to the appellants of their lands to the east of the Hannays' feu was to disable them from fulfilling to the Hannays and their successors in the feu the condition or counterpart obligation, in respect of which they had undertaken to give to the feuars of the lands, now belonging in full property to the appellants, the right to use the streets, drains, and sewers constructed by them upon their own feu. Accordingly, in the same moment in which they executed the disposition of 1877 in favour of the appellants, the superiors ceased, in my opinion, to have any right or title to enforce that obligation against their feuars of 1871.

For this reason I am of opinion that the interlocutor appealed from ought to be affirmed with costs.

LORD SHAND—I also am of opinion that the decision of the Lord Ordinary and of the First Division of the Court of Session should be affirmed and the appeal dismissed.

The ground of judgment is, I think, short, simple, and clear, and is at once an answer to the appellants' case, both on the question of their title to sue and on their claim on its merits. For in this case, as there is no direct feudal relation between the appellants and respondents, even the title of the appellants to sue depends on their being able to show that their authors could enforce the obligations for which they ask decree, in which case, though they have no direct assignation of these obligations, they might, as my noble and learned friend Lord Watson has said, on the authority of Lord Stair and Mr Erskine, have successfully maintained that the obligations having been granted for the benefit of their lands, the disposition of 1877 gave them right to enforce these obligations.

But had the appellants' authors any such right? The obligations which the defenders' authors undertook to make the roads or streets and sewers in question were contained in a contract of feu, with mutual and reciprocal stipulations and obligations, having for their object not only the benefit of the land feued to the Messrs Hannay, a great part of which is now the property of the defenders, but also the benefit of the large remaining property adjoining, belonging to the Polkemmet trustees. The ground feued to the defenders' predecessors was part of a larger tract which it was contemplated and in substance arranged should be feued on a general scheme or plan with continuous streets and drains; and while on the one hand the Messrs Hannay bound themselves to make the streets, drains, and sewers in question, the counterpart or reciprocal obligation of the superiors, in respect of which alone the Messrs Hannay undertook what they did, was that the feuars of the rest of the ground should be taken bound to make the remaining and continued line of streets, drains, and sewers, which would of course be of value, and indeed essential, to the Messrs Hannay in the enjoyment of their property and for the real and complete use of their own streets and drains, as both parties contemplated.

What then happened thereafter? The superiors in 1877 parted with the remainder of their lands of Blochairn, and not only thereby disabled themselves from making the continued lines of streets and drains, which were an essential part of the scheme on which the Hannays were entitled to rely, but gave no right to enforce the right to have these streets made by the new purchasers, for they took no obligation from these purchasers to make these continued lines of streets and drains. It follows that neither the superiors nor their disponees, now represented by the pursuers and appellants, can have any right to enforce the obligations which are the subject of the action. Having rendered themselves incapable of fulfilling their part of the contract in the very matter of the streets and drains, they and those deriving right from them cannot enforce the counterpart of the contract, *i.e.*, the reciprocal obligation undertaken by the defenders' authors, the obligations being mutual and dependent on being fulfilled by one party as well as the other.

LORD DAVEY—I concur.

Interlocutor appealed from affirmed with costs.

Counsel for the Appellants—The Dean of Faculty (Asher, Q.C.) — Guy. Agents — Brooks, Jenkins, & Co., for Macandrew, Wright, & Murray, W.S.

Counsel for the Respondents—The Lord Advocate (Graham Murray, Q.C.)—J. A. Fleming. Agents — John Kennedy, for Tods, Murray, & Jamieson, W.S.

Monday, July 24.

(Before Lord Watson (in the Chair) and Lords Shand and Davey.)

TEACHER *v.* CALDER.

(*Ante*, February 25, 1899, vol. xxxv. p, 517, and 25 R. 661).

Accounting — Agreement for Audit — Whether Audit in Terms of Agreement —Error.

A advanced £15,000 to B, to be used in B's business for a period of five years, receiving in return, besides interest, three-eighths of the profits. It was agreed that B's books should be audited annually by a particular firm of accountants, whose certificates as to the amount of profits were to be binding on both parties. Notice of this agreement and of its terms was given by A to one of the partners of the firm of auditors, but they were not communicated by him to the partner who actually conducted the audit. While aware that A had an interest in the profits, the latter did not know the terms of the agreement, and in particular did not know that his audit was intended to bind the parties.

In an action for a judicial accounting

at A's instance, the Court of Session (*aff.* the judgment of Lord Low—*diss.* Lord Adam) *held*, as the result of a proof, that it would have made no substantial difference in the result of the audit had the auditor been aware of the agreement, and *refused* the accounting. Judgment *reversed* in the House of Lords on the ground (1) that there had been mutual error as regards the auditor's knowledge of the agreement, and that in the absence of such knowledge the audit could not be regarded as binding; and (2) that it was not substantiated by the evidence that the want of this knowledge did not affect the audit.

Contract—Breach of Contract—Agreement for Share of Profits — Assessment of Damage.

A advanced to B £15,000, to be used in B's business of timber merchant for a period of five years, receiving in return 5 per cent. interest and three-eighths of the annual profits. The agreement did not provide that A should become a partner of the business, but it was agreed that B should always keep a like sum of £15,000 of his own in the business. In breach of the latter engagement B withdrew from time to time from the business part of this sum of £15,000, and used it in a distillery business where large profits were earned.

In an action of damages for breach of contract, at A's instance, he maintained that the damages ought to be assessed at the amount made by the diverted capital in the distillery, on the ground that the defender must be treated as a trustee for or a partner of the pursuer.

Held that this method of assessment was inapplicable, and that the appropriate method was to assess the damages by ascertaining the extra profit which might have been made in the timber business with the aid of the diverted capital.

Judgment *affirmed* in the House of Lords.

This case is reported *ante*, *ut supra*.

The pursuer appealed to the House of Lords against the judgment of the First Division.

At delivering judgment—

Lord Watson—Upon the 11th April 1889 a minute of agreement was executed between the late Adam Teacher, wine and spirit merchant in Glasgow, of the first part, and the respondent James Calder, timber merchant, Glasgow, carrying on business there under the name or firm of Calder & Company, of the second part. The agreement, on the narrative that the second party had applied to the first party for capital to be applied to extend and carry on his business as timber merchant, which the first party had agreed to give in consideration of receiving the interest and share of profits or additional interest in terms of the Act 28 and 29 Vict. c. 86, contained, *inter alia*, the following stipulations which the parties bound themselves to observe:—The first party agreed to advance in loan to the respondent, to be put by him as capital into his business of Calder & Company the sum of £15,000 between the first day of May and the first day of November 1889. The first party also agreed to become cautioner to the Commercial Bank of Scotland, Limited, for £20,000, to be advanced to the respondent for the purposes of his said business.

It was agreed that the respondent should pay to Mr Teacher, in the first place, interest upon his loan of £15,000 at the rate of £5 per cent. per annum, beginning the first annual payment at the term of Whitsunday 1890; and in the second place, by way of additional interest, such further sum as should be equal to 37½ per cent. of the net profits of the respondent's business of Calder & Company, under deduction at the rate of £5 per centum per annum upon the capital of the respondent, and of any partner he might thereafter assume, and upon the said loan of £15,000, and also under deduction of the interest on the said bank credit or other interest, and on any addition to and accumulation of capital which, under the provisions of the minute of agreement, might be added thereto during the continuance of the said loan and bank credit, and also of the other charges and expenses of the business, and allowing a reasonable depreciation on plant, but not deducting anything for salaries to partners.

It was agreed that the books of Calder & Company should be balanced as on the 30th day of April 1889, the day before the minute came into operation, and the respondent's capital in the stock and plant of the firm valued and ascertained. In the event of the first party being dissatisfied with the valuation, it was provided that the amount of the respondent's capital stock should be valued by two arbiters, with power to them to appoint an oversman in case of their differing in opinion. It was also provided that the respondent, in the event of his capital not amounting to at least £15,000, should put into the business a sum sufficient to raise the capital to that amount.

The fifth article of the minute, which relates to the ascertainment of the net profits of the business of Calder & Company divisible between the first and second party, has formed the main subject of controversy in this appeal. It stipulates that "the books of the said firm shall thereafter be balanced annually on the 30th April, and shall be audited by Messrs M'Clelland, Mackinnon, & Blyth, chartered accountants, Glasgow, or other auditors to be mutually agreed upon and appointed by both parties hereto, and the certificate of the auditors shall be binding on both parties, as finally fixing the amount of the profits in each year, and the foresaid interest or percentage payable to the first party."

The minute was to continue in force for the term of five years, but either of the parties had right to bring it to a termination at the end of three years upon his giving the other party six months' notice in

writing prior to the 1st day of May 1892. It was stipulated that the respondent Mr Calder, and any other partners that might be assumed by him into the firm of Calder & Company, should have power to draw interest on capital as well as on their share of the profits of the business, or might leave them in the business as capital bearing interest at £5 per cent. per annum, but that no capital should be withdrawn from the business so long as Mr Teacher's loan was unpaid and his liability for the bank credit of £20,000 undischarged. The minute also provided that, in the event of any disputes or differences arising as to the agreement between the parties thereto or their representatives in regard to the agreement, the business of Calder & Company, or the conduct or winding up thereof, the same should be and were thereby submitted to the amicable decision, final sentence, and decree-arbitral of William Mackinnon, accountant in Glasgow, whom failing of Andrew Mackinnon, bank agent there, as arbiter in succession mutually chosen, whose decision or decisions, interim or final, should be conclusive and binding upon both parties.

After the minute of agreement was completed, Mr Teacher called with it upon Mr William Mackinnon, the leading member of the firm of accountants who had been appointed to audit the books of Calder & Company. He did not see Mr Mackinnon, and called again at the office, when he had an interview with another partner, Mr Robert Blyth, to whom he gave the minute of agreement, and after discussing its terms with that gentleman left it with him to be communicated to Mr Mackinnon. Mr Blyth on the same day made an abstract of the terms of the minute; and according to his evidence he gave back the minute to Mr Teacher, and believes that he handed the abstract to Mr Mackinnon on his return to the office. He says—"I had nothing more to do with the matter, and I took no more concern with it whatever." Nothing more is heard of the abstract; and it is not said or suggested that it was seen or read by anyone in the office save Mr Mackinnon, who died not long after he received it, until it was discovered among some other papers in the year 1894.

The parties to the agreement, the late Mr Teacher and the respondent Mr Calder, understood and believed that the accountants, to whom they had entrusted the function of auditing the annual balance-sheets of Calder & Company, were cognisant of and would be guided by its terms in the discharge of their duty as auditors. Mr Teacher had done all that he could to instruct them in the details of the agreement; and the respondent in his evidence states—"Mr Teacher told me he had given the agreement to the auditors, and I understood he had given them instructions to attend to his interests in the audit"; and again—"I had learned from Mr Teacher during that year that he had intimated the agreement to the auditors, and I took no further part in the matter."

The books of Calder & Company were balanced as at the 30th April in each of the years 1890, 1891, 1892, and 1893, by Charles D. Gairdner, who became a partner of the auditor's firm in the year 1888. Mr Gairdner had been for some years previously a clerk of the firm, and he had been in use, under the supervision of Mr Blyth, who retired from the firm in 1891, to balance the books of the respondent Mr Calder. Mr Gairdner when examined as a witness states:—"From 1888 onward to 1893, I continued the audit of the books exactly on the same principle as I had conducted it prior to that date. I got no instructions whatever from anyone to conduct the audit in any different way after 1889 from what I had done before. I have seen the agreement which was entered into between Mr Teacher and Mr Calder in 1889. The agreement itself I first saw late in 1894, but some time before that I had discovered in my office a memorandum in Mr Blyth's handwriting containing a note of the particulars of the agreement. I discovered that entirely by accident. I think it must have been about the spring of 1894. Until I saw the memorandum I did not know what were the terms of the agreement between Mr Calder and Mr Teacher. Until I discovered the document No. 308, I was not aware there was any such agreement between Mr Calder and Mr Teacher."

Upon the completion of Mr Gairdner's audits, and upon his information, his firm issued certificates in these or similar terms:—"We have examined the foregoing balance-sheet and profit and loss account as at 30th April, and compared them with the relative accounts in the ledger and found them correct." In the course of his employment Mr Gairdner became aware, from entries in Mr Calder's private books, which he also audited, that Mr Teacher had advanced the sum of £15,000; but he was not aware that Mr Teacher had granted a cash-credit for £20,000, upon which his claim was postponed to the debt due by Mr Calder to the bank. He had, on the occasion of each audit, numerous meetings with Mr Teacher and Mr Calder separately, and he learnt from them the extent of their interests respectively in the profits of Calder & Company; but neither of these gentlemen ever referred to the existence of an agreement or to its terms. In that statement Mr Gairdner is corroborated by the respondent, who says:—"I understood it (*i.e.*, the agreement) was as well known in M'Clelland, Mackinnon, & Blyth's office as my own, and that every member of the firm knew all about it." Unfortunately, the belief of Mr Calder as to the firm's knowledge of the agreement, which he shared with Mr Teacher, was not justified by the fact. The accountant who made the audit was a member of the firm, but he was not aware of the terms of the agreement, and he did not know that in accordance with the fifth article his audit was to be final and binding upon both the parties. So far as he knew he was merely employed by the parties to make a professional audit for their mutual convenience, and he had no reason to suppose that if they or either

of them were dissatisfied with his determination upon any point it was not open to them to have it corrected elsewhere, and if necessary in a court of law. Mr Gairdner himself gives evidence relating to these points which appears to me to be of considerable importance. He began the audit in July 1894 of the balance-sheet of Calder & Company for the previous 30th of April, which had never been completed, having then the knowledge of the terms of the agreement which he had acquired from the discovery of Mr Blyth's abstract. He says —"Having become aware of the terms of the agreement, I examined the books differently on that occasion from what I had done formerly, because the charge against profits might require to be differently treated. On examining the books at that time I found certain items which appeared to me not to be satisfactory." Also, in reply to the question, "Supposing you made an audit in the capacity of arbiter between parties, would you audit differently?" he states—"I would analyse the allocation between capital and revenue somewhat differently."

Learned counsel for the respondent strenuously contended that the evidence given by Charles D. Gairdner ought not to be believed, and that your Lordship ought to hold it proved as matter of fact that Gairdner was, throughout the years for which he completed an audit, in full knowledge of the terms of the minute of agreement. I do not think it necessary to criticise their argument minutely. It mainly consisted in the suggestion, that because Mr Gairdner had frankly admitted his non-recollection of a variety of trivial circumstances which would not naturally have been retained by his or any ordinary memory, he must be held to have spoken falsely when he affirmed that he had neither seen nor heard the tenour of the agreement until he discovered Mr Blyth's abstract. I have carefully studied the evidence, and I cannot find the slightest ground for any imputation against the credibility of Mr Gairdner. In the Court of Session the Lord Ordinary (Low), before whom Mr Gairdner was examined, accepted his testimony. His Lordship indicated an opinion that notwithstanding the audit Mr Teacher would have been entitled to an accounting if it had been shown that the ignorance of the auditor was due to the fault of the respondent, whom he acquits of all blame in the matter. He does not directly impute any fault or want of due care to Mr Teacher, who, equally with Mr Calder, acted in the honest belief that the auditor knew the terms of the agreement. But his Lordship seems to have thought that if the respondent was not to blame for the ignorance of their auditor, his procedure was binding upon Mr Teacher. The Lord President (Robertson) and Lord M'Laren, who were the majority of the First Division, assumed the veracity of Mr Gairdner's evidence. The Lord President said—"It happened, however, that the books were audited in each year, not by Mr Blyth, but by his partner Mr Gairdner, and the pursuer's point is that Mr Gairdner says (and I hold this to be proved) that he never saw the agreement nor Mr Blyth's précis of it." Lord Adam, who differed from his colleagues in result, rested his judgment upon the proved ignorance of Mr Gairdner.

I should have had much hesitation in differing from the opinion of these learned Judges upon a pure question of fact; but an examination of the evidence, with all the light that was thrown upon it by the arguments of learned counsel, has satisfied me that the testimony of Mr Gairdner is candid and truthful, and is corroborated by all the other evidence in the case.

In 1894, being the last year of the agreement between Mr Teacher and Mr Calder, disputes arose between them which it is unnecessary to detail, and the result was that the audit of the books of Calder & Company as at 30th April 1894 has never been completed. An unsuccessful attempt was made to refer to a neutral accountant, and one of the two arbiters appointed by agreement for the settlement of differences arising out of it having died, the other, Andrew Mackinnon, bank agent, eventually declined to accept the reference.

Mr Teacher, who is now represented in this appeal by his testamentary trustees, in March 1896 brought the present action against Mr Calder. It concludes, first, for a full accounting as to the profits of the business of Calder & Company for the year ending on the 30th April 1890 and the four following years, and for payment to the pursuer of the share of net profits to which he was entitled under the minute of agreement; and, second, for payment of the sum of £15,000 sterling. In the last place, it concludes for reduction, if necessary, of the several audits made by Mr Gairdner for the years 1890, 1891, 1892, and 1894, and of the relative certificates granted by the firm of which he was a partner, under their firm names of M'Clelland, Mackinnon, & Blyth, and M'Clelland, Mackinnon, & Company.

The Lord Ordinary (Low) on the 28th May 1897 pronounced an interlocutor by which he "dismisses the action, and decerns: finds the pursuer liable in expenses." On a reclaiming-note by Mr Teacher, their Lordships pronounced the interlocutor appealed from, by which they "recal the said interlocutor, decern against the defender for payment to the pursuer of £250 sterling of damages, *quoad ultra* dismiss the action: find the defender entitled to two-thirds of the taxed amount of expenses."

The argument for the pursuer in the Courts below, as it was at the bar of the House, appears to have been addressed to four different points. First of all, it was contended that the audits made by Mr Gairdner were not in terms of the minute of agreement, and ought, if necessary, to be reduced and set aside, and an account taken of the business profits of Calder & Company during the currency of the agreement. In the second place, it was maintained that, assuming the audits made by Mr Calder to be conclusive, there were certain erroneous entries in the balance-sheets

which he had passed which ought to be corrected and effect given to the correction, inasmuch as the errors had been occasioned by the fraud or fraudulent misrepresentation of the respondent Mr Calder. The principal items said to have been thus falsified were (1) a bad debt of £3096, 12s. 6d. due to the firm of Calder & Company by Rucker & Company, their agents at Riga, which it was alleged had become irrecoverable and ought to have been written off before the minute of agreement became operative; (2) certain entries in the "depreciation of plant" account; (3) certain entries in the "plant repairs" account; (4) entries in the "stock" account; and (5) entries in the "suspense" account. In the third place, the pursuer claimed substantial damages in respect of the respondent's breach of contract by drawing his capital out of the firm of Calder & Company and employing it elsewhere without the consent of Mr Teacher, to such an extent as to reduce his capital in the business below the amount stipulated in the agreement.

The first, and in my opinion the nicest, point to be decided in this appeal is involved in the question whether the audits made by Mr Gairdner can be rightly regarded as having been made by him in due fulfilment of the duty committed to his firm of M'Clelland, Mackinnon, & Blyth by the 5th article of the agreement of 11th April 1889? To my apprehension that is a question which depends upon the law of Scotland. I am quite aware that legislation, comparatively recent, has done much to assimilate the laws of reference or arbitration in the two countries, but it has not yet made them the quite same. The Lord Chancellor (Cranworth), in *Drew* v. *Leburn*, 2 Macq., Ap. Ca. 3, stated that, as the law of England stood before the Act 3 and 4 Will. IV., cap. 42, "If parties submitted a matter for arbitration to a private tribunal to be decided by a selected person, either of them might at any time, without assigning any ground, revoke that submission." In Scotland, from the earliest times, a concluded contract to submit the determination of any point to the opinion or judgment of a private person, cannot, unless the person referred to die or refuse to act, be revoked save of consent of all the parties submitting, and ousts all interference by the ordinary courts of the country. The fifth article of the minute of agreement was a concluded contract binding both parties to accept as final the decision of the firm of M'Clelland, Mackinnon, & Blyth, or of any one of its members, upon the yearly balances of the books of Calder & Company, and the ascertainment of the net profits of its business to be divided between them in terms of the agreement.

It was argued for the respondent that the contract embodied in the fifth article did not constitute a proper arbitration. I freely admit that it did not contemplate a formal arbitration to be followed by an award, but it was none the less a contract of submission or reference, which committed to the referee the decision of any point which might arise in the course of his audit. In my opinion the contract was of the same nature as a proper arbitration, in this respect, that it came within the well-known rule—"Seeing it is from the consent of the parties submitting that the whole power of arbiters is derived, their award or decree, if it be not given in conformity to those powers, is null, not being founded upon any proper authority."—Ersk. Inst., b. iv. tit. iii. sec. 32.

It was also maintained for the respondent that it was not the intention of Mr Teacher and the respondent that the accountant acting under the fifth article should know the terms of their agreement or of the reference which they made to him. I do not doubt that parties may agree to accept as final the decision or opinion of a referee who knows nothing except the question put to him, and is not to be informed who they are, and what are their respective interests; but it must in that case very clearly appear that they so agreed. To arrive at the conclusion that there was any such agreement in the present case would be contrary to all the evidence. I think it is beyond reasonable doubt that Mr Teacher and the respondent both contemplated and intended that the audit provided by the fifth article should be made by an accountant who was conversant with the terms of the minute of agreement, and also knew that as between them his audit was to be final and conclusive. It seems to me to be equally beyond doubt that throughout the period during which audits were made by Mr Gairdner the parties to the minute of agreement understood and believed that Mr Gairdner knew its terms.

I have no desire to disparage the conscientiousness of referees, whether professional or not, but when parties agree to be bound by their opinion or decision as final, and also agree that they shall be informed of its finality, I am of opinion that the referee who gives an opinion or decision without knowing that it was meant to be conclusive does not act in conformity with the power that was conferred upon him. The objection in this case to Mr Gairdner's audit is deeper still, because he was ignorant of the terms of the minute of agreement and of the precise nature of the interest conferred by it upon Mr Teacher. Mr Gairdner himself states that after he came to know the details of the minute in the year 1894 he no longer regarded the audits which had been made by him as satisfactory, and that with that knowledge he would have audited the books of Calder & Company somewhat differently. I see no reason to discredit that statement. The evidence in this case shows that there may be considerable difference of professional opinion upon matters of audit, and I cannot resist the conclusion that Mr Gairdner would have audited differently had he known the terms of the agreement, and also that his determination was final. If that were so, I do not think he can be said to have made the audit contemplated by the agreement.

The Lord Ordinary indicated an opinion that if Mr Gairdner's ignorance of the

terms of the minute of agreement had been traceable to the fault or negligence of the respondent Mr Calder, Mr Teacher probably would have been entitled to decree for an accounting. That conclusion does not necessarily suggest that his Lordship thought the ignorance of Mr Gairdner was in some sense due to the fault of Mr Teacher, and for that proposition I can find no evidence whatever. Mr Teacher did all that he could be reasonably expected to do for the purpose of informing the accountant firm and its partners, and the non-communication of the contents of the minute to Mr Gairdner, the partner who made the audit, was entirely due to the ill-health and subsequent death of Mr Mackinnon, and to Mr Blyth assuming that he had done all that was necessary in giving his abstract to Mr Mackinnon. It appears to me that a mutual mistake as to Mr Gairdner's knowledge of the agreement, for which neither of the parties to it was responsible, was as good a ground in Scotch law for disregarding his audit and allowing an accounting as if the mistake had been occasioned by the fault or negligence of one of them.

The two learned Judges who formed the majority of the Division were of opinion that Mr Gairdner's evidence was trustworthy, and they did not impute his ignorance of the agreement to the fault or negligence of either Mr Teacher or the respondent. But they were of opinion that Mr Gairdner knew so much that he was in substantially the same position as if he had known the full terms of the agreement, and that his audit was necessarily the same as if he had been in possession of that fuller knowledge. Their conclusions appear to me to labour under a double vice in this respect, that (1) it discards the referee's own statement that he would have audited differently, and (2) it makes a new agreement for the parties, which they did not make, and probably never would have made, for themselves.

I do not consider it necessary to discuss at length any of the other questions which were argued at the bar. I agree with your Lordships in thinking that the appellants have failed to substantiate any of the charges of fraud or misrepresentation brought against the respondent; and that the respondent ought, accordingly, to be assoilzied from the conclusions of the summons in so far as rested upon these allegations. I also agree with those of your Lordships who are of opinion that there is no ground for increasing the amount of damages for which the respondent has been found liable in respect of his breach of contract.

Lord Shand—I am also of the opinion which has been expressed by my noble and learned friend on all the points which he has mentioned.

The House is about to affirm the decision of the Court of Session in reference to the charges of fraud which have been brought against the respondent and which the appellants have failed to make out, and also in regard to the amount of damages for which a decree has been given. I shall only detain your Lordships for a few minutes by saying a few words on the subject of the only point on which the House is differing from the judgment of the Court of Session.

I think it is clear upon the facts, as they appear in the proof, that Mr Gairdner was not aware of the terms of the minute of agreement under which he was acting practically as an arbiter or as the auditor whose finding was to be final between the parties, and I think it is further clear that neither party was to blame for that circumstance. Mr Teacher had done his best to make the terms of the agreement known to him, but unfortunately Mr Blyth, to whom they were communicated, had not handed on the agreement, and, in point of fact, its terms did not come to the knowledge of Mr Gairdner. In those circumstances for four or five years (I am not sure which) Mr Gairdner made the audit believing that he was simply acting as his firm had done for a considerable time before in an ordinary audit of a business firm with a view simply to reporting to the partners how matters stood between them. He was not aware that he was acting in a matter on which his judgment on any point that occurred to him in the course of his investigation would be final, and that his certificates, when granted, would fix finally the sums which were due from the one party to the other, or the sums which were due to Mr Teacher the appellant. Under those circumstances I agree with my noble and learned friend in thinking that that accounting must now be opened up. It appears to me that the evidence, especially the evidence of Mr Gairdner himself, shows that if he had known the position which he was truly to occupy under the minute of agreement his audit would have been different.

The Lord Ordinary, when he sent the case originally for proof, put in a short but clear light the difference between the two positions of an auditor acting as an arbiter and an auditor merely reporting to the firm how their books stood. He says at page 30 in the print before me—"In my opinion the pursuer was entitled to have the books audited in knowledge of the agreement and of the purpose of the audit. There are many matters—such as the value of the stock, the amount to be written off for depreciation, the striking off of debts as bad, and such like—which an accountant, auditing the books merely for the satisfaction of the sole partner, would not investigate closely if that partner was satisfied, but which he would investigate closely if he knew that the purpose of the audit was to fix finally the share of the profits to which a party who had lent large sums to the firm was to be entitled. If Mr Gairdner was not informed of the purpose of the audits, and of the effect which was to be given to the balance of profits brought out, I do not think that the audit can be regarded as an audit within the meaning of the agreement." In that statement I entirely concur.

Again, I find it was put to Mr Gairdner himself in the evidence he gave that he had not known the character of this audit and the finality that was to be given to his findings. He is asked, "Did you do in this case just what you generally do when employed by a trader to audit in his interest?—(A) Yes. (Q) Supposing you made an audit in the capacity of arbiter between parties, would you audit differently?—(A) I would analyse the allocation between capital and revenue somewhat differently. (Q) You mean in the case of a partnership limited to a few years?—(A) Yes, and acting as arbiter. (Q) Why would you do that?—(A) A man trading on his own account might charge up a number of entries to revenue which should be debited to capital account if there were other interests." Then he is asked, "Then had you at any time in signing these docquets the impression that you were giving an arbiter's award?—(A) No."

It is true, as has been observed by the learned Judges of the First Division, that Mr Gairdner was made aware that Mr Teacher had some interest in the profits, and no doubt it is a consideration which has to some extent raised a difficulty in my mind as to whether or not I should agree in what is now proposed, that the fact of his knowing of this interest in those profits showed him at least that there was a counter interest to be attended to. But I have come to the conclusion that it was necessary in order to the proper discharge of his functions that Mr Gairdner should not only know that there was an interest, but should know specifically what that interest was, and should carefully look into the matter and see that that interest was properly guarded. He did not know what the interest was at all, and he tells us himself, when he became aware of that interest, that he is satisfied he would have audited the accounts somewhat differently had he known of it, and accordingly when he became aware of it he at once made the parties also aware of his position.

I have only further to say that I think the analogy which has been suggested between this case and the case of counsel whose opinion is asked without his being told that it is to be final and binding between the parties is a misleading analogy, and can have no application to a case like this. If counsel has merely a question of law before him, he has only to deal with it as such, and whether it is to be binding upon one party or upon a dozen parties is of no consequence. His opinion and answer will be the same. But an accountant has a great deal more to do than to give an opinion upon matters of law or of accounting. He has, in a case like Mr Gairdner's, in making his audit to gather a great many facts for himself; he has to ascertain the details of the business, and he has to put the facts together, and then to draw inferences from them. A person in such a position is in a totally different position from counsel when giving an opinion on a question of law on facts supplied to him.

I am of opinion with your Lordship that the decision which is proposed, reversing the judgment of the Court of Session on one point, ought to be pronounced by this House.

LORD DAVEY—I confess it is with some regret that I feel obliged to concur in your Lordships' opinion that the case must be sent back to the Court of Session to take the accounts between these parties. I regret it, first, because I am not satisfied that any substantial wrong or injustice has been done to the pursuer by the mode in which the accounts have been audited by Mr Gairdner, and secondly, because I am of opinion that no blame whatever is to be attached to Mr Calder for Mr Gairdner's failure to take the accounts in accordance with the minute of agreement of 11th April 1889. He assumed, and had the right to assume, that Mr Gairdner's firm were in possession of the full particulars of that agreement, and that Mr Gairdner, on behalf and in name of his firm, was auditing the accounts on the basis of the agreement, and so as to bind Mr Teacher and himself. But I cannot dissent from the opinion of Lord Adam that a party cannot be held to be bound by an audit under an agreement of which the auditor was ignorant, and in particular when he was ignorant that his audit was to be conclusive between the parties. No doubt the reference and submission to the accounts was not in strictness an arbitration to be followed by an award or decree-arbitral, but it partook of the character of an arbitration in this respect—that the decision of the accountants was intended to bind the rights of the parties, and when made would have the effect of depriving both parties of their recourse to the ordinary courts. I think it appears from the evidence that Mr Gairdner never intended to give a decision having this effect, and for aught that appears he was under the impression that Mr Teacher was at liberty to challenge his decision by a suit in the Court of Session. Of course, parties may expressly or by implication agree to be bound by the decision of a person who does not know that his opinion is to have that effect, as when parties agree to accept the opinion of counsel on a joint case submitted to him on behalf of both parties. But there is nothing of that kind in the case before your Lordships. On the contrary, both parties assumed, and had the right to assume, that Mr Gairdner was properly instructed. It is no answer to say that the certificates are those of the firm, and the firm were in possession of the agreement through Mr Blyth. It is a question of fact—were the certificates relied on by the respondents in fact made in accordance with the agreement, or were they made *alio intuitu*.

One may feel some legitimate surprise that the partner of an experienced firm of accountants entrusted with the performance of an important item of the firm's business should not have been put in possession of the proper materials, and also that Mr Gairdner himself, when he knew, as he did at a very early stage, that Mr Teacher was

entitled to three-eighths of the profits and was interested in the audit, did not ask to be furnished with the agreement giving Mr Teacher his rights, the contents of which might materially affect his audit. But I do not feel at liberty to question Mr Gairdner's positive statement that he did not know of the agreement, and that he would have audited differently if he had done so.

The condescendence contains numerous and detailed charges of fraud against the respondent. The Lord Ordinary and the learned Judges in the Inner House were of opinion that these charges had entirely failed. The charges were repeated at the bar of this House, but I believe all your Lordships agree on this point with the Courts below. On one point only, that relating to Rucker's debt, the Lord President, while negativing any fraudulent intention on the rospondent's part, expressed an opinion adverse to him on the merits. As the accounts have to be taken I will not express any opinion on this or any other point arising on the accounts. I will only say that in my opinion each question should be considered by the auditor on its merits, and unprejudiced by any judicial dictum.

There only remains the question of damages for the breach by the respondent of his agreement not to withdraw his capital. It is admitted, and indeed appears on the face of the accounts, that the respondent did withdraw large sums for the purposes of employing them in other businesses carried on by him. The learned Dean of Faculty claimed to follow these sums, and sought to make the respondent account to the appellants for the profits derived by the use of them. The contention was a novelty, unsupported by either authority or principle. The money withdrawn was not Mr Teacher's in any sense, and he had no interest in it except to have it employed in the respondent's timber business. But his representatives are entitled to damages for the loss he sustained by the respondent's breach of the agreement so to employ it. There is evidence that money could at that time be profitably employed, say at 8 per cent. per annum in the timber business. But there is no evidence of any business being lost by the respondent, or of his being unable to tender for any contract from want of capital, and there is some affirmative evidence to the contrary. It also appears that the capital withdrawn was to some extent (at any rate) replaced for the purpose of trading by money borrowed from the bank, and interest at 5 per cent. was allowed on the money withdrawn, and the like rate only paid on the money so borrowed. This was of course wrong on the respondent's part, as it exposed Mr Teacher's loan to unnecessary risk, but his loan has now been paid in full, and the only element of damage is the loss of profit or income. On the whole, taking all these circumstances into consideration, I am unable to say that the appellants have made out to my satisfaction that Mr Teacher suffered any larger damages by the respondent's breach of his agreement than the sum which has been awarded to them by the Court of Session. I concur in the order which has been proposed by my noble and learned friend on the Woolsack.

Ordered that the interlocutor of the First Division, dated 25th February 1898, be reversed except (1) in so far as it recals the interlocutor of the Lord Ordinary dated 28th May 1897; and (2) in so far as it decerns against the defender for payment to the pursuer of £250 sterling of damages: That it be found and declared that the audits made by Mr Charles D. Gairdner for the year ending upon the 30th day of April in the years 1890, 1891, 1892, and 1893, and the relative certificates granted by his firm, were not made or granted in accordance with the terms of the minute of agreement dated 11th April 1889: That subject to that finding and declaration the clause be remitted to the Court of Session with directions (1) To take an account in terms of the said minute of agreement of the net profits of the firm of Calder & Company for the year ending 30th April 1890, and for the four following years; (2) To assoilzie the respondent (defender) from the whole conclusions of the summons, in so far as the same are founded upon the alleged fraud or fraudulent misrepresentation of the respondent: That it be declared that neither of the parties be entitled to decree for the expenses of process incurred in the Court of Session, and that the respondent do pay to the appellants their costs of this appeal.

Counsel for the Appellant — Dean of Faculty (Asher, Q.C.) — H. Johnston. Agents—A. & W. Beveridge, for Carmichael & Miller, W.S.

Counsel for the Respondents — J. B. Balfour, Q.C.—Salvesen. Agents—Hollams, Sons, Coward, & Hawksley, for Alex. Morison, S.S.C.

Tuesday, July 25.

(Before the Lord Chancellor (Halsbury), Lord Shand, and Lord Davey.)

MAGISTRATES OF LEITH *v.* LEITH DOCK COMMISSIONERS.

(*Ante*, Nov. 30, 1897, vol. xxxv., p. 132, and 25 R. 126.)

Burgh — Assessment — Ultra vires — Costs of Opposing Bill in Parliament—Public Health (Scotland) Act 1867 (30 *and* 31 *Vict. cap.* 101), *sec.* 95.

The Public Health (Scotland) Act 1867, by section 95, authorises the local authority to impose assessments for the expenses incurred by them "in executing this Act."

The Magistrates of Edinburgh introduced into Parliament a bill, the purpose of which, *inter alia*, was to have the burgh of Leith amalgamated with