only not bound to go on with their works in the circumstances in which they were placed, but were absolutely prohibited from doing so, and the evidence has been led for the purpose of showing that that was the position in which the contractors stood. The proposition that they can be due penalties for a period when they not only could not execute the works, but when they were prohibited from executing the works, is a very startling one undoubtedly. The Lord Ordinary seems to indicate an opinion that if he had been the arbiter he would have taken a different view from that which the arbiter has actually taken, but he feels himself constrained to refuse effect to the objection, because he considers that the whole of that matter is absolutely within the power of the arbiter, and in that I agree with him. The arbiter is by the terms of the arbitration clause in the contract made absolutely master of the whole affair. He is not only to take evidence in so far as that is necessary for satisfying himself of the facts of the case, but the construction of the contract is left to him. That is one of the things expressly left to the arbiter by the contract, and he has construed the contract in such a way with regard to the facts as to satisfy his own mind that these penalties are due. The ground of the objection is nothing else than this, that the decree-arbitral to this extent is unjust. It is said to be very unjust, grossly unjust, manifestly unjust; but these are degrees of injustice, and the adverbs do not add very much to the importance of the objection as being a complaint of injustice. Now, nothing can be clearer in the law of Scotland than that according to the Act of Regulations injustice, or iniquity as the Act calls it, is not a ground for reducing a decree-arbitral. The parties choose their own tribunal, they determine what matters shall be submitted to the arbiter, and by his award they are bound. In this respect we know that the law of Scotland differs very materially from that of England, in which the Courts review decrees-arbitral or awards much more readily than we do. And the same kind of rule prevailed in this Court prior to the Act of Regulations. But certainly the practice at that time was such as fully to justify, I think, the enactment of these Regulations, because anything more loose or indefinite than the rules according to which the Court interfered or did not interfere with awards of arbiters can hardly be conceived, as I think some of us had occasion to point out in a case not very long ago. But be that as it may, we are bound by the Act of Regulations, and injustice or iniquity, although very glaring, very serious, and very hard upon the party who suffers, is no ground for interfering with the award of an arbiter. And therefore upon this particular part of the case I agree with the Lord Ordinary also. The result is that I am for adhering to his interlocutor.

Lord Mure—I am obliged to come to the same conclusion. The terms of the clause in reference to this contract are very broad and general, and everything is referred to the arbiter selected by the parties, including the construction of the provisions of the contract. Now, he has construed the clause applicable to compensation or penalties for delay in the execution of the works in a way which has led him to the conclusion that there had been such delays as warranted him in awarding the penalties. That was a matter of which he was made sole judge according to the terms of the contract, and I agree with your Lordship that the mere fact that it is unjust, as the contractors allege it to be, is not a ground on which we as a Court can review or alter the judgment of the arbiter. We have no right to do so. And upon that ground I agree that the Lord Ordinary has come to a right conclusion, and that the contractors here are not entitled to any further deduction from the sum that has been fixed by the arbiter.

Lord Shand—I agree with your Lordship in thinking, with reference to the points other than head sixth, which formed the subject of discussion, that the argument maintained on behalf of the reclaimers does not require to be specially dealt with. I think the Lord Ordinary has disposed of all these points satisfactorily.

The only question which I think attended with some difficulty is that under head sixth, and we

had a very full argument with reference to the subject there dealt with. It was maintained that the Court should look at the contract itself, and should determine its meaning. I am bound to say, as the result of the argument, that if the construction of the contract lay with the Court I should have had the utmost difficulty in adopting the view that the arbiter has taken. On the contrary, I should have been clearly of opinion that the meaning of the contract would not justify the award that he has given. But parties have excluded the Court from considering the meaning of the contract. It has been left to the arbiter expressly to decide all questions regarding the true intent, meaning, and construction of the contract with reference to the settlement of all these claims; and that being so, I am of opinion with your Lordships that we cannot get behind that award, and on that ground I agree in thinking that we must adhere to the Lord Ordinary's judgment.

LORD ADAM concurred.

The Court adhered.

Counsel for the Pursuers—Johnstone—Law. Agents—Alexander Campbell, S.S.C.

Counsel for the Defenders—D.-F. Balfour, Q.C. —Ferguson. Agents—Gordon, Pringle, Dallas, & Company, W.S.

Wednesday, July 17.

OUTER HOUSE.

[Lord Kyllachy, Ordinary on the Bills.

ROSE, MURISON, & THOMSON *v.* GOURLAY (WINGATE, BIRRELL, & COMPANY'S TRUSTEE).

Guarantee—Jus quæsitum tertio — Action on Guarantee by One not being Person to whom Guarantee Originally Given.

A firm gave certain guarantees addressed to an underwriters' association, for the transactions of certain underwriters, who thereafter entered into policies with certain other underwriters and brokers belonging to the association. There was no reference to the guarantees in the policies. The firm and the underwriters who underwrote the policies having been sequestrated—*held* (by Lord Kyllachy and *acquiesced in*) that the insured had a title of the nature of a *jus quæsitum* to enforce the guarantees by being ranked as creditors under them against the firm's estate.

Guarantee—Partnership—Change in Firm.

In 1871 a firm of insurance brokers granted a guarantee in the ordinary course of business for the transaction of an underwriting. At that time the firm consisted of two partners. One partner died, and thereafter the other conducted the business under the same name, and took over the assets and liabilities. After a time he assumed his son into partnership, and the business thereafter continued to be carried on under the same name. There was no agreement excluding liability for the underwriters' transactions. The underwriters having failed—*held* (by Lord Kyllachy and *acquiesced in*), in a question between the firm and the holders of policies underwritten by them, that the guarantee of 1871 was available against the firm.

The estates of the firm of Wingate, Birrell, & Company, marine insurance brokers, underwriters, and shipowners, Glasgow, and Walter Birrell and James Aitken Birrell, the partners thereof, were sequestrated in 1888. John Gourlay, C.A., was appointed trustee.

Claims were lodged in the sequestration by Rose, Murison, & Thomson, insurance brokers. They claimed a ranking in respect of certain policies of insurance, of which they were the holders and indorsees. These policies were underwritten by (1) Walter Birrell, (2) James Aitken Birrell, (3) George G. Birrell, and (4) Peter M'Ara, and the claim was made in respect of certain guarantees alleged to have been granted by the bankrupt firm or its predecessors in business trading under the same name.

The following were the material facts with regard to the claims—Rose, Murison, & Thomson were members of the "Glasgow Underwriters' Room," a body composed of brokers and underwriters, in which a great part of the underwriting business in Glasgow was done. The Underwriters' Room was governed by bye-laws. The underwriters there meeting did business only with each other—that is, with members admitted by the Committee of Admission, a committee whose business it was to see to the financial position of candidates for admission. This committee, if not otherwise satisfied, required a guarantee, which was generally granted by a broker who was to act for the applicant, and held his mandate for that purpose.

Policies underwritten by the "guaranteed members" did not bear any reference to the guarantee, but such policies were accepted, if not always in the knowledge of and in reliance on the guarantees, yet always in reliance on the fact that all underwriters who were admitted had to satisfy the committee by guarantee or otherwise of their ability to fulfil their engagements.

The firm of the bankrupts Wingate, Birrell, & Company was founded in 1860, the partners being the late Mr Wingate and Mr Walter Birrell. Walter Birrell did not become a member of the "Room" till 1862, when he was admitted by committee a member thereof on a letter addressed to the secretary of the "Room," and which was to this effect—"We acknowledge that we are responsible for the underwriting account carried on by us in the name of our Mr Birrell.—We remain, &c., WINGATE, BIRRELL, & COMPANY."

In 1871 Wingate, Birrell, & Company granted to the secretary a letter of guarantee for the liabilities underwritten by James A. Birrell, Walter Birrell's son, who was then admitted to the "Room."

Mr Wingate died in 1877. Mr Walter Birrell took over the assets and liabilities of the firm, and continued business in the same name.

On 1st January 1880 Walter Birrell assumed his son James A. Birrell into partnership. The business still continued to be carried on under the firm name of Wingate, Birrell, & Company.