them from the conclusions of the action, with expenses.

Counsel for the Pursuer—Dewar. Agent—Daniel Turner, L.A.

Counsel for the Defenders—Jameson—Salvesen. Agents — Boyd, Jameson, & Kelly, W.S.

Thursday, July 20.

FIRST DIVISION.

[Lord Kincairney, Ordinary.

G. MACKAY & SON *v.* POLICE COMMISSIONERS OF LEVEN.

Arbitration — Contract — Clause of Reference.

A firm of contractors offered to construct certain waterworks in terms of a specification issued by the police commissioners of a burgh, which provided that the contractor would get possession of ground "immediately after acceptance of tender," and that he must enter into a formal contract. The tender was accepted on 11th September 1889, and a formal contract was thereafter executed between the parties, which, while declaring that the specification was incorporated therewith, provided that the commissioners reserved right "to appoint the time when the second parties may enter on the lands and proceed with the works." The contract further provided that in the event of any dispute arising between the parties "in relation to the execution, construction, or completion of the said whole works contracted for, or any of them, or any part or portion thereof, or as to the quality or quantity of the work or the materials thereof, or as to the settling of accounts, or as to any points or matter whatever in regard to the works, or as to the contract, or the true intent, meaning, or effect thereof, or of the plans, drawings, specification, or conditions," the same should be referred to the decision of an arbiter named.

The contractors did not get entry to any part of the lands until June 1890, and they subsequently claimed damages from the commissioners on the ground that the latter were bound to have given them entry on acceptance of their tender, or shortly thereafter, and that they had failed to give timeous entry in terms of the contract. They maintained that the question whether timeous entry had been given should be referred to the arbiter.

Held that that question did not fall to be referred to the arbiter, in respect (1) that the clause of reference did not give the arbiter power to assess damages, and that it only gave him power to determine the meaning of the contract, where such power was necessary to enable him to decide points of dispute specially referred to him by that clause; and (2) that the pursuers had not made any relevant statement of a dispute as to the meaning of the contract—*diss.* the Lord President, who *held* that a question was raised as to the meaning of the contract, and that it fell to the arbiter to decide it.

In July 1889 the Police Commissioners of the burgh of Leven, through their engineers Messrs Leslie & Reid, issued a specification of the work to be done in connection with the execution of proposed waterworks for that burgh, and invited tenders. The specification contained, *inter alia*, the following general conditions—"The contractor will get possession of the ground immediately after acceptance of the tender (p. 4 of App.) . . . He must enter into a regularly stamped contract containing all the ordinary legal clauses."

By letter, dated 10th August, G. Mackay & Sons, contractors, offered to construct the works, and their offer was accepted by the Police Commissioners on 11th September 1889.

A formal contract was subsequently concluded between the parties, of date 4th and 14th October. This contract proceeded on the narrative that Mackay & Sons had offered to construct the works in terms of the specification, "which specification, with the general clauses therein stated, is hereby incorporated as part of these presents;" that the Commissioners had decided not to proceed in the meantime with a certain branch pipe, but to have the other works "carried out now;" that Mackay & Sons had agreed to execute the whole works in accordance with the conditions stated in the specification and contract, and that the Commissioners had accepted their offer, provided that Mackay & Sons had therefore become bound, and thereby bound and obliged themselves, to complete the works to the satisfaction of the Commissioners or their engineers Leslie & Reid, according to the true intent and meaning of the specification, plans, and contract, "providing always (p. 9 of App.) that the first parties (the Commissioners) reserve right to appoint the time when the second parties (Mackay & Sons) may enter upon the lands and proceed with the works, the second parties being entitled to a similar extension of time to complete the works," as that between 1st September 1889 and the date when entry was given. On their part the Police Commissioners bound themselves to pay the stipulated price. The contract further provided as follows—"And it is hereby provided and declared that in the event of the said works being stopped by interdict or other legal proceedings at the instance of any party, and damage arising thereby to the said second parties for which the first parties may be responsible, the amount to be awarded to the second parties on account of such damage shall be ascertained, and is hereby referred to arbitration as after provided for: And in the event of any dispute or difference arising between the said first

and second parties, or the said J. & A. Leslie & Reid and the said second parties, in relation to the execution, construction, or completion of the said whole works contracted for, or any of them, or any part or portion thereof, or as to the quality or quantity of the work or the materials thereof, or as to the settling of accounts, or as to any points or matter whatever in regard to the works, or as to the contract, or the true intent, meaning, or effect thereof, or of the plans, drawings, specification and conditions, the same shall be submitted and referred to the amicable decision, final sentence, and decreet-arbitral of Alan Brebner, civil engineer, Edinburgh, whom failing by death, resignation, incapacity, or other cause, to Robert Carstairs Reid, civil engineer, Edinburgh; and the decree or decrees-arbitral, interim or final, of the said arbiter shall be final and binding on all parties."

The Police Commissioners did not give Mackay & Sons entry to any part of the ground until June 17th 1890, and to the remainder of the land entry was not given until September 13th of that year or later.

In October 1892 Mackay & Sons raised an action against the Police Commissioners of Leven, concluding for declarator that the defenders were bound to join with the pursuers in submitting the following claims by the pursuers against them, viz., (1) a claim for £1470, 17s. 3d., as the balance due by the defenders on account of work executed under the contract of 4th and 14th October 1892; and (2) a claim of damages for £3255, 4s. to Robert Carstairs Reid, the surviving arbiter named in the contract, and for decree ordaining them to do so, and to pay the sums which the arbiter might find due, or otherwise to pay the sums sued for.

With regard to the first claim mentioned in the summons no question arose, as the defenders admitted that it fell under the arbitration clause.

With regard to the second claim the pursuers (to whose record considerable amendments were added in the Inner House) made, *inter alia*, the following averments—"(Cond. 3) The specification of the works declared that the contractor will get possession of the ground required for the execution of the works immediately after acceptance of tender; and the said letter of acceptance stated, 'You can begin to make preparations for a start;' and at a meeting which took place in Edinburgh soon after 11th September 1889 between the pursuers and the engineers, the latter advised the pursuers to . . . make all necessary arrangements for proceeding with the works forthwith. The said contract of 4th and 14th October 1889 likewise described the works as to be 'carried out now.' (Cond. 4) The pursuers accordingly, immediately after said 11th September 1889, . . . ordered materials and furnishings, and engaged assistants and men, and otherwise incurred expenses, . . . all with the view of executing the contract. Immediately on the acceptance of their tender the pursuers were entitled to enter upon the execution of the contract, . . . and in point of fact they did so. The defenders as well as the pursuers treated the contract from the said acceptance as in course of execution, the engineers of the defenders passing certificates for payment of sums to account of the cost thereof, which were met by the defenders. (Cond. 6) It was the duty of the defenders under the contract above-mentioned to give the pursuers entry to the ground immediately on the contract being concluded on 11th September 1889, or immediately after the date of the formal contract; or at all events, within a reasonable time thereafter. . . . The defenders, however, in breach of their contract, failed to give the pursuers entry to any portion of the lands until 17th June 1890, and it was not until 13th September 1890 that they got possession of any portion of the land through which the pipe-track was to pass, entry being given as regards the remainder only on 17th November 1890. (Cond. 7) Had reasonable diligence been used, the defenders could quite well have made such arrangements as would have enabled them to give the pursuers entry to the lands, but this they failed to use. They frittered away the time in vexatious disputes with the proprietor and his tenants, and in frivolous disagreements among themselves . . . and it was not until long after the formal contract had been signed that they took any steps to enable them to give the pursuers entry to said lands. . . . (Cond. 11) In consequence of the defenders' failure to give the pursuers entry to the lands in question in terms of the contract, the pursuers have sustained . . . loss and damage as per account produced . . . to the extent of £3255, 4s." The pursuers also averred that before proceeding with the works, they had reserved their right to claim damages for the delay which had occurred.

The defenders in answer denied that the delay had been caused by any fault of theirs, or that the pursuers had suffered any loss through their fault. They explained that they had pressed forward the statutory proceedings necessary to enable them to enter on the lands with the utmost despatch, and were unable owing to the position taken up by the proprietor of the ground to give the pursuers entry sooner than they did.

The defenders pleaded—"(1) The pursuers' averments are irrelevant. (5) The declaratory and first petitory conclusions of the summons are incompetent as regards the sum second sued for, in respect that the said claim, assuming it to be well founded, does not fall within the clause of reference."

On 17th January 1893 the Lord Ordinary (KINCAIRNEY) pronounced this interlocutor:—"Finds that the claim for £3255, 4s. does not fall within the clause of reference in the contract libelled, and that the defenders are not bound to submit the said claim to Robert Carstairs Reid as arbiter under said clause: Finds that there are no relevant averments in support of the alternative claim for said sum: Therefore assoilzies the defenders from the conclusions of the action so far as they bear on said sum, and decerns: Finds it admitted that the

claim for £1470, 17s. 3d. falls within said clause of reference; and sists the process in order that the parties may submit said claim to the said arbiter.

"*Opinion.*— . . . No substantial question arises as to the first claim. The defenders admit that the claim falls under the clause of reference in the contract founded on, and must be decided by the arbiter.

"But the defenders maintain (1) that the second claim does not fall within the reference; and (2) that there is no relevant averment in support of it.

"I agree with the defenders on both points. I think the record open to very serious criticism, but on asking the pursuers' counsel whether he wished an opportunity of amending it, was informed that he could not make it any better.

"The contract is for the execution of waterworks in the town of Leven. In support of the second claim it is averred that it was the duty of the defenders to give the pursuers entry to the ground immediately after 11th September 1889, but that they were not allowed to enter on the ground required for the reservoir until 17th June 1890, nor upon the lands under which the pipe-tracks were to be laid until 30th September 1890—when they got access to a part of the lands—and 17th November, when they got access to another part. They say that 'the delay in giving the pursuers possession of the ground was due to the fault and breach of contract of the defenders.' Then the record refers to another part of the work, but it was admitted at the debate that no claim could be made on that ground. It is then said that 'in consequence of the breaches of contract or fault on the part of the defenders above narrated, the pursuers have sustained loss and damage as per account No. 2.'

"That is all that the record says on the matter. For the nature and extent of the damage it is necessary to go to the account No. 2, in which a claim of a very extraordinary kind is stated. But whether that claim be unconscionable and extravagant or not is not the question. Whatever *prima facie* impression one may form of it, it would require to be considered and examined if a relevant ground for it were alleged. It is said that the pursuers' right to make this claim was reserved before they entered on the works in June 1890, and it is not said to be barred.

"The clause of reference founded on is as follows—[*His Lordship quoted the clause*].

"In the first portion of that clause it is expressly provided that if damage should arise to the contractors from the causes there specified, the amount of damages to be awarded to the contractors should be ascertained by the arbiter. Express power is given to the arbiter to assess damages in the particular event there stated. That event had not occurred, and that part of the clause does not apply. The pursuers do not contend that it does. There is no power conferred on the arbiter to assess damages in any other case. Now, in this case the summons concludes for nothing in its second conclusion except that the defenders shall be decerned to submit to the arbiter a claim for damages. It is not averred—at least with any distinctness—what the question is on this point which has arisen between them, which the pursuers desire to submit to the arbiter. The action, so far as concerns the second conclusion, is brought for no other purpose than that the arbiter shall assess a claim of damages.

"Now, I understand that this is precisely what an arbiter cannot do without express powers. It was so decided in *Blaikie Brothers* v. *The Aberdeen Railway Company*, June 17, 1852, 15 D. (H. of L.) 20, the fullest report of which is to be found in 24 Jurist, 537. In the important judgment of Lord Rutherfurd Clark in *Mackay* v. *The Parochial Board of Barry*, June 22, 1883, 10 R. 1046, in which the other Judges concurred, his Lordship says expressly, 'without express power an arbiter cannot assess damages,' p. 1050. In *M'Alpine* v. *The Lanarkshire and Ayrshire Railway Company*, November 25, 1889, 17 R. 125, Lord President Inglis, in considering whether a claim fell under a clause of reference, says—'There is another most important objection to holding this claim of damages to be within the reference clause, because the claim being one of damages, the arbiter, or referee, or engineer, or whatever he may be called, is not empowered to assess damages, and unless he is expressly empowered to assess damages he cannot do so. This was fixed by the judgment of the House of Lords in the case of *Blaikie* v. *The Aberdeen Railway Company*.'

"The pursuers referred to *Levy & Company* v. *Thomsons*, July 10, 1883, 10 R. 1134, in which a claim for damages was held to come under a clause of reference, but in that case there was no question as to assessing damages because the damages were liquidated by the contract.

"So standing the authorities, I am bound by authority to hold that the arbiter in this case has no power to assess damages, although I do not see clearly on what principle this limitation of an arbiter's powers depends.

"Now, in this case I am not asked to order the defenders to submit any question or difference to the arbiter, but only to ordain them to submit this claim of damages.

"I am further disposed to hold that this claim of damages does not fall within the words of the reference, although the words of the reference are very wide, and if the arbiter had had power to assess damages I might have had a difficulty on this point.

"There remains the alternative claim of the pursuers for damages without reference to the clause of reference.

"The defenders meet this claim by reference to a clause in the contract by which it is provided 'that the first parties reserve right to appoint the time when the second parties may enter on the lands and proceed with the works.

"The pursuers refer to a provision in the contract whereby the specification with its 'general clauses' is incorporated with the

contract, and to a clause in the specification which provides that 'the contractor will get possession of the ground immediately after the acceptance of the tender.' I cannot doubt that the provision in the contract qualifies this clause in the specification, and that under it the Commissioners of Police had power to fix when the works should commence. They explain their reasons for the delay which occurred, but the important point is that the pursuers do not aver that the delay was caused by any unfairness or neglect or want of diligence on the part of the Commissioners.

"I am of opinion that the bare averment that the pursuers did not get possession until June 1890 is not relevant to infer damages, because the defenders had power under the contract to delay giving possession.

"The pursuers argued that even should it be held that the defenders had power for adequate reasons to delay putting the contractor in possession of the land, that did not warrant them in giving possession piecemeal; but I do not think that a sound interpretation of the contract, and the pursuers have not averred any special damage which they suffered from not getting possession of the ground for the pipe-track at the precise time when they got possession of the ground for the reservoir.

"For these grounds I consider that the defenders are entitled to absolvitor from the conclusions of the summons in regard to their claim for £3255, 4s. I think further consideration of the action should be superseded in order to allow the parties to submit to the arbiter the pursuers' claim for £1470, 17s. 3d."

The pursuers reclaimed, and argued—The claim of the pursuers was based on the ground that they had not got timeous entry in the sense of the contract. That raised a question as to the true meaning of the contract, which fell, in terms of the clause of reference, to the arbiter to decide, even though he might not be empowered to assess the damage due—*Shotts Iron Company* v. *Dempster*, October 27, 1891, 29 S.L.R. 40. The Court would give effect to a clause of reference according to its terms—*Caledonian Railway Company* v. *Gilmour*, December 16, 1892, 30 S.L.R. 172. Further, the defenders' explanation was that the delay had been caused by the necessity of taking statutory proceedings to obtain entry to the lands. That was a "legal proceeding" in the sense of the clause of reference, and the arbiter was specially authorised to assess the damage arising thereby. Assuming the pursuers to fail in the above contention, they were entitled to go to proof on the question of damage. Under the specification and contract they were entitled to practically immediate entry, it being left to the defenders to fix the exact time at which they were to enter, and everything that had passed between the parties warranted the pursuers in believing that they were getting immediate entry. The contract did not contemplate a delay of over eight months. Such a delay was out of all reason, and the pursuers were entitled to damages for the loss occasioned to them thereby.

Argued for the defenders—The question was whether the pursuers had got timeous entry. If they had not, their remedy was to have declined to proceed with the contract. The claim was not under the contract, which left it entirely to the defenders to appoint the date of entry. Besides, the clause of reference did not give the arbiter power to assess damages except where the works were stopped by "legal proceedings." The statutory proceedings necessary for the acquisition were clearly not "legal proceedings" in the sense of that clause. The claim being one of damages could not therefore be dealt with by the arbiter—*M'Alpine* v. *Lanarkshire and Ayrshire Railway Company*, November 26, 1889, 17 R. 113. Assuming that the claim was not to be referred to the arbiter, the pursuers had stated no relevant case to be admitted to proof.

At advising—

LORD ADAM—This action relates to two sums claimed by the pursuers, one of £1470, 17s. 3d., and the other of £3255, 4s.

With reference to the first of these sums no question is raised under the reclaiming-note. With reference to the second, it is a claim for loss and damage alleged to have been sustained by the pursuers in respect of the defenders' failure to give them timeous possession, under the contract libelled, of the ground upon which the works contracted for were to be executed.

The summons concludes that the defenders are bound to join with the pursuers in submitting the claim to the arbiter named in the contract, or alternatively for payment of the said sum.

The Lord Ordinary has found that the claim in question does not fall within the clause of reference in the contract, and that the defenders are not bound to submit the claim to the arbiter, and he further finds that there are no relevant averments in support of the alternative claim for said sum.

I agree with the Lord Ordinary as to both findings. With reference to the first of these findings it is unnecessary to recite the clause of reference at length. It is sufficient to say that it gives no power to the arbiter to assess damages, and as the Lord Ordinary has stated in his opinion, it is settled law that an arbiter has no power to do so unless such power is specially conferred on him. But the question remains, whether the pursuers are not entitled to damages to be assessed either by the Court or a jury?

It is averred that the pursuers entered into a contract with the defenders, dated 4th and 14th October 1889, for the execution of certain work connected with a water supply to the burgh of Leven; that this contract followed upon a specification of works issued by the defenders, which contained a clause to the effect that the contractor would get possession of the

ground immediately after acceptance of tender, and unless specially excepted in the contract the works were to be completed by 1st September 1890 under a penalty, and that the pursuers' tender was accepted on 11th September 1890.

The grounds of action were set forth in the 6th article of the condescendence. It is there said that it was the duty of the defenders to give the pursuers entry to the ground immediately on the contract being concluded on 11th September 1889, or immediately after the date of the formal contract, or at all events within a reasonable time thereafter. It is then alleged that the defenders gave the pursuers entry to part of the ground only on 17th June 1890, and to the remainder on 13th September and 17th November thereafter, and that they suffered the loss, injury, and damage claimed in consequence of the defenders' delay in giving them possession of the ground.

It is therefore necessary to see what the contract provided with reference to giving entry to the ground.

The provision in the contract on that subject is in these terms—"Providing always that the first parties" (that is, the defenders) "reserve right to appoint the time when the second parties" (that is, the pursuers) "may enter on the lands and proceed with the work, the second parties being entitled to a similar extension of time to complete the works from that—between 11th September 1889 and the date when entry to the lands may be given to the second parties." I think the meaning of this provision is perfectly clear, and that the defenders thereby reserved right to fix the time when the pursuers were to receive possession of the ground, and the reason of it is equally clear, because the defenders were not themselves at the time the contract was signed in possession of the ground, and could not give possession of it to the pursuers. They were then in treaty with Mr Gilmour, the owner of the ground, with a view to getting possession, but having failed to come to an arrangement with him they had ultimately to obtain possession of it under their compulsory powers. Having so obtained possession of the ground they appointed, in terms of the contract, the 17th June as the time when the pursuers might enter on the lands and proceed with the works.

It is clear, therefore, that the defenders were not bound under the contract to give the pursuers possession, as they allege, on the 11th September, or immediately after the contract was signed, and so far as the action is laid upon that ground it is without foundation.

But then it is said that the defenders were bound to give the pursuers possession, "at all events within a reasonable time thereafter," *i.e.*, after the contract was signed.

The defenders might no doubt have been guilty of such conduct, and caused so much delay as possibly to have given the pursuers a claim of damages on this ground, but I am clearly of opinion that no such facts are averred on this record. All that appears to be averred is, that if the defenders had been more conciliatory in their negotiations with the proprietor, or had used greater diligence in pressing on the legal procedure necessary to their obtaining possession of the ground, they would have obtained possession of it at an earlier period than they in fact did. But it is not said that they acted in any way unfairly, or for the purpose of delay in acquiring possession of the ground. I cannot think that such averments are relevant to support an action of damages against the defenders, and therefore I concur in the Lord Ordinary's interlocutor on this point also.

But the pursuers further maintained that any dispute "as to the contract, or as to the true intent, meaning, or effect thereof" was referred to the arbiter—that the arbiter might hold, on the construction of the contract, that the defenders were bound, as the pursuers contend, to have given them possession on the 11th September, or immediately after the contract was signed, and if he so held, then that the action of damages would be well founded, and that it would be the duty of the Court in that case to assess the damages, and therefore that it was the duty of the Court to ascertain the opinion of the arbiter on this point before disposing of the case.

But, as has been already pointed out, this is not a claim which is by the contract referred to the arbiter. It is a claim for damages for breach of contract over which he has no jurisdiction, but which the Court alone has jurisdiction to entertain.

The construction of a contract is a matter of law, and it would seem to be rather an anomalous proposal that the Court, which alone has jurisdiction in the case, should be required to remit the case to an engineer to instruct them as to the law applicable to the case, and to decide the case according to his opinion, no matter how erroneous they might consider it.

But the question is, what is the true construction of the clause of reference? Was it the intention of the parties to refer the meaning of the contract to the arbiter in all possible cases which might arise between them, or only in cases arising under the contract, and which were thereby referred to his decision, and for the purpose of enabling him to expiscate his jurisdiction? I think the latter is the correct view, and that the words any dispute or difference arising "as to the contract, or the true intent, meaning, or effect thereof," are to be read with reference to and in connection with the preceding words of the clause, and are controlled by them. I am therefore of opinion that the Court is not required in this case to ascertain the arbiter's opinion of the meaning of the contract.

But assuming this construction of the clause to be erroneous, I am disposed to think that it is not enough for the pursuers merely to say that there is a question at issue between the parties as to the meaning of the contract to have the case sent to the arbiter for his opinion. The

Court are entitled and bound to see that such a question is truly raised. On this point I may refer to the cases of *Pearson* v. *Oswald*, 21 D. 419; *Mungle's Trustees*, 10 Macph. 901; *Parochial Board of Greenock* v. *Coghill's Trustees*, 5 R. 702; and *M'Alpine* v. *Lanarkshire and Ayrshire Railway Company*, 17 R. 125, and particularly to the observations of Lord Shand in that case.

Now, I doubt whether any proper question as to the meaning of the contract is raised in this case. It appears to me that the meaning of the contract is perfectly clear, to the effect that the defenders reserve to themselves the power of fixing the time of giving the pursuers entry to the lands. The pursuers' contention that the defenders were bound to give them immediate possession does not appear to me to raise any proper question as to the meaning or construction of the contract, but to be contradictory of it. It may well be that the defenders had, by their own actings, or those of their servants, become bound to give the pursuers immediate entry, but that would not raise any question as to the meaning or construction of the contract.

On the whole matter, I am of opinion the Lord Ordinary's interlocutor should be adhered to.

LORD M'LAREN concurred.

LORD KINNEAR—I am of the same opinion. The first conclusion of the summons to which we are asked to give effect is that the defenders shall submit to arbitration a claim for £3000 odd, for loss and damage sustained by the pursuers. Now, it is impossible to give effect to that claim unless we hold that the arbiter has been expressly empowered to assess damages on the ground upon which this sum is claimed, because I think it is settled law, upon the authorities to which Lord Adam has referred, that if there be no express power to assess damages, such assessment is not within the jurisdiction of the arbiter. Now, in this contract there is an express reference to the arbiter for the purpose of assessing damages in the event of the works being stopped by interdict or any other legal proceedings at the instance of some third party, and damage arising thereby for which the other parties to the contract are liable; and an argument was suggested, rather than seriously maintained, that the claim for damages now in question might be brought in under that part of the clause of reference. Whether such a claim could be sustained under that part of the clause of reference is a question which it is not for the arbiter to decide, for it is not for him to define the limits of his own jurisdiction. I am very clearly of opinion that the claim now in question is not within that part of the clause, and cannot by any construction be brought within it. The claim which the pursuers now make is not for damages arising from interference with their works, after they were begun, by legal proceedings at the instance of some one whose legal claims had not been previously satisfied by the Commissioners, but it is for damages arising from the failure of the Commissioners themselves to give entry in accordance with what the pursuers allege to be their obligation in the contract to the land in question. Now, it is quite certain that there is no power given to the arbiter in the contract to assess damages upon any such ground as that, and therefore it appears to me to be out of the question to sustain the first conclusion of the summons.

But then, if that conclusion be not sustained, the pursuers ask the Court to determine the question of the defenders' liability for damages for itself, and to give decree for a sum of money in name of damages upon a consideration by the Court itself of the grounds upon which the claim is rested. That appears to me to make it absolutely indispensable for the Court to make up its own mind as to the relevancy of the averments upon which the claim for damages is put forward. It may be—and I think the case of *Blaikie* is an authority for it—that though an arbiter has no power to assess damages, the question whether liability for damages is incurred may be within his exclusive jurisdiction, and it may be also that while the Court is called upon to consider for itself the main question at issue between the parties, subordinate questions may arise in the course of that consideration which the Court cannot decide for itself, but must leave to the arbiter, and so it may be only when his judgment upon these questions has been ascertained that the Court can proceed to apply its mind to and come to its own conclusion upon the main points in dispute. And accordingly, as I understand the argument, the pursuers' contention is, that while we must consider whether there is a relevant claim for damages averred or not, as soon as we find that the relevancy of that claim depends upon the construction of the contract between the parties, we must hold our hands and ask the arbiter what the contract means, and that it is only when we have ascertained his opinion upon that legal question that we can proceed to say whether a claim for damage has arisen, and calculate the damage the party is entitled to receive. Now, that argument, as I understand, depends entirely upon the general words of the second branch of the clause of reference, by which there is referred to the arbiter any dispute or difference as to the contract, or the true intent, meaning, and effect thereof. I agree with Lord Adam, for the reasons he has given, that these general words must be defined by reference to the previous enumeration of particulars, and that their true intention is to give the arbiter power, in order to his deciding effectually the questions that have been submitted to him, to determine the true meaning and effect of the contract with reference to these questions. I do not think it was intended to give the arbiter power to determine any academic questions as to the construction of the contract. The power is given to enable him to explicate the jurisdiction

which the parties undoubtedly intended to confer upon him. But if it were possible or reasonable to put a wider interpretation upon these words, then I should still hold that in order to exclude the jurisdiction of the Court, and require us to send any question to the arbiter, it is indispensable to the pursuers to define specifically what is the dispute, and the difference as to the meaning of the contract which he says the Court cannot determine, and which they ought to send to the arbiter. Now, upon reading this record I find no relevant statement of any such dispute or difference. What the pursuers aver is, that under the contract it was the duty of the defenders to give them entry, but they do not base that averment upon any particular clause of the contract, and when we come to read the contract for ourselves, and find that the defenders have reserved right to fix the time when the pursuers may enter upon the land and proceed with the works, I do not find that the pursuers maintain that there is any specific meaning attached to these words different from that which they plainly bear, or that there is any difference or dispute between them and the other party as to what is really meant. It appears to me, therefore, that there is no question raised between the parties as to the meaning or effect of the contract.

It may be that notwithstanding the reserved right of the defenders to give entry at such time as may be convenient for themselves, they may yet be bound to use all reasonable diligence in fulfilling their part of the contract, and therefore if they have unreasonably withheld that, or have caused the pursuers delay by negligence or fault of theirs, there might be a claim of damages. But then that is not a claim which raises any question as to the meaning and effect of the contract. It would depend upon the legal obligations arising out of the relation between the parties, and I do not think that claim is referred to arbitration.

Then, again, there might have been a claim founded upon the conduct of the defenders themselves or persons in their employment, and there are averments upon record on which it is maintained that the defenders are responsible for damages, because the pursuers were induced to believe that they would get entry at an earlier date than the defenders were able to give it them. I do not see that that is a matter which raises any question of difference as to the meaning and effect of the contract between the parties. The claim of damages appears to me therefore to stand upon grounds which are entirely separate from any question that can be suggested between the parties as to the meaning of any clause in this contract.

For the reasons Lord Adam has given, and concurring also with the Lord Ordinary, I am of opinion that the averments upon which the claim of damages is founded are irrelevant, and if the question is to be decided, as I think it must be, by the Court without reference to the arbiter, I agree with the Lord Ordinary that the defenders should be assoilzied.

LORD PRESIDENT—I agree with your Lordships in holding that the claim of damages in question is not one which the arbiter is empowered by this contract to give effect to. If it follows from this that the contract cannot have submitted to the arbiter the question as to its meaning and effect on which the existence of a claim of damages depends, and if we are therefore to consider and determine that question of construction, then I am entirely of the same mind as your Lordships that the claim is bad.

I am, however, by no means so clear that this question of the construction of the contract, even although arising in an action of damages, is not for the arbiter, and that it is not our duty to remit it for his decision, and then, in the event of his deciding it in favour of the pursuers, to have the amount of damages ascertained in this Court. The arbitration clause in the contract purports to submit to the arbiter any dispute or difference which may arise as to the true intent, meaning, or effect of the contract. The structure of the clause seems to me to give their inherent strength and latitude to those words; I do not think that there is anything to warrant the view that they are subordinate and ancillary to the preceding words about the execution of the works. The question then is—Is there here a dispute about the meaning and effect of the contract? and I do not see how better anyone could describe the debate we heard at the bar on the combined effect of the clauses which were the text of the discussion—the one on p. 4, and the other on p. 9 of the appendix—than as a dispute or difference about the meaning and effect of the contract. Nor does the fact that this dispute takes place in a lawsuit, or incidentally to a lawsuit, seem to furnish any reason for holding that the reference clause does not apply. What the parties intend to bind themselves to is the contract, whatever Mr Brebner or Mr Reid holds it to import, and a lawsuit is a very natural occasion for this stipulation to come into play. That this view is consistent with decision and high legal authority appears from the two cases of *Blaikie Brothers*, cited by the Lord Ordinary; and *Tough* v. *The Dumbarton Waterworks Commissioners*, 11 Macph. 236. In the latter case there were several heads of claim; but that to which I refer is dealt with by the Lord President (Inglis) in the following paragraph of his judgment (p. 242)—"In regard to the other claim of damages for £500 for failure to give timeous access to the ground, it may be very doubtful whether this is within the clause of reference. A great deal will depend upon the circumstances. It may depend on the meaning of the contract; and in that case it will be necessary to go to the arbiter. But, in any event, this claim for £500 cannot be given effect to by the referee, and can only receive effect in this or some other Court."

Of course, in those cases to which I have referred, as in this case, the primary question is as to the construction of the arbitra-

tion clause—what is its intended scope? If, on its fair reading, the parties have agreed to refer to the arbiter every dispute or difference about the meaning and effect of the contract, whensoever and whereso-ever such dispute or difference may arise, then there is no rule or principle of law to defeat such agreement. In the present case, if the words of the contract on which the claim for damages turns had been technical words, or words descriptive of material, we should, I am pretty sure, have applauded the good sense of the parties in binding themselves in the contract to the construction to be adopted by an engineer; remitted to the arbiter to state the true meaning and effect of the contract on the matter in hand; and, taking his word for the soundness of his decision, have gone on to get damages assessed if he was in favour of the pursuer. And yet the warrant for so doing would have been the very words of reference now in question, which cannot have a different meaning when they result in getting the arbiter to decide on a question for which we think him less qualified.

On these grounds I should, had your Lordships not thought differently, have considered that we are bound to remit to the arbiter to decide as to the effect of the contract in regard to the time for giving possession of the works. I have stated my own view, because these questions about the effect of arbitration clauses perpetually recur. But so far as the interests of the parties to this suit are concerned, it is satisfactory that we are all agreed that (by whomsoever to be adjudged on) the claim is bad in law.

The Court adhered.

Counsel for the Pursuers—Salvesen—Clyde. Agent—J. Smith Clark, S.S.C.

Counsel for the Defenders—Vary Campbell—Dundas. Agents—Drummond & Reid, S.S.C.

Thursday, July 20.

FIRST DIVISION.

SOCIETY OF SOLICITORS IN THE SUPREME COURTS OF SCOTLAND *v.* OFFICER.

FACULTY OF PROCURATORS OF GLASGOW *v.* LANG.

Law Agent—Misconduct—Suspension—Law Agents (Scotland) Act 1873 (36 *and* 37 *Vict. c.* 63), *sec.* 22.

In May 1887 a divorce suit was pending in the English Courts at the instance of M., a domiciled Englishman, against his wife and a co-respondent C., which did not seem likely to result in decree in favour of the plaintiff. C. wishing to marry Mrs M., with whom he was then living in adultery at Ayr, consulted L., a procurator in Glasgow, as to the possibility of having the lawsuit dropped in England and an action instituted in Scotland. M. consented to this being done provided his whole expenses were paid by C. L., who throughout acted for the three parties, received an opinion of counsel upon an A B case that decree could only be obtained by a careful suppression of facts. He thereupon took an office in Glasgow for M., who never entered it, and only came to Glasgow over the end of two weeks. L., to avoid C. being recognised, also arranged that he and Mrs M. should live together in Glasgow under the name of Mr and Mrs R. for the purpose of establishing adultery against them there, and of there serving the summons upon Mrs M. The summons designed M. as a tea merchant in Glasgow, referred to C. under the name of R., and contained no allusion to England or the English suit. O., the Edinburgh agent, through whom the opinion in the A B case had been obtained, and with whose office L. communicated throughout the summer and autumn of 1887, became aware of the real facts of the case at least in November 1887, when he protested against adultery being arranged. Nevertheless he allowed the case to remain in his office, where the final summons, after four drafts, was prepared. The correspondence in connection with the case, although signed by him, was left to his principal clerk, and he handed over the summons for signature and calling to another agent, but he himself arranged for the pursuer going to the Parliament House to take the oath of calumny, and his clerk attended the proof, which resulted in decree in favour of the pursuer.

The Court *held* that both L. and O. had been guilty of misconduct as law-agents under the 22nd section of the Law Agents Act 1873, and *suspended* them from practising as law-agents for one year.

Decree of divorce was pronounced upon 10th March 1888 by Lord M'Laren in an undefended action at the instance of Norfolk Bernard Megone, tea merchant, West Nile Street, Glasgow, against Rosalie Barlow or Megone, his wife, who was found to have lived in adultery with "Joseph Richards" at 365 Sauchiehall Street, Glasgow, for some time from 6th December 1887 onwards. Counsel for the pursuer was Mr John Rhind, the Edinburgh agent was Mr William Officer, S.S.C., and the Glasgow agent was Mr John Stuart Lang, a member of the Society of Procurators, Glasgow. Richards, whose real name was Louis Clovis Bonaparte, and Mrs Megone went through a marriage ceremony on 30th March 1888, and in 1892 Richards raised an action in the High Court of Justice in England against Mrs Megone to have his marriage with her declared null, on the ground that at the date of the ceremony she was still Megone's wife.