and had positively no effect. It follows, therefore, that John Boyd (II) was infeft in the feu as fully as his father before him in all the subjects conveyed by the original feu-contract. Now, the mines and minerals may be made a separate estate from the lands, but, until this is done, there is only one subject, and the conveyance of the lands is a conveyance of the minerals. And in the original charter there is, as we have seen, no reservation of minerals, so John Boyd (I) was in right of them as well as of the lands, and therefore John Boyd (II), having been infeft in the feu as fully as John Boyd (I), was also in right of the mines and minerals. Now, the case of the pursuer rests entirely on the assumption that the mines and minerals are in the *hereditate jacente* of John Boyd (I), and as it is apparent that they are not so, but that they passed to John Boyd (II), the pursuer has no case—no title to sue. I am therefore of opinion that we should adhere to the interlocutor of the Lord Ordinary.

LORD DEAS concurred.

LORD ARDMILLAN—As the case is presented to us the only question is, whether there was any title to the minerals left in John Boyd (I.), for if there was not, then there is an end of the case, as it is now presented to us.

It is settled that a superior cannot, at his own hand, alter the relation between him and the vassal, and cannot, in a charter by progress, introduce any reservation or limitation of the vassal's right which was not contained in the original investiture. As in a question between superior and vassal, there can be no doubt on this point. In this case there is a reservation to the superior of mines and minerals in the precepts of *clare constat*, under which John (II.) and John (III.) were infeft, although the entire estate in land and minerals was originally conveyed, and there is no such reservation in the original feu-contract. That the reservation so introduced is of no force as regards the superior—that it does not, in a question with the superior, impair the right of the vassal—is clear. The question then is, Shall that reservation be held to be valid and effectual in this question when the superior has no interest and states no plea? I think that no effect can be given to it. It was not a good reservation as regarded the superior, or as regarded the vassal as in a question with the superior, for the measure of their relative rights was within the original contract; and, if it was not a good reservation in regard to the superior, the person for whose benefit alone it was introduced, it could not be good as qualifying the right of the owner of the land, or in regard to any one else. So this reservation did not qualify the transmission of the estate to John (III.), or limit his right; and as he was infeft in the whole subjects, except in so far as legally and effectually qualified and limited, the right to the minerals as well as the lands must be held to have vested in him. That is, I think, the only question now before us, and I therefore agree with your Lordship, that we should adhere to the Lord Ordinary's interlocutor.

The Court adhered to the interlocutor of the Lord Ordinary.

Counsel for the Pursuer—The Lord Advocate and Kinnear. Agents—Murray, Beith, & Murray, W.S.

Counsel for the Defenders—Solicitor-General and Marshall. Agents—Mackenzie & Kermack, W.S.

Friday, December 20.

FIRST DIVISION.

[Lord Mure, Ordinary.

TOUGH *v.* DUMBARTON WATER WORKS COMMISSIONERS.

Arbitration—Contract—Damages.

Circumstances in which the Court *repelled* the defence that the action was excluded by the clause of reference contained in one of two contracts under which the action was brought.

The pursuer of this action was Mr Charles Tough, a contractor, residing in Govan, and the defenders were the Dumbarton Water Works Commissioners, and the action concluded for payment of certain sums which the pursuer alleged to be due to him by the defenders, and also for damages on account of alleged breach of contract. In April 1870 the pursuer entered into a contract with the defenders, by which he undertook to form an embankment and other works for a reservoir on the Overtoun Burn on the lands of Auchentorlie and Strathleven, a short distance above the Black Linn, at a level of about 1000 feet above the sea, and about four miles north from the town of Dumbarton; also to form a fire-clay pipe conduit from the reservoir about 1300 yards long, and to construct an additional filter on the lands of Garshake, close to and of the same dimensions as the filter belonging to the commissioners, all according to plans and specifications referred to in said contract. In October 1870 the pursuer entered into a second contract with the defenders, by which he undertook to remove the peat from the bottom of the reservoir. The first contract—that of April 1871—also contained a general reference of all doubts, disputes, or differences that might arise in connection with the contract, to the amicable decision, final sentence, and decree-arbitral of James Morris Gale, civil-engineer, Glasgow, whom failing, by death, non-acceptance, resignation, or otherwise, of any arbiter to be named by the Sheriff of Dumbartonshire, upon the application of either party, as sole arbiter in the premises, whose decision, valuation, and awards should be final and binding on all the parties. And it was thereby declared that although the said James Morris Gale might continue and remain engineer of the commissioners, such connection should not disqualify him from acting as arbiter in the premises, and his decision should be as unchallengeable as if he were wholly unconnected with the commissioners or the said works. The pursuer proceeded with the work specified in these contracts, and his averments in reference and hereto, upon which he founded his action, were as follows. He averred that he had executed under the first contract work to the extent of £2277, 2s., on account of which he had been paid £2124, 14s. 9d., leaving a balance due to him of £152, 7s. 3d. Under the second contract the pursuer averred that he had excavated the whole peat mentioned in the contract, and, at the defender's request, 18,771 cubic yards in addition. The amount which he claimed as still due to him for these operations was £742, 1s. The pursuer next averred that, to expedite the removal of the peat, Mr Gale, the engineer of the defenders, in or about the month of June 1871, acting with the authority of the defenders, ordered the pursuer to

put all his men, wherever working, on the embankment, and wheel out a part of the peat, and lay it down on the ground from which the clay had been removed for the formation of the embankment, and stated that the pursuer would be paid therefor. The expense incurred in carrying out these instructions was £79, 16s.

The whole amount which the pursuer thus claimed as due to him by the defenders for work done was £974, 4s. 3d., and the summons contained a conclusion for that amount with interest. Besides claims for work done, the pursuer brought two claims for damages against the defenders. In the first place, he averred that in or about July or August 1871, the defenders, without any reason, and without any legal authority whatever, seized the pursuer's plant, appropriated it to their own purposes, and retained possession of it; and at said date they also took the contracts out of his hands. On account of these alleged proceedings, the pursuer claimed £500 damages. In the second place, the pursuer averred that "it was part of the contract between the pursuer and the said commissioners that the former should execute the work within fifteen months from the date of the acceptance of his offer, and he entered into the contract on the faith of his being able to get immediate access to the ground. According to the fair meaning of the contract the pursuer was entitled to immediate access to the ground, but the defenders wrongfully failed till April 1870, a period of upwards of seven months from said acceptance, to give the pursuer access to the ground, other than that on which the filter had to be constructed. The pursuer was thereby prevented from taking up the work simultaneously, and from getting the work done in the winter months necessary to prepare the ground for the embankment being completed in summer. In consequence of the delay, the work was thrown into winter which should have been done in summer, when it could have been done at much less cost. In this case, also, the pursuer claimed £500 damages. In defence, the Water Works Commissioners stated that the pursuer failed to carry on the works during the summer of 1870 so as to ensure their being completed in time, although he had the whole summer to execute the works, and that he was continually in money difficulties, and made frequent applications for advances beyond the provisions of the contract. That in the early part of June 1871 it became apparent that the means which the pursuer was taking for disposing of the peat were insufficient, and Mr Gale, the defenders' engineer, made them aware of this, and stated that at the rate at which the pursuer was proceeding there was no prospect of the reservoir being in a state to be used even to a partial extent during the then approaching winter, and that it would be necessary to take the work out of the pursuer's hands, and to make new contracts for its completion. In consequence of this communication, the commissioners arranged a meeting with the pursuer, which took place in Glasgow on 1st July 1871, and the result of that meeting was that on 4th July 1871 the pursuer addressed a letter to the commissioners voluntarily renouncing both contracts. This letter was considered at a meeting of the commissioners held on 7th July 1871, when they agreed to accept of said renunciation, reserving the rights of both parties, and under an express denial of an allegation made by the pursuer, that he was able and willing to proceed with the contracts in terms thereof, or that he had hitherto complied with the terms of the contract.

The defenders pleaded, *inter alia*, that the action was excluded by the clause of reference in the said contract, and ought therefore to be dismissed.

The Lord Ordinary pronounced the following interlocutor:—

"3*d December* 1872.—The Lord Ordinary, having heard counsel on the motion of the defenders to have the action dismissed in so far as it relates to the sums sued for, other than those applicable to the contract for excavation of peat, in respect that Mr Gale is ready to accept the reference made to him under the contract, No. 10 of process, finds that the action is excluded by the clause of reference in so far as regards the £152, 7s. 3d. claimed as balance due under the original contract price of the works, and 2d, the two sums, each of £500, claimed in name of damages under the summons; allows the parties a proof of their averments applicable to the removal of the peat from the reservoir, and to each a conjunct probation; appoints the proof to be taken before the Lord Ordinary on Thursday, the 9th day of January 1873, at half-past ten o'clock; and grants diligence for citing witnesses and havers: *Quoad ultra* sists process until the result of the question raised in this action relative to the removal of the peat."

The pursuer reclaimed.

It was argued for him, that in regard to the claims for money due to the pursuer by the defenders, that was clearly not within the scope of the arbiter, for it was simply a claim for a debt due. If questions arose within the province of the arbiter the Court would remit to him, but to deal with a money claim was not within his province.

As to the claims under the second contract, that could not be a matter for the arbiter, as there was no clause of reference in that contract. As regarded the claims for damages, that was obviously a matter for the Court, as there was no power to the arbiter to decide any such question.

It was argued for the defenders that the subject matter of the action was within the clause of reference, as all matters connected with the contract were there referred to the arbiter. The claim of the pursuer for £152 for work done under the contract was not due under the contracts at all, if, as the defenders alleged, the pursuer was in breach of the contract, and whether or not he was so was a matter for the arbiter.

As to the claims for damages they were also within the province of the arbiter, for the clause of reference was very wide and included any thing done in reference to the contract.

At advising—

Lord President—In this case the pursuer sues the defenders for various claims arising out of two contracts entered into between the pursuer and the defenders. The first contract is for the construction of a reservoir, and the second is for the removal of a quantity of peat. The first contract contained a clause of reference, but the second contained no such clause, but was merely in the form of a specification. The Lord Ordinary, by his interlocutor of the 3d December, finds the action excluded by the clause of reference in regard to certain of the claims. He does not, however, on that account dismiss the action, because he thinks it better to allow proof in regard to the other matters.

Now, I cannot agree in the course here pursued by the Lord Ordinary, and I do not think that in regard to any of the claims the action is excluded by the clause of reference.

We must see what under the clause of reference falls to the arbiter, for it is only to the extent to which the parties have bound themselves to abide by his decision that it is final, and other tribunals excluded. Now, the clause in this contract authorises the arbiter to decide on all questions as to the meaning of the contract, and all questions as to work done under the contract. There is here no power expressly given to the arbiter to decern for a sum of money, and we need not now consider whether or not such power is implied. The clause of reference is to the effect that the merits of all disputes arising under the contract shall be for the arbiter, but, notwithstanding that, claims based on the contract may require an action in Court to give effect to them, and so it is going too far to say that the clause of reference excludes all claims arising in reference to the contract which contains that clause.

So we must consider the claims excluded by the Lord Ordinary. In the first place, he excludes a claim for £152, 7s. 3d., claimed as the balance due under the original contract price of the works. This is a claim for work done under the contract which contains the clause of reference. Now, if it had been alleged by the defenders that the work had not been done, or if there had been any question as to the manner in which the work was performed, that would have been a question for the arbiter. But there is no such allegation or question here, and no defence of that sort is stated. The only defence which the defenders state to this claim are certain counter claims, to the effect that as the contractor deserted the contract, no money is due to him for work done under the contract, because by his desertion the defenders were unduly put to expense and trouble. This is the only defence to this claim, and I cannot in these circumstances see how this claim for money due for work acknowledged to be done can be a matter for the arbiter.

The second claim, which is for £79, 16s., is for extra work done under neither contract, and so cannot be under the clause of reference.

Then the next claim, which is for £742, is, in so far as it is under either contract, under the second contract alone, and so cannot be referred to the arbiter,

The two remaining claims are the claims for damages. Now the first claim for damages is, I think, not a matter for reference in any sense. It is a claim for damages because, in or about July or August 1871, the defenders, without any reason, and without any legal authority whatever, seized the pursuer's plant, and appropriated it to their own purposes, and have retained possession of it ever since; and at said date they also took the contracts out of his hands. Now this is a direct denial of the defenders' statement of the facts of the case. They say that the pursuer failed to carry on the work in the summer of 1870 as he ought to have done under the first contract, but that, notwithstanding, in October of the same year they entered into a second contract with the pursuer for the removal of peat, for no other reason apparently than that he had the first contract. Then they go on to state that, on Mr Gale's report that the pursuer was not doing his work properly, they arranged a meeting with the pursuer, the result of which was that he voluntarily renounced both contracts in a letter addressed to the commissioners in July 1871. It is this alleged voluntary resignation on the part of the pursuer which is the defenders' justification for seizing his plant. Now this is a question as to the legality or illegality of a certain proceeding, which is not a matter for the arbiter, and, besides, the proceeding is instituted not under either of the contracts, but under the letter of July 1871.

As to the other claim for £500 damages, for failure on the part of the defenders to allow the pursuer timeous access to the lands, it may be doubtful whether or not it comes under the clause of reference, and I do not think it necessary to give an opinion on that point. If it is fairly a question as to the meaning of the contract, it is a matter for the arbiter. But whether it is to be referred to the arbiter or not, the claim for £500 damages cannot be given effect to except by a court of law.

So I am of opinion that none of the claims are so completely within the clause of reference as to bar the pursuer from insisting in them in this action, and so I think we should recall the interlocutor of the Lord Ordinary, and remit to him to proceed with the cause, but I may add for the Lord Ordinary's guidance, that if questions arise which are clearly within the clause of reference, they must go to the arbiter.

Lord Deas—There are here two contracts, 1st, one which contains a clause of reference, and 2d, one which contains no such clause; and so it is quite clear that the reference to an arbiter has nothing to do with the second contract.

Under the first contract there is a claim for £152, the balance due to the pursuer for work done under that contract. The pursuer states the total amount due to him for work which he has done, and the amount which he has received, and brings out the balance of £152. Now the defenders do not challenge that statement—do not say that that balance is not due. If the dispute had been as to what work had been done, that would have been a matter for reference, but there is no such dispute here. The defenders do not deny that the sum is due, but they bring various objections, in the shape of counter claims, to making payment, and obviously this is not a matter for the arbiter.

The only other claims about which there can be any question, are two claims for damages for £500 each, for the remaining two claims are, 1st, a claim for £79 for work done by the pursuer under neither contract, and 2d, a claim for £742, partly for work done under the second contract and partly for extra work, neither of which claims can possibly be matter for reference. So we must consider the claims for damages. The first claim for damages is for the alleged illegal seizure of the pursuer's plant by the defenders. Now this is not a thing done under the contract, or a question as to its meaning, but a question as to the legality of the course pursued by the defenders, and it is impossible to bring that under the clause of reference. The other claim for damages is not brought under the first contract alone, but under both contracts, and there is, as we have already seen, no clause of reference in the second contract. This being so, I cannot understand how we are to separate between the portion of this claim brought under the first contract and that brought under the second, and so I think that

this claim is not one which comes under the clause of reference. If either of these claims for damages had been fairly under the clause of reference, I am not prepared to say that the arbiter could not have assessed damages. This is a difficult question, and I rather think it would depend upon the terms of the clause of reference, for it may well be, that if there was a clause of reference giving power to the arbiter to fix damages, it would be competent for him to do so. But we are not called upon to decide this question, for there is no such power given in the clause of reference now before us.

LORDS ARDMILLAN and JERVISWOODE concurred.

The Court recalled the interlocutor of the Lord Ordinary, and remitted the case to him to be proceeded with.

Counsel for Pursuer—Watson and Smith. Agent—Thomas Spalding W.S.

Counsel for the Defender—Solicitor General and Asher. Agents—J. & R. Macandrew, W.S.

Saturday, December 21.

SECOND DIVISION.

[Lord Manor, Ordinary.

SAWERS, PETITIONER.

Expenses.

Where the House of Lords had ordered an interlocutor of the Second Division (reversing a judgment of the Lord Ordinary in favour of the defender in the cause) to be reversed, and the said cause to be remitted back to the Court of Session to do therein as shall be just and consistent with this judgment—*held* that the original defender was entitled to expenses since the date of the Lord Ordinary's interlocutor.

On 23d June 1868 a petition was presented by James Monteith, trustee on the estate of the late Peter Sawers, praying the Court to sequestrate the estate and appoint a judicial factor. The petition was opposed by the Rev. Peter Sawers, the only other trustee on the estate. On 5th November 1868 the Lord Ordinary refused the petition, and found the Rev. Peter Sawers entitled to modified expenses. The petitioner appealed to the Second Division, who, after a remit to the Sheriff of Renfrew, and report from him on 18th March 1869, recalled the interlocutor of the Lord Ordinary, appointed a judicial factor, and found the petitioner entitled to expenses out of the trust-estate.

The respondent appealed to the House of Lords. On 23d February 1872 the House of Lords ordered the interlocutor of the Second Division to be reversed, "and further, ordered that the costs decerned for payment out of the trust-estate shall, if the same have been paid or retained, be repaid to the said trust-estate, with interest, and further, ordered that the said cause be remitted back to the Court of Session, to do therein as shall be just and consistent with this judgment."

The respondent in the original petition now presented a petition craving the Court to apply the judgment of the House of Lords—"to alter the interlocutors appealed from, in terms of said judgment, to dismiss the reclaiming petition for the late James Monteith, to affirm the interlocutor of the Lord Ordinary of 5th November 1868, and to refuse the prayer of the petition for the appointment of a judicial factor; and also to ordain the respondents to repeal and pay back the costs, amounting to £93, 18s. 2d., decerned for under the said interlocutor of 14th July 1869, if the same have been paid or retained, with interest thereof at five per cent. from the date thereof, to the said trust-estate, and to find the petitioner entitled to the expenses of process since the date of the Lord Ordinary's interlocutor of 5th November 1868, including the expenses of the present application; to remit the account thereof, when lodged, to the Auditor to tax and report, and to decern in the petitioner's favour for the taxed amount against the said Hugh M'Connell and John Petrie, as trustees of the late James Monteith, or to do farther or otherwise as to your Lordships shall seem proper."

The representatives of the petitioner in the original petition, who had been sisted in the petition in June 1869, appeared as respondents, and argued that as the House of Lords had not mentioned the matter of expenses in their judgment, it was not competent for the Court to find the petitioner entitled to his expenses since the date of the Lord Ordinary's interlocutor, and also, that it was not a case for an award of expenses.

Authorities cited—*Campbell* v. *Colquhoun*, Dec. 20, 1854, 17 D. 245; *Hay*, 17 D. 246; *Purves*, 7 D. 810; *Stewart* v. *Scott*, 14 S. 692.

At advising—

LORD JUSTICE-CLERK—I have little difficulty in dealing with this application. In the cases cited to us, the House of Lords affirmed or adhered to the judgment allowed by the Court, and reversed the judgment complained of. Here the Court alters the interlocutor of the Lord Ordinary, and the House of Lords reverses, and does nothing more but simply remits to us. The question is—Whether this limits our power to do justice in the matter of expenses? I think not.

LORD COWAN—I concur. The question is—Whether the original application was well founded or not? The House of Lords say it was not.

LORD BENHOLME.—I have no decided opinion, but I cannot think the distinction drawn between the case where the House of Lords affirms the judgment allowed by this Court and where it simply reverses and remits to us, is substantial or satisfactory. When the House of Lords does not say anything about expenses, but simply reverses, I doubt whether it means anything more than that the judgment should be wiped away—otherwise it would have remitted to us to deal with the matter of expenses.

LORD NEAVES—We must affirm the Lord Ordinary's judgment, as there is here a reclaiming-note which we must decide upon, and the necessity of our affirming it makes it necessary to give expenses. Both in point of form and in justice I think the proposed procedure is correct.

Counsel for Petitioner—Scott and Lord Advocate (Young). Agent—A. Beveridge, S.S.C.

Counsel for Respondent—Trayner. Agents—M'Ewen & Carment, W.S.