

Wednesday, December 15.

FIRST DIVISION.

EDWARDS v. AITON.

Contract—Arbiter—Commission—Completion—Damages—Services. A, who had dealings with the Suez Canal Company, suggested to B to offer himself as a contractor for part of their works. He was introduced to the directors by A and his proposal agreed to. Thereon A and B entered into an agreement, by which B, in virtue of A's services, agreed to pay him one per cent. upon the sums received by him from the company for work accomplished; but the last half was to be paid only after the completion of the contract, and if, in the opinion of three arbiters, it had been an advantageous one. B did not complete the contract, as he found it very disadvantageous; this, however, was never settled by arbitration. *Held*, A was not entitled to damages for B's not completing the contract; nor to payment for services to B; nor to more than a-half per cent. commission as the contract was manifestly an unremunerative one: and the half per cent. was only due on money received by B for work accomplished.

This was an action brought by Francis Edwards, iron merchant in Glasgow, against William Aiton, contractor there, in which he sought for payment of commission due to him under an agreement entered into between them. Mr Edwards had had large business transactions with the French Company formed in order to construct a canal across the Isthmus of Suez; and, knowing they were in want of contractors to perform the necessary dredging operations, directed his assistant, M. Castel, to make inquiries in Glasgow for a suitable person. Mr Aiton was recommended; and he, approving of the proposal, came to Paris at Mr Edward's suggestion. He was introduced to the directors of the Company, and his offer being approved of, a contract for the work was signed by him and M. Lesseps, president of the Company. In consequence of Mr Edward's having thus benefited Mr Aiton, an agreement was entered into which contained the following stipulations:—"Mr Edwards having introduced and recommended Mr Aiton to the managers of the Suez Canal Company for the purpose of enabling Mr Aiton to contract for the dredging of the whole or of part of the Suez Canal, and Mr Edwards hereby engaging to continue his endeavours to that effect, and also to act, during all the period of Mr Aiton's works in the Suez Canal, as his agent for all the transactions which he may have with the Company in Paris, and to forward and to defend Mr Aiton's interests by all the means in Mr Edwards' power, Mr Aiton hereby binds himself, in case he contracts alone or with any one else, at any time, for dredging in the Suez Canal, to pay to Mr Edwards a commission of one per cent. upon all the sums which he will receive from the Company for the work accomplished by Mr Aiton in connection with the Suez Canal. One-half of that commission of one per cent., that is to say, one-half per cent., will, with Mr Aiton's assent, and as a part of his contract with the Company, be paid to Mr Edwards by the Company itself upon all the sums due to Mr Aiton. The other half of the commission, that is to say, one-half per cent., will be reserved, and paid only to Mr Edwards after

the completion of the contract, and the final settlement with the Company, provided the contract has been advantageous to Mr Aiton, according, in case of dispute, to the judgment of three arbiters, two of whom are to be named respectively by Mr Aiton and Mr Edwards, and the third to be named by the two first. If it is decided by the arbiters that Mr Aiton has derived no benefit from his contract with the Company, from circumstances which were unforeseen at the date of the contract, Mr Edwards will have no claim whatever to the second part of his commission, one-half per cent., which will thus remain in suspense until the completion of the contract."

Mr Aiton went to Egypt, and for six months carried on operations under the contract; but, finding it a dead loss, he sought permission to give it up. This eventually was agreed to; and an agreement was entered into between the Company and Mr Aiton, by which they agreed to pay him all the expenses he had incurred, the value of all the materials he had in Egypt, £8000 as an indemnity, repay him the money he had deposited as a security, undertake the contracts he had made, and take up his bills. He accordingly gave up the contract, and esteemed himself well treated by the Company. The pursuer now claimed one per cent. on all the work done by the defender, £2000 in consequence of his having given up the contract, and £2000 for services rendered by the pursuer to him in procuring the contract for him, acting as his agent, and sending M. Castel out to Egypt with him. The above circumstances were disclosed in the proof led; and also that Mr Edwards' agency was objected to by the Company, and that there had been no reference to arbiters. The Lord Ordinary (ORMIDALE) found that the pursuer was only entitled to £90, being one-half per cent. upon the sum of £18,000 paid to the defender for work accomplished.

The pursuer reclaimed.

GIFFORD and GLOAG for him.

WATSON and CAMPBELL in answer.

At advising—

LORD PRESIDENT—I have come to be very clearly of the same opinion with the Lord Ordinary. The pursuer asks for production of the defender's accounts with the Canal Company, and for payment of the commission due to him under their agreement. This is a conclusion based entirely on the agreement. The next conclusion is for damages over and above, by reason of the defender having failed to complete his contract with the Suez Canal Company. And lastly he asks for £2000 as remuneration for services rendered by him to the defender. The Lord Ordinary is of opinion that the sum on which a commission is allowed is £18,000; but he refuses the additional half per cent asked for by the pursuer.

There are thus two questions that must be determined; first, on what sum is a per centage to be allowed? and second, is that per centage to be a half or one per cent? By the agreement Mr Aiton binds himself—(*reads*). It is upon these words the first question turns—viz., upon what sum the commission is given. All the dredging contracts of the Company were so framed that the contractor was to be paid by the amount of excavation, and not by the amount of stuff put out. Mr Edwards therefore knew quite well that Mr Aiton was to be paid on the amount of cubic space excavated. But then Mr Aiton, finding that this contract with the Company was most unremunerative, entered into

a new contract with the Company, in the way of compromise, whereby he was to be paid a much larger sum for his excavations. He says he was very handsomely treated by the company; and there is no doubt that he was. They took over all his standing plant, paid him his outlay, and took up all his bills in the circle. This is the effect of the agreement, or *resiliation*, as it is termed. It may be presumed, however, that they received value for the bills. And the Company in addition give him £8000 as an indemnity. That, the pursuer says, is profit. But the answer to it falls under the second question. We are therefore driven to the statement by the defender, as a witness for the pursuer, that the whole sum he received for his work was £18,000.

In regard to the second question, one half of the commission is to be paid for the work done; and one-half if the three arbiters to be appointed shall say the contract was remunerative to the contractor on its completion. The Lord Ordinary has allowed the first half per cent, and, as the defender says he was all along willing to pay it, I say nothing further in regard to it, save that if the point had been raised, I have grave doubts whether even it should have been allowed. In regard to the second half per cent, it was only to be paid if the contract was completed and in the opinion of the arbiters remunerative. Their opinion was never taken. I will not say that their decree was a condition precedent of the commission being allowed. But I certainly say it was the pursuer's duty to shew the contract was an advantageous one. We have every reason to believe from the defender's statements that the contract was a losing one to him. And I therefore have no doubt as to the correctness of the Lord Ordinary's refusal of this claim.

As to the claim for damages for Mr Aiton's having broken off the contract, little has been said; and such a claim is perfectly unreasonable.

But, lastly, the pursuer claims payment for services rendered. I think the pursuer was undoubtedly for a short time the agent of the Company. He employs his clerk, M. Castel, to seek out a contractor; and he fixes on Mr Aiton. In all this Mr Edwards was an agent of the Company. But M. Castel goes out to Egypt as his servant or assistant. I have some doubts whether under the circumstances, M. Castel, *i.e.* Mr Edwards, is entitled to payment for these services. The Company objected to Mr Edwards acting as agent for Mr Aiton. I think his position was improper. He was agent on both sides; and he was receiving payment on both sides. It is not to be doubted that the payment he received, and the claim he made, included remuneration for the services of M. Castel and himself. He only got decree for £240; but having got this sum by decree of a French Court, he now seeks to get payment for the same services from the other side. On the whole matter, I am for adhering to the interlocutor of the Lord Ordinary.

LORD DEAS considered the defender was not entitled to give up the contract except of necessity and of good faith. But there was no doubt it was so given up. He was to be paid not for the soil thrown out but for what might be called the vacuum produced. The Company did not force him to go on, because they saw he would be ruined without their getting their work done. The pursuer was therefore not entitled to damages. And it was plain he was not entitled both to

remuneration for his agency and under the contract. Under the contract the pursuer was to get a commission on the work done on the canal. It was unnecessary to go into the question whether the pursuer would be entitled to remuneration if the contract had been remunerative, but unfinished.

LORD ARDMILLAN thought that the stipulation for payment to be given for the work accomplished was meant to be contrasted with work contracted for. If any portion of the £8000 could be shewn as indemnity or damages, the additional half per cent. might have been found due. In regard to this point, therefore, he concurred with difficulty.

LORD KINLOCH concurred.

Agent for Pursuer—William Ellis, W.S.

Agents for Defender—Hamilton, Kinnear, & Beatson, W.S.

Wednesday, December 15.

DUNDEE CALENDERING CO. v. DUFF.

Title—Expenses—Back-bond—Disposition—Progress of Writs—Purchaser. A, infert, disposed certain heritable subjects to B by a disposition containing a procuratory of resignation. B recorded the disposition, but did not execute the procuratory. He conveyed the subjects to C by a disposition *ex facie* absolute, but qualified by a back-bond in which C declared he held only in security. The back-bond was not recorded, and B continued in possession. *Held (diss. Lord Deas)*, the purchaser of these subjects was not entitled to object to a title which consisted of a disposition by C's ultimate donee, with the consent of the ultimate assignee to B's right of reversion under the backbond, who conveyed his whole right and interest in the subject.

As the objections raised a point of difficulty, no expenses were allowed.

In the beginning of the present year the Dundee Calendering Company purchased from Robert Duff, as trustee and executor of the deceased John Duff, merchant in Dundee, certain heritable subjects in Dundee at a price of £2200. There was no dispute as to the validity of the contract, nor the amount of the price; but the Company being dissatisfied with the title offered to them refused to pay the price till they received a title judicially declared to be sufficient. Thereon Mr Duff threatening to sell the subjects to some third party, the Company presented a note of suspension and interdict, praying to have Mr Duff interdicted from selling the subjects to any person other than the company. These proceedings were still in dependence; but it was agreed that they should be held as settled by the decision in the present case.

The title to the subjects stands in the following position. The property (which is held *burgage*) was conveyed by John Nicoll junior, with certain consents, by disposition in 1824, duly recorded, to William Howe, manufacturer, Dundee, and his heirs and assignees whomsoever, heritably and irredeemably. The disposition contained a procuratory of resignation which, however, was not executed by William Howe, so that no title in his favour appeared in the register of sasines. William Howe, by an *ex facie* absolute disposition and assignation, conveyed the property to Mrs Elizabeth