the findings in fact and in law contained therein: Of new decern for payment in terms thereof: Dismiss the appeal and decern. . . ."

Counsel for the Appellants—M'Lennan, K.C.—J. M. Hunter. Agents—Macpherson & Mackay, S.S.C.

Counsel for the Respondents—Morison, K.C.—Lippe. Agents—Fraser, Stodart, & Ballingall, W.S.

Wednesday, February 22.

FIRST DIVISION.

[Lord Dewar, Ordinary.

NORTH BRITISH RAILWAY COMPANY *v.* NEWBURGH AND NORTH FIFE RAILWAY COMPANY.

Arbitration—Railway—Contract—General Arbitration Clause — Jurisdiction of Court.

A railway company entered into an agreement with another railway company to work and maintain a line of railway which the second company undertook to construct. In terms of the agreement the first company came under an obligation to pay the second company such a sum as would be sufficient to make up the annual dividend to four per cent. on the "paid-up share capital" of the second company. The agreement contained this clause—"All questions which may arise between the parties hereto in relation to this agreement, or to the import or meaning thereof, or to the carrying out of the same, shall be referred to arbitration. . . ." A question having arisen as to whether the *ex facie* paid-up share capital of the second company, looking to the mode in which it had been created, which was said to have been *ultra vires*, was truly "paid-up share capital" in the sense of the agreement—*held* that the question was a pure question of construction under the contract, and that although it was a question of law it fell under the arbitration clause.

On 3rd December 1909 the North British Railway Company, *pursuers*, raised an action against the Newburgh and North Fife Railway Company, *defenders*, to have it found and declared "(1) that the pursuers are freed and relieved from liability under articles seventh and eighth of the agreement dated 31st March and 5th and 6th April 1897, scheduled to and confirmed by the Newburgh and North Fife Railway Act 1897, to contribute any sum or sums to make up any dividend or dividends of the defenders, and that the said articles of the said agreement are null and of no effect as from the twenty-fifth day of January Nineteen hundred and nine, or from such other date as our said Lords may determine: Or (2), otherwise and alternatively, that the pursuers and the defenders are freed and relieved from the said agreement, and that the said agreement is null and of no effect as from the twenty-fifth day of January Nineteen hundred and nine, or from such other date as our said Lords may determine: or (3), otherwise and alternatively, that the liability of the pursuers under articles seventh and eighth of the said agreement to contribute any sum or sums to make up any dividend or dividends of the defenders does not extend or apply to a dividend or dividends on one hundred and eighty thousand pounds of share capital of the defenders, but only to a dividend or dividends of four per centum per annum on such smaller amount of share capital as our said Lords may, after such inquiry, remits, reports, or other procedure as they shall think proper, ascertain and determine in the course of the process to follow hereon to be the equivalent in amount of the legal and proper capital expenditure of the defenders."

The scheduled agreement which provided that in the event of an Act of Parliament being obtained and the capital subscribed the second parties should construct and complete a railway from Newburgh to St Fort, stations on the North British Railway, and that upon the construction and completion thereof the first parties should work and maintain it in perpetuity, subject nevertheless to the right of the second parties to terminate the agreement at the end of ten years on six months' notice, contained these articles—"*Article Fourth.* . . . (5) The first parties shall collect the said gross revenues and shall be entitled to retain fifty per centum thereof as their remuneration for maintaining the railway and relative works and conveniences and working and managing the traffic thereon and collecting the said revenues, and shall pay over the balance of fifty per centum to or for the behoof of the second parties in manner hereinafter provided. . . . *Article Seventh.* If the nett revenue accruing to the second parties is not sufficient to pay a dividend of four per centum per annum on the paid-up share capital of the second parties, then the first parties shall, out of fifty per centum of the mileage proportion of receipts accruing to them on their own railway from traffic including mails passing over their system or any part thereof to or from any place on the railway, contribute such sum as may be necessary to make up that dividend so far as the said fifty per centum of mileage receipts accruing in each half year to the first parties shall suffice to pay such deficiency. *Article Eighth.* Should the sum to be contributed under the immediately preceding article along with the said nett revenue of the second parties not be sufficient to pay a dividend of four per centum per annum on the paid-up share capital of the second parties, then the first parties shall, out of twenty-five per centum of the mileage receipts accruing to them on their own railway from traffic, including mails passing over their system or any part thereof and

over the railway, contribute such further sum as may be necessary to make up the said dividend of four per centum per annum so far as the said twenty-five per centum of mileage receipts accruing in each half year to the first parties shall suffice to pay such deficiency. . . . *Article Fourteenth.* All questions which may arise between the parties hereto in relation to this agreement or to the import or meaning thereof, or to the carrying out of the same, shall be referred to arbitration under and in terms of the Railway Companies Arbitration Act 1859.

The pursuers pleaded, *inter alia*—"(2) The actings of the defenders condescended on having been *ultra vires* of their statutory powers and of their rights and obligations under the scheduled agreement, the provisions for arbitration in the said agreement do not apply, and the questions raised in the present action fall to be decided by the Court of Session."

The defenders pleaded, *inter alia*—"(1) The questions in dispute between the parties in the present action falling to be referred to arbitration, and having been referred by the defenders to the Railway and Canal Commissioners, with their consent, for their decision, in terms of section 8 of the Regulation of Railways Act 1873, and section 15 of the Railway and Canal Traffic Act 1888, the action should be dismissed, or otherwise should be sisted to await the decision of the Commissioners."

The following *narrative* of the *facts* is taken from the opinion (*infra*) of the Lord President—"The facts out of which this case arises are that a set of persons became promoters of a small railway called the Newburgh and North Fife Railway. This was to effect a junction between Newburgh and St Fort, both of which are stations upon the North British system. Now the promoters, as is not uncommon, looked ahead as to what was to happen, and they entered into an agreement with the North British Railway Company. Very shortly expressed, this agreement was an agreement which dealt with the provision of the railway by the promoters, and the working of the railway on certain terms after provided by the North British Railway Company. The agreement, as is usual in certain agreements, narrated the whole matters and the arrangements between them, and also, of course, was necessarily conditional upon the obtaining of the Act of Parliament without which a railway cannot be constructed. Now the Act of Parliament was obtained, and the railway was constructed, and the North British Railway Company have, from the date of the opening of the railway under sanction of the Board of Trade, as matter of fact, worked the railway.

"There has now arisen a dispute between them, and it is in order to determine that dispute that the present action is brought.

"In order to explain what the dispute is it is necessary to go to the agreement. The agreement, I ought to say, was scheduled to the Act, and made binding upon the parties thereto.

"The agreement, as I have already stated, provided for the working of the railway when made by the North British Railway Company, and then it went on to provide for the partition of the revenues. Roughly speaking, again, each party was to take 50 per cent. of the revenues, and out of their respective fifty per cents. certain payments were to be made. Now article seventh, which is in the fasciculus of sections which deals with the 50 per cent. of the Newburgh and North Fife Railway Company, is as follows—'. . . [*His Lordship quoted Article Seventh*] . . .' And then there is an article eight, which is really a sort of ancillary article to article seven, which also provides for the making up out of another fund, so to speak.

"Now, as matter of fact, the Newburgh and North Fife Railway Company issued the whole of the capital which they were authorised by Parliament to issue. Their capital consisted of, first of all, debenture capital, then preference shares, and then ordinary shares. They have, as matter of fact—at least so they allege, and I assume this at least is not denied—not got a sufficient nett revenue out of their own 50 per cent. of the receipts of the railway sufficient to pay a dividend of 4 per cent. per annum on the paid-up share capital as issued, and accordingly they have called upon the North British Railway Company to make up the deficiency under articles seven and eight. That demand is resisted, and the North British Railway have not waited to be sued, but, if I may say so, have taken the first word of fighting by raising this action to determine this question.

"Now what they say is this. They say, 'It is quite true that under the agreement we were bound to pay you out of certain sources' (which they do not allege are insufficient to provide the payment) 'such a sum as will make up the dividend to four per cent. on your paid-up share capital.' They do not allege that as matter of fact the revenues have been sufficient to pay 4 per cent.; but they say, 'What you tell us is paid-up share capital is not truly paid-up share capital at all'; and they base that upon a long narrative of facts which are in the condescendence in the action, which I need not read, but which I may summarise thus—they say paid-up share capital in the proper sense of the word means paid-up capital as capital can be raised by companies incorporated under the Companies Acts, and raised in the way and in the manner as provided by the various clauses in the Companies Clauses Act. They say, 'You have done none of these things; you really did not raise your capital at all in that way. You tried, but you failed, and what you then did was, you went to a firm of persons and you entered into a contract with them, and in respect of an undertaking on their part to provide the railway (that is to say, to make it) you gave over the whole of your capital to them; you delegated to them your whole powers as to the construction of the railway and to seeing how it was to be made; you left it entirely to them, and you simply handed

over your whole nominal capital.' They go on to say also, 'As matter of fact, by doing so you not only delegated your powers in a way that was entirely *ultra vires*, but in a way which was to the prejudice of all concerned.' For they aver roundly that the firm to whom they went had already made an arrangement with an actual constructing firm, under which the railway was to be made for a sum of money very much less than the sum of money represented by the total capital raised, and accordingly they say, 'We are not bound to pay you the sum which you ask.'

"Now your Lordships will notice at once that this is really a defender's attitude put into a pursuer's form, and accordingly when I have to find out what the pursuer's form is I have to go to the conclusions of the summons. Now the conclusions of the summons are, first, for declarator that the pursuers are freed and relieved from liability under articles seventh and eighth of the agreement; second, otherwise and alternatively, the pursuers are freed and relieved from the agreement—that is, from the agreement as a whole; and third, that the liability of the pursuers under article eighth does not extend or apply to a dividend or dividends on one hundred and eighty thousand pounds of share capital of the defenders (£180,000 being the total share capital as purported to be issued), but only to a dividend or dividends of 4 per cent. per annum 'on such smaller amount of share capital as our said Lords may, after such inquiry, remits, reports, or other procedure as they shall think proper, ascertain and determine in the course of the process to follow hereon to be the equivalent in amount of the legal and proper capital expenditure of the defenders.'"

On 14th December 1910 the Lord Ordinary (DEWAR) repelled the first plea-in-law for the defenders and before answer allowed a proof.

"*Opinion.*—[*After narrating the facts*] . . . In these circumstances the pursuers argued that they had relevantly averred facts which, if proved, are sufficient to entitle them to decree in terms of one or other of the conclusions of the summons. These conclusions are—[*His Lordship here summarised the conclusions*]. They asked for a proof.

"The defenders admit that an inquiry is necessary; but they maintain that the jurisdiction of the Court is excluded by the arbitration clause (14) of the agreement. That clause is in the following terms—[*His Lordship quoted the clause*].

"The pursuers maintained that the questions raised did not fall within the arbitration clause. They argued that the second conclusion raised the question whether the agreement was *ab initio* null, and that the arbitration clause cannot exclude the Court from deciding that an agreement under which an arbiter is appointed is inoperative. And further, that the questions raised under the first and third conclusions were whether the defenders had acted *ultra vires* and made certain illegal payments to the prejudice of the pursuers. These questions could not be decided by merely construing the agreement, but involved consideration of questions which did not arise under the agreement, and with which the arbiter had no power to deal.

"The defenders contended that in so far as the pursuers' averments were relevant they raised questions which fell within the scope of the arbitration clause. They admitted that the pursuers' averments were relevant and sufficient to support the first and third conclusions of the summons, but denied that there was any relevant averment to support the second conclusion. They maintained that it was clear from the record that the real dispute between the parties was—what was the measure of their respective liabilities under the agreement. That was a question which could only be ascertained and determined by construing the agreement, and that, they submitted, was a duty which fell to the arbiter, and the parties had carefully chosen a tribunal appropriate for the purpose.

"I think there is force in the argument that the pursuers have not averred facts sufficient to support their second conclusion. I doubt whether they would be entitled to have the agreement declared void even if they succeeded in proving all their averments. It will depend upon whether any of the stipulations which go to the root and essence of the agreement were broken. If so, the agreement may be declared void but not otherwise. Now it appears to me that the root and essence of the agreement is that the defenders on the one hand undertook to build the railway, and the pursuers on the other hand undertook to work and maintain it in perpetuity. The railway has been built—and there is no averment that it is disconform to the agreement — and is being worked. The stipulations which are alleged to have been broken do not affect the railway, but the pursuers' liability to guarantee payment of dividend. They allege that they are being asked to pay too much. I think it may be possible to adjust that matter equitably without terminating the agreement. But I do not think that I require to decide that question at this stage, because I am of opinion that the questions raised under the first and third conclusions of the summons, viz., the measure of the pursuers' liability to make up dividends—cannot be submitted to arbitration. I do not think that this question can be decided—as the defenders maintain — by construing the scheduled agreement. It means much more than that. It involves consideration of matters lying beyond the scheduled agreement and outwith the scope of the arbitration clause. For example, I do not see how it is possible to ascertain what the pursuers' liability is without considering and construing the contract entered into between the defenders and the Engineering, Electric, and Construction Syndicate. Perhaps I may best illustrate what I mean by referring to the case of the *Great North-West Central Railway* v. *Charlebois* [1899],

A.C. 114. In that case the Railway Company entered into an agreement with certain persons to construct a railway—and the effect of the agreement was very much what the pursuers allege happened here—the company were saddled with the payment of £200,000 ostensibly for the construction of the road, and it was made to appear as getting a length of road valued at £200,000, whereas in point of fact that sum was not paid or estimated for construction, but was calculated to cover a large bonus to an individual and other matters which had nothing to do with construction. The Courts in Ontario held that the payments were *ultra vires*, but could be so separated from the lawful payments for construction that it was open to them to maintain the contract while disallowing the wrongful payments. But on appeal the judgment was reversed. The contract was set aside and an inquiry ordered to ascertain the rights and obligations of parties.

"Now it appears to me that before the pursuers' liability under the scheduled agreement can be ascertained there must first of all be an inquiry as to whether the agreement between the defenders and the Engineering, Electric, and Construction Syndicate was *ultra vires*, and if so, whether the payments *ultra vires* can be separated from the lawful payments. I do not think that the arbiters have power to pursue such an inquiry. The arbitration clause is wide, but the question which has arisen is beyond its scope. They have power to determine questions in relation to the scheduled agreement, or the import and meaning of the scheduled agreement, or to the carrying out of the scheduled agreement; but they have no power to decide whether the agreement between the defenders and the syndicate was *ultra vires*, or whether the payments *ultra vires* can be separated from the lawful payments, and I do not think that a tribunal without such power can decide the question which the pursuers have raised.

"I am accordingly of opinion that the first plea-in-law for the defenders should be repelled and a proof allowed."

The defenders reclaimed, and argued—The question in the case was simply, what was the paid-up capital of the company. Was the *ex facie* paid-up capital, capital within the meaning of article seventh? Now that was just one of the matters which the parties had agreed should be settled by the arbiter, for the arbitration clause covered the whole dispute and excluded the jurisdiction of the Court. The arbiter would have no difficulty in deciding the case, because an arbiter was entitled to go outside an agreement and consider other matters in order to expiscate it. The agreement could not be reduced because it was statutory, but this action was really just an attempt to substitute the equivalent of a reduction. In any event a reduction was only competent on certain special grounds, such as mutual error, fraud, &c., and in this case there were no relevant averments on record sufficient to support a reduction or the equivalent of a reduction. The Lord Ordinary had erred in regarding this action as a reduction, and the case of the *Great North-West Central Railway* v. *Charlebois*, [1899] A.C. 114, to which he referred, was not in point. In that case the dispute was between a railway company and the persons who had actually constructed the line, and the question there related to irregularities in the agreement itself, but in this case the syndicate who had actually constructed the line were not parties to the action, and the question here did not relate to the validity of the agreement.

Argued for the pursuers—There were conditions-precedent to the agreement coming into force, one of which was a condition that the capital should first be subscribed (article first), and the arbiter would have to decide in the first place whether the capital of the company was really paid-up capital within the meaning of the agreement, and therefore he would have to decide whether the condition-precedent had been implemented and the agreement had come into force. But that was a proper question for the Court and not for the arbiter. Moreover, if the arbiter decided that question in the negative, he would next have to decide what was to take the place of the obligation on the pursuers to make up the dividend to four per cent., or whether the pursuers should escape liability altogether. But that also was not a proper question for an arbiter, because it amounted to assessing damages, and an arbiter could not do that. The pursuers conceded that they were not freed from the whole contract, but they submitted that they were entitled to be freed from contributing to the dividend on any amount of capital at all. Now a question of that sort was not intended for the arbiter's decision, because it depended on the construction of the Act. It was really outside the agreement, and before submitting any such question to the arbiter the Court ought to construe the agreement and decide whether the question fell within it—*Steuart* v. *Young's Paraffin Light and Mineral Oil Company*, July 2, 1898, 6 S.L.T. 69; *Mackay & Son* v. *Leven Police Commissioners*, July 20, 1893, 20 R. 1093, *per* Lord Adam, p. 1102, and *per* Lord Kinnear, p. 1104, 30 S.L.R. 919. In the first instance it was the duty of the Court to determine whether the contract had been so breached by the defenders as to be outside the jurisdiction of the arbiter—*Municipal Council of Johannesburg* v. *D. Stewart & Company* (1902), *Limited*, 1909 S.C. (H.L.) 53, 47 S.L.R. 20; *Boyd & Forrest* v. *Glasgow and South-Western Railway Company*, 1911 S.C. 33, 48 S.L.R. 157.

At advising—

LORD PRESIDENT—. . . [*After the narrative of facts quoted supra*] . . .—Now the Lord Ordinary has allowed a proof, and the only question that has been pled before your Lordships to-day is whether a form of inquiry by proof before this

Court is not excluded by the arbitration clause of the agreement. The agreement which I have so far recited under articles 7 and 8 finishes up with an article 14—". . . [*quotes*, v. *sup.*] . . ."

It has long ago, I think, been settled in the law of Scotland that arbitration clauses in contracts may be of two descriptions. They may be either what has been called an executry arbitration clause, which is limited to dealing with matters as they arise during the carrying out of the contract. Most of the clauses in the older cases in the books were of that character; but I think it is also perfectly well settled in the law of Scotland that there is nothing wrong in having a general arbitration clause which may give to the determination of arbiters everything which can be decided either in respect of the carrying out of the contract or in respect of the breach thereof. One of the first cases that decided that quite plainly, especially the judgment of Lord Rutherfurd Clark, was the case of *Mackay* v. *Parochial Board of Barry*, 10 R. 1046, 20 S.L.R. 697, and there have been various cases since then; and I take it that that is undoubtedly the law. Now I have no doubt that on a proper construction of article 14 here that is one of that class of clauses; that is to say, it is not a mere executry clause, but it is a general clause which refers to an arbiter all questions which may properly arise either upon the import and meaning or the carrying out of the contract. Of course that does not put upon the arbiter something which is still beyond his jurisdiction, like the assessing of damages.

Now, holding as I do that that is a clause of that general character, what is the meaning of that? The meaning of that is that the parties have chosen and contracted themselves out of the Court's jurisdiction as to anything which falls within that clause. I think it very necessary to make these observations, because I think it is as well, especially for other places, that it should be quite clear as to what the law of Scotland upon this matter is. It is not within our powers, as it is within the powers of the Court in England, to determine whether in their discretion a case should be tried under an arbitration clause or not. If the parties here have contracted themselves out of the jurisdiction of the Court, according to the law of Scotland we cannot help ourselves, and the tribunal they have elected that is the tribunal to which they must go.

Now, does the question between these parties fall under the arbitration clause or not? For if it does so this action is ousted. The second conclusion, which seeks declarator that the agreement is not binding altogether, although not in form reductive is practically reductive, and of course anything that is reductive of the agreement altogether cannot fall within the jurisdiction of the arbiter; and therefore, so far as the second conclusion here is concerned, if there was any averment which was relevant to support that conclusion I would say that that matter would have to be taken up by this Court, and did not go to the arbiter. But I search in vain in the condescendence for any averment that is properly relevant to support the second conclusion. There is nothing in the condescendence except what I have already summarised and what I have already said. It is quite clear that the averment that "the capital on which the payment is asked is not capital in the meaning that capital is used in the agreement" is not an averment that ousts the agreement as a whole altogether; and therefore I put the second conclusion altogether out of Court. And when I come to the other dispute, as to whether they are bound to pay upon this *ex facie* capital, that seems to me simply a question whether the *ex facie* capital is truly share capital in the true sense of article 7 of the agreement. That seems to me a pure question of construction under the contract, and as such must be determined by the arbiter. It was argued before us with great persistency and great ability that all this depended upon a question of *ultra vires* of the company, and that that is a question of law. Well it is a question of law, but then there is no doctrine that questions of law may not be referred to arbitrators, and it may be a foolish thing to do, but it is a competent thing to do. It seems to me that the principal reason, that this is a question whether this is paid-up share capital at all, is a reason that rests upon law, but it might just as well have been a reason that rested upon fact. If they had said they got the money by gift, that would have been a question of fact. Here it is a question of law, because they say what you put forward as share capital is not really paid-up share capital at all, and accordingly I think that this case must be determined by the arbiter. Many an arbiter has to discuss a pure question of law in order to get at the true meaning of the contract.

The third conclusion raises something else. The third conclusion raises another view, namely, that there may be a payment to be made, not upon the paid-up share capital as it appears on the face of things, but upon a sum which truly represents what they would have had to pay if they had gone, instead of to this financing firm, to a proper constructing contractor, and it is said that the arbiter cannot have jurisdiction to decide that. I am inclined to agree that he cannot, because that really is a sort of equitable plea which arises when the contract in terms does not apply, and where at the same time there is a certain equity that people should not get something for nothing. But your Lordships will observe that that question can only arise after you have determined the antecedent question whether or not the North British Railway Company are bound for the *ex facie* amount of the paid-up share capital as it stands upon the books of the company, and if that question is by contract relegated to the arbiter the arbiter must determine that before the Court can proceed to the consideration of the second; and it would never do to take

away from the arbiter to determine it here a question which *ex hypothesi* belongs to him alone, because you were frightened that, having determined that question, he would go on to decide something with regard to which he had no jurisdiction. That is just the old question of stopping an arbiter because you are afraid he will do something which will exceed his jurisdiction. We have been accustomed to go upon the footing that the arbiter will not do so. Accordingly, upon the whole matter, I think that the Lord Ordinary's interlocutor should be recalled, and that the case must go to arbitration.

Now there are some cases in which it is as well to keep the case in Court in order to keep the other matters to be determined, but I really do not think that is the case in this action, because if the North British Railway Company succeed in resisting the only payment as asked, namely, the payment upon the share capital of the company, I think they can well rest content to leave the other parties to raise the question whether there is a certain sum due upon an equitable view. Accordingly I think the proper interlocutor here is to dismiss the action.

LORD JOHNSTON—I agree in the course which your Lordship proposes for the disposal of this case.

The real questions between the parties, as shown by a perusal of the record and by the argument, appear to be these—1st, Are the pursuers bound, in terms of an agreement of 1897 between them and the defenders, out of a specific fund to make good a dividend of 4 per cent. on the issued share capital and debenture debt of the defenders' company. If not—in respect that that capital does not represent the true cost of the line—2nd, are the pursuers altogether relieved of their guarantee, in other words, of their obligation under articles 7th and 8th of said agreement? Or, 3rd, are they bound to make good the dividend on such sum as may be ascertained to have been the true cost of the line? and 4th, if so, what is that sum?

But the agreement of 1897 contains a reference clause sending to arbitration all questions between the parties "in relation to this agreement or to the import or meaning thereof or to the carrying out of the same."

It is, I think, obvious that the first and second of the above questions are questions under the contract, and therefore fall under the reference clause, but that the third and fourth of these questions are outside the contract, and therefore cannot be disposed of by the arbiter. They assume no liability under the contract but a liability outside the contract.

But we must regard not the true questions between the parties but the action as it has been laid; and here the pursuers have found themselves hampered by the fact that in an important moiety of their conclusions they make themselves pursuers of an issue in which their real attitude is the defensive. They conclude (1) that they were not liable to contribute any sum towards the defenders' dividend under articles 7 and 8 of the agreement. The actual conclusion is very circuitous. But that is its real meaning and effect. They conclude (2) that they are relieved of the agreement altogether, and that it is now null and of no effect. This they very properly depart from, as they now admit that even though they may be freed from liability under certain articles of the agreement, this would neither free them from the agreement as a whole nor form any ground for setting aside the agreement. And they conclude (3) alternatively, that they are not liable to make good dividend on the nominal capital of the company, but only on the real expenditure as that may be ascertained.

I think it unfortunate that the first plea for defenders, founded on the arbitration clause, should have been pressed, as it cannot be sustained to exclude both branches of the action, and the result of sustaining it as regards the first half will be to require that half to proceed before the arbiter, whereas if his award is against the defenders the second half must proceed in some form before this Court. But as it is pressed it must be sustained to the extent which I have indicated. This would not necessarily result in dismissing the action, but in merely sisting it until the arbiter had given his award. But I agree with your Lordship that, having regard to the peculiar situation which would be created by the pursuers being left to insist in that part of an action in which they are really defenders, it is more convenient to dismiss the action altogether, leaving the defenders, if the arbiter's award on the first branch of the case is against them, to raise if they think fit an action more appropriate to try the question which will remain.

LORD SKERRINGTON—I agree with your Lordship in the chair.

The Court recalled the Lord Ordinary's interlocutor, dismissed the action, and found the defenders and reclaimers entitled to expenses.

Counsel for Pursuers (Respondents)—Cooper, K.C.—R. S. Brown. Agent—James Watson, S.S.C.

Counsel for Defenders (Reclaimers)—Clyde, K.C.—Macmillan—Gentles. Agents—Guild & Shepherd, W.S.