for his trustees, was in his contemplation when he made the provision about expenses in the earlier part of the settlement.

LORD DUNDAS was sitting in the Justiciary Court in Glasgow.

The Court answered the first question in the affirmative, and the second question by declaring that the second parties were entitled to divide among the first parties the residue of £900.

Counsel for the First Parties—Ballingall. Agents—W. & W. Saunders, S.S.C.

Counsel for the Second Parties—Wilton. Agents — Cairns, M'Intosh, & Morton, W.S.

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*Thursday, February 27.*

## FIRST DIVISION.

[Sheriff Court at Glasgow.

## UNITED CREAMERIES COMPANY, LIMITED *v.* DAVID T. BOYD & COMPANY.

*Arbitration — Reference to "Arbitration in Glasgow"—Application to Court to Appoint Arbiter — Proof of Custom — Arbitration (Scotland) Act* 1894 (57 *and* 58 *Vict. cap.* 13), *secs.* 1, 2, *and* 3.

A contract for the sale of oil contained an arbitration clause in these terms — "Disputes to be settled by arbitration in Glasgow." In a petition for the appointment of an arbiter under the Arbitration (Scotland) Act 1894 the petitioners averred that by the custom of the oil trade in Glasgow, where the contract provided that disputes were to be settled by arbitration in Glasgow, each party nominated one arbiter and the arbiters named an oversman. *Held* that the averment was relevant, and if proved would render the arbitration clause sufficiently specific to bring it within the scope of the Act, that the reference therefore was not invalid, and proof *allowed.*

*Sheriff — Arbitration — Process — Application to Appoint Arbiter—Summary Procedure — Competency — Arbitration (Scotland) Act* 1894 (57 *and* 58 *Vict. cap.* 13)—*Sheriff Courts (Scotland) Act* 1907 (7 *Edw. VII, cap* 51), *sec.* 3 (*p*).

A contract for the sale of oil contained an arbitration clause in the following terms: — "Disputes to be settled by arbitration in Glasgow." One of the parties to the contract having refused to nominate an arbiter, the other party presented a petition in the Sheriff Court for the appointment of an arbiter under the Arbitration (Scotland) Act 1894. The petition was in the form of a summary application within the meaning of the Sheriff Courts Act 1907 and was so dealt with by the Sheriff, who allowed the petitioner a proof of his averment, that by the custom of the oil trade in Glasgow such a clause meant that each party nominated one arbiter and the arbiters named an oversman.

The Court *allowed* the case to proceed, but *transferred* it to the ordinary Court, *observing* that summary procedure was in the circumstances inappropriate, and that the petition should have taken the form of an ordinary action in which the evidence would have been recorded and there would have been an appeal as of right.

The Arbitration (Scotland) Act 1894 (57 and 58 Vict. cap. 13) enacts—Section 1—"From and after the passing of this Act an agreement to refer to arbitration shall not be invalid or ineffectual by reason of the reference being to a person not named, or to a person to be named by another person, or to a person merely described as the holder for the time being of any office or appointment."

Section 2—"Should one of the parties to an agreement to refer to a single arbiter refuse to concur in the nomination of such arbiter, and should no provision have been made for carrying out the reference in that event, or should such provision have failed, an arbiter may be appointed by the Court, on the application of any party to the agreement, and the arbiter so appointed shall have the same powers as if he had been duly nominated by all the parties."

Section 3—"Should one of the parties to an agreement to refer to two arbiters refuse to name an arbiter in terms of the agreement, and should no provision have been made for carrying out the reference in that event, or should such provision have failed, an arbiter may be appointed by the Court, on the application of the other party, and the arbiter so appointed shall have the same powers as if he had been duly nominated by the party so refusing."

The Sheriff Courts (Scotland) Act 1907 (7 Edw. VII, cap. 51) enacts—Section 3 (*p*)—"'Summary application' means and includes . . . all applications, whether by appeal or otherwise, brought under any Act of Parliament which provides, or, according to any practice in the Sheriff Court, which allows that the same shall be disposed of in a summary manner, but which does not more particularly define in what form the same shall be heard, tried, and determined."

First Schedule, Rule 4—"The warrant of citation shall be as nearly as may be—(*a*) In summary causes and summary removings, and also in summary applications when citation is necessary, and in cases under the Workmen's Compensation Act, in the form B hereto annexed; (*b*) in all other causes in the form C hereto annexed."

On 10th August 1911 the United Creameries Company, Limited, Dunragit, Wigtownshire, *pursuers*, presented a summary application in the Sheriff Court at Glasgow against David T. Boyd & Co., 50 Wellington Street, Glasgow, *defenders*, in which, after setting forth that the defenders had refused to nominate an arbiter to act with

their (the pursuers') arbiter in settling a dispute between them, they craved the Court to appoint an arbiter under the Arbitration (Scotland) Act 1894.

The contract under which the dispute had arisen—which was one for the sale by the defenders to the pursuers of 400 barrels American prime summer yellow cotton seed oil—contained an arbitration clause in the following terms:—"*Arbitration.*—Disputes to be settled by arbitration in Glasgow."

The pursuers averred—"(Cond. 10) By the custom of the oil trade in Glasgow, where the contract provides that disputes are to be settled 'by arbitration in Glasgow,' each party nominates one arbiter and the arbiters name an oversman, and said disputes are settled by the decision of said arbiters or oversman. Said custom was impliedly incorporated in the contract of sale between the pursuers and the defenders."

The defenders pleaded, *inter alia*—"(1) The application is incompetent. (2) The pursuers' averments being irrevelant the application should be dismissed."

On 8th September 1911 the Sheriff-Substitute (FYFE) repelled the defenders' first and second pleas, allowed a proof, *primo loco*, of the pursuers' averment in condescendence 10, and granted leave to appeal.

*Note.*—"The defenders in the first place plead that this application is incompetent; but it appears that they do not mean all they say. What they do mean by this plea is that they take exception to the form in which the application is presented, because it is presented as a summary application in which there is no appeal except by leave of the Court. They contend that it should have been in the form of an ordinary action, where they have an appeal of right. I have no hesitation whatever in repelling this plea. The application is brought under an Act of Parliament, and according to the practice of this Court it is to be disposed of in a summary manner, and that the Act of Parliament does not forbid. It is accordingly quite clearly a summary application within the meaning of section 3 (*p*) of the Sheriff Courts Act 1907.

"The defenders' next plea is that the action is irrelevant. Under that plea they contend that the arbitration clause in the contract founded on is not in itself sufficiently specific to bring it within the scope of the Arbitration Act of 1894, and that the weakness of the arbitration clause is not cured by the averment in condescendence 10, because that averment does not allege that the custom of trade founded on was known to the defenders when they signed the contract in question.

"I think this is a very technical and somewhat fanciful plea. It means that the expression in the contract 'arbitration in Glasgow' is merely geographical, and that the clause does no more than locate the arbitration if an arbitration is otherwise competent. I think this is a far too narrow construction of the contract. It is a contract for the sale of oil, and I think that the arbitration clause—which reads 'disputes to be settled by arbitration in Glasgow'—means that the dispute is to be settled according to practice in that particular trade in that particular city. It is accordingly in my opinion quite relevant to make the averment which pursuers do in article 10 of their condescendence, and if that is established, it is, I think, sufficient to get over the difficulty illustrated in the case of *Macmillan* v. *Rowan*, 1903, 5 Fraser 317, and to bring the present case within *Douglas* v. *Stiven*, 1900, 2 Fraser 575, which recognises that custom may be brought in to explain an ambiguity in the arbitration clause itself. The defenders urge that the case of Douglas is quite different from the present, in respect that the contract there expressly referred the dispute to arbitration in the customary manner of the timber trade, whilst here custom is not in the contract itself, but only in the condescendence. I do not think there is any material distinction between the cases.

"In my opinion 'arbitration in Glasgow' is merely a short way of expressing the intention of the parties to settle their dispute according to the custom of the oil trade at Glasgow.

"In my opinion pursuers' averment in article 10 of the condescendence is quite sufficient to warrant an order for proof, but the proof, of course, will meantime be restricted to that one matter.

"I have, at the defenders' request, granted leave to appeal.

"I am not in favour of appeals in summary applications, for to carry a case from court to court might often defeat the whole object of the application, but there are exceptional cases where, as here, an important legal question may be raised, and nobody will be prejudiced by delay, and in that kind of case I think it is quite proper that an appeal should be sanctioned."

The defenders appealed to the Sheriff (MILLAR), who on 3rd January 1912 adhered and granted leave to appeal.

*Note.*—"The first question that was raised in this case was as to the form of the petition. The agent for the appellants maintained that it should have been by way of an ordinary action and not a summary application to the Court. The recent practice in this sheriffdom with regard to these applications is that they should be by summary petition, and I do not see any special circumstance in this case why the ordinary course should not have been followed. The only ground which the appellants' agent stated as directed against the present form was that it excluded his right of appeal, but that has been granted by the Sheriff-Substitute and by this Court, and accordingly I do not think there is any difficulty raised by that argument.

"Another question that was raised was that there really was no ground of dispute between the parties, as the pursuers had elected to accept the goods, and could not

now raise any question founded on their rejection. This contention seems to go to the merits of the question in dispute, and if these fall within the clause of reference, it must be decided by arbitration in terms of the contract.

"The main question that was debated was whether there was a good clause of reference in the contract. It is to be observed that the contract was drawn up by the defenders upon a printed form of their own, and issued by them. The clause is—'*Arbitration.*—Disputes to be settled by arbitration in Glasgow.' The defenders maintained that there was no reference either to one or two arbiters, and that therefore the clause of reference fell under the authority of the case of *M'Millan* v. *Rowan*, 1903, 5 F. 317. The pursuers' agent replied that the clause did not refer to arbitration in Glasgow merely as to the place where it is to be carried out, but that it imported a reference to the custom of trade in Glasgow, and they founded on the case of *Douglas* v. *Stiven*, 1900, 2 F. 575. From both these cases it is quite clear that the Court cannot make a contract for the parties, but can only give effect to a term implied in it. The term 'Arbitration in Glasgow' did not explicitly refer to a custom of trade, and unless that is implied, in my opinion the case of *Douglas* would not apply. The question therefore would be whether, according to the common custom of merchants, the clause in question would imply a reference to the custom of the oil trade in Glasgow with regard to arbitration. I think that question can only be settled by proof. It will be for the pursuers to prove that merchants would understand such a contract as being by implication a reference to the custom of trade with regard to arbitration, and that the defenders in issuing and the pursuers in accepting the document must be taken as to have so understood it. I think therefore there are two questions to go to proof under condescendence 10—first, Does the clause in question, according to the general acceptance of merchants, imply a reference to the custom of trade in Glasgow as to arbitration? and second, What that custom of trade is?"

The defenders appealed, and argued—(1) A summary application was incompetent, where, as here, the arbitration clause was not in proper form. The clause required to be construed by evidence in order to ascertain whether it was a valid clause or not, for *prima facie* it did not satisfy the conditions of the Arbitration (Scotland) Act 1894 (57 and 58 Vict. cap. 13)—*Cooper & Company* v. *Jessop Brothers*, March 20, 1906, 8 F. 714, *per* Lord Kyllachy at p. 722, 43 S.L.R. 517. That being so, a summary application for the appointment of an arbiter under it was clearly incompetent. (2) If not incompetent, it was a highly inconvenient form of process, for no record of the evidence required to be kept in summary cases, and there was no appeal as of right. That being so, this was an inappropriate method of trying the question—*Sleigh* v. *Glasgow and Transvaal Options, Limited*, January 19, 1904, 6 F. 420, 41 S.L.R. 218; *M'Nabs* v. *M'Nab*, February 3, 1912, 49 S.L.R. 339. (3) The Arbitration Act was inapplicable, seeing that the clause left it undetermined whether the reference was to be to one or to two or more arbiters—*M'Millan & Son, Limited* v. *Rowan & Company*, January 16, 1903, 5 F. 317, 40 S.L.R. 265. The cases of *Douglas & Company* v. *Stiven*, February 2, 1900, 2 F. 575, 37 S.L.R. 412, and *Cooper & Company* v. *Jessop Brothers* (*cit.*), were distinguishable, for in both of these cases custom of trade was stated in the contract. That was not so here, and the averment in condescendence 10 was not relevant, for it was not averred that the custom referred to was known to the other party, and that was essential to relevancy — *Holman* v. *Peruvian Nitrate Company*, February 8, 1878, 5 R. 657, 15 S.L.R. 349; *Robinson* v. *Mollet* (1875), L.R., 7 H.L. 802. The action was therefore irrelevant and should be dismissed.

Argued for respondents—The application was competent—Sheriff Courts (Scotland) Act 1907 (7 Edw. VII, cap. 51), sec. 3 (*p*). It was also convenient, for the Sheriff had power under secs. 27 and 28 of that Act to grant leave to appeal, and this he had done. It was also relevant, for custom of trade had been relevantly averred, and that being so the Arbitration Act was clearly applicable — *Cooper* (*cit. sup.*); *Douglas* (*cit. sup.*). As to what would amount to a relevant averment of custom of trade, reference was made to Dickson on Evidence, vol. ii, sec. 1061, and Taylor on Evidence (10th ed.), sec. 1161.

LORD PRESIDENT—In this case matters began in the Sheriff Court by the presentation of an initial writ which set forth that the complaint of the pursuers was that the defenders refused to nominate an arbiter, and originally craved the Court "to order the defenders to appoint an arbiter, and failing their doing so, to appoint an arbiter." That crave was afterwards amended by minute to this effect, that the words "to order the defenders to appoint an arbiter, and failing their doing so," were struck out, and after the words "to appoint an arbiter" were put in the words "under the Arbitration (Scotland) Act 1894"; and accordingly it became a simple crave for the appointment of an arbiter under that Act. That crave was opposed in respect that the dispute which had emerged was not within the arbitration clause. The contract containing the clause in question was drawn up by the defenders, a firm of oil merchants in Glasgow, and accepted by the pursuers, a company called the United Creameries Company, Limited, and carrying on business at Dunragit. It was a contract for the sale of 400 barrels American prime summer yellow cotton-seed oil, and among other clauses there was one which provided that disputes were to be settled "by arbitration in Glasgow."

What happened in the cause was this.

When the initial writ was presented, the first step taken was that a warrant of citation was pronounced upon the 10th August 1911, and the warrant was in the form "B" of the First Schedule to the Sheriff Courts (Scotland) Act 1907. Rule 4 of that schedule provides that a warrant of citation form "B" shall be used in summary causes, summary removings, and summary applications where citation is necessary, and that in all other causes a warrant in form C shall be used. Accordingly it is undoubted that the warrant for citation used was such a warrant as would be pronounced upon a summary application.

After that the Sheriff-Substitute appointed a condescendence to be lodged and allowed the amendment that I spoke of. He then repelled the defenders' first and second pleas, which were pleas that the application was incompetent, and that the averments were irrelevant, and he granted the pursuers a proof of their averments in condescendence 10. Condescendence 10 contains an averment that by the custom of the oil trade in Glasgow, where the contract provides that disputes are to be settled "by arbitration in Glasgow," each party nominates one arbiter and the arbiters name an oversman, and that this custom was impliedly incorporated in the contract in question. The Sheriff-Substitute granted leave to appeal against the interlocutor, and he subjoined a note in which he put forward very clearly the contentions of the defenders. These contentions were (*a*) that the application was incompetent in respect that it was presented as a summary application and not in the form of an ordinary action in which there would be an appeal as of right, and (*b*) that the action was irrelevant, inasmuch as the arbitration clause was invalid or not sufficiently specific, there being no averment that the custom of trade founded on was known to the defenders when they signed the contract. The Sheriff-Substitute called attention to certain decisions in this Court in the cases of *Macmillan* v. *Rowan* (1903, 5 F. 317) and *Douglas* v. *Stiven* (1900, 2 F. 575). The learned Sheriff adhered, but he again granted leave to appeal. The defenders are here in an appeal against that interlocutor. They urged very strongly that these preceedings are bad *ab initio*; that the case is not appropriate for summary proceedings at all; and that following what was done by the Second Division in the case of *Cooper & Company* v. *Jessop Brothers* (1906, 8 F. 714) we ought to dismiss the action altogether, or at least to sist it until the question of whether the parties are properly bound under an arbitration clause is settled by some competent process.

In the case of *Cooper* v. *Jessop* a petition to appoint an arbiter under the 1894 Act was presented to a Lord Ordinary, and there, as here, there had to be an averment of custom in order to make the arbitration exactly square with section 3 of the Act of 1894; and the averment there was this, that the usual way of arbitration in that particular trade was for each party to nominate an arbiter, and for these arbiters to appoint an oversman. Lord Dundas allowed the parties a proof of their averments and granted leave to reclaim. The Second Division recalled that interlocutor and remitted the cause to the Lord Ordinary to sist process in order that the questions between the parties might be determined by a court of competent jurisdiction and in the appropriate form. Lord Kyllachy, who delivered the leading judgment, pointed out that there were other matters in controversy between the parties before him—in particular, that the jurisdiction of the Lord Ordinary to entertain the petition depended upon its being proved, first, that there was a concluded agreement between the parties, which was denied; second, that such concluded agreement included a clause of reference, which one party maintained and the other denied to be part of the agreement; third, that this clause of reference, which admittedly did not *prima facie* satisfy the conditions of the Arbitration Act, might yet be made to do so by proof of an alleged but disputed custom of trade in Glasgow; and finally, fourth, that the clause of reference *ex hypothesi* thus set up by proof amounted on its just construction to a prorogation by both parties of the jurisdiction of the Scotch tribunals. There being all this amount of debatable matter between the parties, the Second Division considered—I think I am not putting too great a stress on what they said—that it was quite improper, at least in such a case, to take all this matter incidentally in the course of a petition which craved the Court to perform a ministerial act.

Now I do not think that that decision necessarily binds us in every case to say, "You shall not go on with a petition of this sort unless you have a pure and simple case where you find, by the mention of either one or two arbiters as the case may be, that the case exactly fits either section 2 or section 3 of the Arbitration Act of 1894." And there are certain passages which have been cited to us from the opinions both of Lord Kyllachy and of Lord Low which point the same way.

But what I think the matter comes to is this—the Arbitration Act of 1894 had twofold scope. First, comes section 1, which contains a general amendment of the law. Prior to that a reference to arbitration was invalid in Scotland if there was not a named arbiter. Section 1 altered the law generally upon that matter. Then come sections 2 and 3, in which a remedy is provided for a state of matters where parties were not really in dispute as to construction or any such thing, but where the difficulty was that one party was supine, and simply by *vis inertia* made it impossible for the other party to go on by refusing to appoint an arbiter, and accordingly sections 2 and 3 provided a remedy which I think is certainly meant to be a summary remedy to meet that state of affairs. Section 2 deals with a case where the agreement refers to a single arbiter; section 3

to one where the agreement refers to two arbiters and each provides the appropriate remedy.

*Prima facie* summary procedure is only appropriate to a case which falls naturally and obviously under the provision of section 2 or of section 3. But there are cases which in truth may fall within these provisions and yet do not obviously do so—that is to say, cases of this sort where, if you look at the arbitration clause and read it, you do not find in so many words a reference either to a single arbiter or to two arbiters, but where you find a reference to a custom, which custom being interpreted and writ large will give you a reference to one arbiter or to two arbiters. But in any case where such a question emerges, whether it be upon the original statement of the case or upon the defences that are put into the original case, I think it is obvious that summary procedure is inappropriate, if for no other reason than this, that by making the procedure summary and so dispensing with a record of the evidence you would practically exclude review upon what might be the crucial point of the dispute between the parties. I think that is really what the learned Sheriffs felt in this case, because although they treated the matter as a summary cause, they granted, what they would not ordinarily grant in a summary cause, leave to appeal from what was purely an interlocutory judgment; and I cannot doubt that, actuated by the same spirit, they would probably, even if nothing had been said to them, have kept a record of the evidence so that appeal would have been possible upon the whole merits of the cause. But as the matter has been raised here, what I feel constrained to say is that I think technically they did make a mistake in treating this cause all through as a summary cause. I think as soon as they found out as they did what was the true contention between the parties, they ought to have sent this cause to the ordinary Sheriff Court roll. It does not follow, however, that we can do nothing except sist, because I see no incompetency whatsoever in a person presenting a writ in the Sheriff Court in which he first asks for judgment in what I may call a declaratory form and thereafter, such judgment having been pronounced, craves an appointment under the Act of 1894. I see no incompetency in that. Accordingly I do not think there was any necessity, so to speak, to turn the case out of Court or sist it, and to say, go and try the case in another action. But I think it ought to have been tried in the ordinary Court so as to allow an appeal, and having that put before them I have no doubt that the learned Sheriffs will do so in the future.

The only question is what is to be done in this case. I think it would be a great pity not to utilise the procedure which has already taken place, because although Mr Horne was entitled to argue as he did that there was no relevant averment of custom here, I do not think your Lordships were impressed with his argument. In other words, we thought that the decision of the Sheriffs in this matter was clearly right. If it can be shown that there was a custom in the oil trade in Glasgow to have arbitration in the way proposed, then the other party would be bound to go to arbitration.

I would therefore move your Lordships to remit the case to the Sheriffs with instructions to them to proceed with the proof which they have allowed, but to proceed with that proof sitting in the ordinary Court and keeping a record of the evidence which may be used in an appeal if necessary.

LORD JOHNSTON—I quite agree. As soon as it became apparent that something more than the performance of a ministerial duty was involved, it was obvious that this case could not either conveniently or properly be tried in a summary form. That, however, did not prevent the Sheriff, as soon as this was made apparent—and it was so at a very early stage of the case—from transferring it at once to his ordinary Court, and I agree that that may now be done with advantage to the parties and a saving of expense.

LORD HUNTER—I entirely agree.

LORD KINNEAR and LORD MACKENZIE were absent.

The Court pronounced this interlocutor—

"Recal the interlocutor of the Sheriff and Sheriff-Substitute dated 3rd January 1912 and 8th September 1911 respectively: Remit the cause to the Sheriff-Substitute to transfer it to the ordinary Court, to close the record, to allow a proof *primo loco* upon pursuers' averments in condescendence 10, and to proceed as accords."

Counsel for Pursuers (Respondents)—Sandeman, K.C. — Hon. W. Watson. Agents—J. & J. Ross, W.S.

Counsel for Defenders (Appellants)—Horne, K.C.—Paton. Agents—J. W. & J. Mackenzie, W.S.

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*Wednesday, February 28.*

## FIRST DIVISION.

(SINGLE BILLS.)

## MARLOW, PETITIONER.

*Company—Winding-up—Voluntary Winding-up — Petition for Appointment of Committee of Inspection — Procedure — Companies (Consolidation) Act* 1908 (8 *Edw. VII, cap.* 69), *sec.* 188.

In a petition under section 188 of the Companies (Consolidation) Act 1908 for the appointment of a committee of inspection to act along with the liquidator in a voluntary winding-up, the Court, on the production of a letter from the liquidator consenting to the application, made the appointment craved without intimation or service.