and the complainers did not challenge his decision. There was therefore no question to go before the arbiter, and the Court should grant interdict.

Argued for the respondents — It was averred by the respondents that the abstract of measurement included items which the engineer had no power to adjust, and also that the abstract was not a final adjustment but only a statement by the engineers of the amounts which they were prepared to advise their clients to accept. The parties were therefore at issue on the question whether the abstract was conclusive. That was a question for the arbiter—*Duff* v. *Pirie*, November 14, 1893, 21 R. 80, 31 S.L.R. 118. Where there were questions for the arbiter the Court would not interfere with the conduct of the arbitration, or assume that the arbiter would exceed his jurisdiction—*The Licences Insurance Corporation and Guarantee Fund, Limited* v. *Shearer*, October 26, 1906, 44 S.L.R. 6, 1907, S.C. 10. Interdict should therefore be refused.

At advising—

LORD PRESIDENT—I agree with the result to which the Lord Ordinary has come. The arbitration clause between the parties is an arbitration clause of what may be called the most ample character. It is one of those which I think upon the cases covers all disputes, and not only disputes which may arise absolutely during the progress of the work. The argument presented to us depended upon this, that it was said by the complainers that there was really no dispute here at all, because all that they wished to do was to adhere to the measurement of the work which, under section 51 of the contract, fell to be made by the engineer, and which measurement was approved of by the document which we have before us, and which bears that the docquet upon it is dated 1st March 1905.

To a certain extent I was impressed with that argument, because I certainly thought that justice would not be done in a case like this if, as a matter of fact—the engineer having truly devoted his attention to the question of measurement—it was sought afterwards to rip up everything that he had done. But, then, what prevents me from giving effect to that argument is this, that the *de quo quæritur*, or one of the *de quibus quæritur*, is whether the engineer has truly put his mind to it in that sense. Parties are not at one as to what was truly done at the time when that account was docquetted; and, besides, the party on the other side points out with some force that that so-called measurement of the work was not only a measurement of the work, but also includes at least one sum as an allowance for claims which is not measurement at all but something of the nature of damages. Parties having gone before the arbiter on that matter, it seems to me there is a dispute pending before the arbiter, and it is impossible to take the whole matter away from the arbiter by means of an interdict. I, of course, do not prejudge the question of what the arbiter may do. It is possible that the arbiter will act *ultra vires* but we never *ab ante* suspect the arbiter of doing that unless something is brought before us to make us think so. I think, therefore, the arbitration must go on, and I hope the arbiter will keep in view that on a just construction of the contract—as I hold—the measurement was to be done by the engineer, and anything done by the engineer ought not to be lightly interfered with.

LORD M'LAREN—I concur. I am satisfied with the judgment of the Lord Ordinary.

LORD KINNEAR — I am of the same opinion. The reclaimers' case clearly came to this, that there was no question between the parties to go before the arbiter, but it seems to me that there is quite clearly a question both as to the scope and the effect of the particular article in the specification, and as to what the engineer really did do. And since there is a dispute it must be decided by somebody, either by the Court or by the arbiter; and it is my clear opinion, with your Lordship, that it is a dispute which falls within the arbitration clause.

LORD PEARSON—I was much impressed by the argument for the reclaimers, but upon full consideration I am of the same opinion as your Lordship.

The Court adhered.

Counsel for Complainers—Clyde, K.C. —Hon. W. Watson. Agents — Guild & Guild, W.S.

Counsel for Respondents — Orr, K.C. — Constable. Agents — Buchan & Buchan, S.S.C.

Wednesday, June 5.

FIRST DIVISION.

(EXCHEQUER CAUSE.)

INLAND REVENUE *v.* THE WESTERN STEAMSHIP COMPANY, LIMITED.

Revenue—Income Tax—Profits—Deduction —Company only Partially Insuring and Accepting itself Remainder of Risk—Sum Transferred from Fund Accumulated out of Profits to Meet a Loss Sustained—Income Tax Act 1842 (5 *and* 6 *Vict. cap.* 35), *sec.* 100, *Schedule* (*D*), *Case* 1, *Rule* 3.

A shipping company which had a ship only partially insured with underwriters, accepting itself the remainder of the risk, and setting aside to an insurance fund out of its annual profits after deduction of income tax the premium which would have been paid to underwriters for undertaking such risk, claimed, on the loss of the ship, to deduct, in calculating the profits of the year for the purposes of the Income Tax Acts, the amount which it had had to transfer from such insurance fund to meet the loss incurred.

Held that the company was not entitled to the deduction claimed.

The Income Tax Act 1842 (5 and 6 Vict. cap. 35), section 100, Schedule (D), First Case, Third Rule, enacts—"In estimating the balance of profits and gains chargeable under Schedule (D) or for the purpose of assessing the duty thereon, no sum shall be set against or deducted from . . . such profits or gains . . . for any sum employed or intended to be employed as capital in such trade . . . nor for any sum recoverable under an insurance or contract of indemnity."

At a meeting of the Commissioners for the General Purposes of the Income Tax Acts, held at Glasgow on 30th October 1905, the Western Steamship Company, Limited, appealed against an assessment for the year ending 5th April 1905 made upon it under Schedule (D) of the Income Tax Acts, and claimed repayment of £41, 2s. as duty overpaid.

The Commissioners sustained the appeal and the Surveyor took a case for appeal.

The company had owned two steamships one of which, the "Kenmore," bought by the company in the year 1898, was wrecked on 11th January 1904 and became a total loss. Its market value immediately before being wrecked was £37,000, and it was insured with underwriters to the amount of £34,500 on a valuation in the policies of £37,000. The company, in accordance with a common practice of shipowners, took upon itself a risk of loss to the amount of £2500, and claimed that to that extent it insured itself and ran a risk of loss on trading account. The amount actually paid by the company to underwriters for insurance premiums was allowed as a deduction from the profits of each year in arriving at the amount of the assessable profits of the year. The company, in accordance with its practice, transferred from its revenue account to its insurance fund a sum equivalent to the amount of premium that would have been payable to an underwriter on a risk of £2500, the amount of the risk undertaken by the company itself. No deduction from profits in calculating income tax was allowed for the sum so transferred. The company recovered from the outside underwriters the full amount of £34,500. In arriving at the amount of the assessable profits for the year ending 31st December 1904 the company claimed to deduct from its revenue for that year the sum of £2465, 4s. 1d., being the amount of the risk of £2500 undertaken by itself, less £34, 15s. 11d. received from the Salvage Association as the proportion of the proceeds of the sale of the wrecked "Kenmore" effeiring to the risk of £2500. The company transferred the said sum of £2465, 4s. 1d. from its insurance fund to its capital account.

The company contended—"(1) That the sum of £2465, 4s. 1d. transferred from its insurance fund was, especially looking to practice of shipowners and that followed by itself, a loss in trading and a proper deduction to be allowed from revenue in a question of income tax. (2) That as in making the assessment for the year 1904 and previous years the sums transferred from revenue to the insurance fund had paid income tax and had not been allowed as a deduction from revenue, a deduction in respect of the actual loss which had arisen could not be consistently refused. And (3) that it should not be put in a worse position than an outside underwriter, as, had the company insured the risk of £2500 with an outside underwriter, he would have been allowed the loss when it arose as a deduction from any profits."

The Surveyor of Taxes maintained—"(1) That there was no authority in the Income Tax Acts for allowing the deduction of £2465, 4s. 1d. claimed by the company (5 and 6 Vict. c. 35, s. 159). (2) That said sum of £2465, 4s. 1d. was not a disbursement or expense incurred by the company in earning its profits, but was a sum transferred from its revenue account, and employed or intended to be employed as capital, and was not a proper deduction from profits (5 and 6 Vict. c. 35, s. 100, First Case, Rule 3 and Rule 1 applying to both First and Second Cases). (3) That any sum recoverable under an insurance or contract of indemnity is not deductible from profits (5 and 6 Vict. c. 35, s. 100, First Case, Rule 3). . . . ."

Argued for appellant — The deduction claimed should not have been allowed, for the sum in question was capital. No deduction was allowed in respect of sums "employed as capital"—Income Tax Act 1842, Schedule D, First Case, Rule 3; Dowell's Income Tax Laws (5th ed.), pp. 133, 145. Taking another view, the sum claimed to be deducted was part of the value of the ship which had been lost, *i.e.*, part of the company's capital, and no deduction was allowed for "diminution of capital"—Income Tax Act 1842, sec. 159 (Dowell, p. 217); *Inland Revenue* v. *Watt*, February 20, 1886, 23 S.L.R. 403, 2 Tax Cas. 143; *Smith* v. *Westinghouse Brake Company* (1888), 2 Tax Cas. 357; *Granite Supply Association, Limited* v. *Inland Revenue*, November 7, 1905, 8 F. 55, 43 S.L.R. 65, Dowell, p. 148; *Alianza Company, Limited* v. *Bell*, [1906] A.C. 18. Further, no loss had in fact been suffered, for the vessel was fully insured, and deduction was not allowed for sums recovered under an insurance—Income Tax Act 1842, section 100, First Case, Rule Third, end (*v.* Dowell, p. 145.)

Argued for respondents—Insurance was an outlay necessary to earn profit, and was therefore deductible—*Inland Revenue* v. *Stewarts & Lloyds, Limited*, July 20, 1906, 8 F. 1129, 43 S.L.R. 811. Income tax had been paid on the sums set aside in name of premiums, and therefore the principal sums corresponding thereto had been, as it were, enfranchised. Had these premiums been paid to underwriters instead of being transferred to the company's reserve fund, no tax would have been payable. The shipowners having constituted themselves their own insurers, ought not to be put in a worse position than if they had insured with outsiders. The deduction claimed was not loss of capital in the sense of the Act;

it was merely a loss of accumulations of income which the company had set aside, and in respect of the loss of which deduction fell to be made.

LORD M'LAREN—The ship "Kenmore," whereof the respondents are owners, was wrecked, as we are informed, on 11th January 1904, and became a total loss. It was insured with underwriters to the amount of £34,500, on a valuation in the policy of £37,000.

It is stated in the case that the market value of the "Kenmore" immediately before being wrecked was £37,000, and it must be taken for the purposes of this appeal that the valuation in the policies of insurance represents the true value of the ship. Accordingly the sum of £37,000 is the "measure of indemnity," and to the extent of £2500 it must be taken that the "Kenmore" was uninsured.

It is true that the owners for their own protection against losses had established what is called an "insurance fund" into which they were in the practice of paying every year sums equal to the premiums of insurance which would have been payable to an underwriter in respect of the uninsured fraction of the value of each ship. The fund thus provided was then liable to be drawn upon for losses, and the respondents say that by payments into this fund in respect of the "Kenmore" they insured themselves to the extent of the sum of £2500, which was not covered by underwriters' insurances.

I do not doubt that it is a common practice, and I may say a very laudable practice, of shipowners to take upon themselves a certain proportion of the risk of losses, and to provide for the distribution of such losses over a term of years by means of a so-called insurance fund. But I must point out that this is not marine insurance in the legal sense of the term; because there is no contract of insurance, but only a reservation of a sum out of the profits of the business to provide for future losses.

In this state of the facts the respondent company claim, in a question with the Inland Revenue Department, to be entitled to a deduction from the profits of the year of the sum of £2500, less a small sum recovered as salvage, on the ground that they have lost this sum in the course of their trade during the year. This contention, as I think, is not consistent with the view which they put forward, that they have insured themselves to that extent, because if they are insured, then they have sustained no loss, and at most they could only claim deduction of the amount which they had paid as the equivalent of a premium into their own insurance fund. It is not a satisfactory answer to say that they have not been allowed to deduct these quasi-premiums in the income-tax accounts. I do not, as at present advised, see how they could maintain a claim for such deduction, because under the Income Tax Acts sums which are set apart out of gross profits to meet future contingencies are not allowed as deductions from assessable profits. In any case we must assume that the sums set apart as the equivalent of premiums were rightly treated as subject to income tax, because the company has paid the tax and has not appealed under this head.

But now if we reject the theory that the company has insured itself to the extent of £2500, it follows (on the assumption that the ship was not overvalued) that a loss has been sustained to the extent of £2500. But then I am afraid that in this view the company is in no better position to maintain its claim, because this is a loss affecting its capital account, and if anything is clear in the income-tax rules for assessment it is that losses affecting capital are not allowed as a deduction from the profits of the year.

The most favourable view of the case for the respondents' argument is, that a sum of £2500 had to be provided by way of reinstatement in order that the company should be enabled to complete the purchase of a new ship. But I think the conclusive answer is, that this is just a replacement of a capital sum which has been lost. If it can be replaced out of the company's insurance fund the company's capital account does not suffer diminution. If it cannot be replaced in this way, the capital of the company is less by £2500 than it was before the ship was wrecked; but that is a loss of capital, and is a loss which does not enter into the trading account on which income tax has to be assessed. I am accordingly of opinion that the appeal of the Surveyor of Taxes should be allowed.

LORD KINNEAR—I am of the same opinion.

LORD PEARSON—The sum of £2465, 4s. 1d., which is here sought to be deducted from profits before calculating the income tax, represents the uninsured part of the loss incurred by the company on their ship "Kenmore." When the loss occurred the company transferred that sum from its insurance fund to its capital account, so replacing the loss to capital. In my opinion that is not a case for deducting the sum from income in calculating income tax. The loss is really a loss of capital, and I think the fallacy of the view submitted by the company results from a failure to distinguish between the company's business and the company's practice in carrying on their business. It is said that to the extent of the sum claimed they are their own insurers; that their insurance fund is the product of moneys which had previously paid income tax; and that they should not be put in a worse position than an outside underwriter, who would have been allowed the loss, when it occurred, as a deduction from profits. It is a convenient expression to describe a shipowner in these circumstances as his own insurer; but that is a figurative expression, and there is no real analogy between his position and that of a person carrying on the business of underwriter.

The LORD PRESIDENT was absent.

The Court reversed the determination of

the Commissioners, remitted to them to disallow the deduction of £2465, 4s. 1d. claimed by the company, and to refuse a certificate of overpayment of duty, and decerned.

Counsel for the Appellant—Cullen, K.C.—A. J. Young. Agent—Solicitor of Inland Revenue (Philip J. Hamilton Grierson).

Counsel for the Respondent—Hunter, K.C.—Macmillan. Agents—J. & J. Ross, W.S.

Thursday, June 6.

SECOND DIVISION.

[Lord Johnston, Ordinary.

BURGH-SMEATON *v.* WHITSON (BURGH-SMEATON'S JUDICIAL FACTOR) AND OTHERS.

Marriage Contract—Trust—Succession—Destination—Right by Implication—Gift-over on Failure of Issue—Interest of Issue—Implied Gift to Issue of Rights Sufficient to Disentitle Wife on Divorce to Immediate Reconveyance of Estate.

By antenuptial contract of marriage a wife conveyed her estate, heritable and moveable, to trustees, and directed, *inter alia*, at what period in the various events of the wife surviving the husband, the husband surviving the wife and re-marrying, the husband surviving the wife and not re-marrying, the trustees were to convey the estate to herself or to her testamentary assignees and disponees. In each case the fee of the heritage was disposed of unless at the date in question there were issue of the marriage or children of predeceasing issue alive, but no rights were expressly given to such children or their issue. The wife, divorced for adultery, brought an action, which was defended by, *inter alios*, the children of the marriage, seeking declarator that she was entitled to the sole right, title, and beneficial interest in the fee of the heritable estate.

Held that the children of the marriage had by implication a right to the estate, at all events if they survived their mother and the death or second marriage of their father, and that, whatever the precise nature of their right it was at any rate sufficient to disentitle the pursuer, in the existing circumstances, to the declarator sought.

Mrs Elizabeth Margaret Burgh-Smeaton, residing at Coul, Auchterarder, Perthshire, brought an action against, *inter alios*, (1) Thomas Barnby Whitson, C.A., Edinburgh, judicial factor on the trust estate constituted by the marriage contract between Thomas Wright Burgh-Smeaton, Manitoba, Canada, and the pursuer; (2) Thomas Wright Burgh-Smeaton; (3) the children of the marriage between Thomas Wright Burgh-Smeaton and the pursuer; and (4) Mrs Mary Margaret Young or Smeaton.

The pursuer sought (First) to have it found and declared that she had the sole right and title to and beneficial interest in the fee of the heritable estate of Coul; (Second) to have it found and declared that Thomas Barnby Whitson, as judicial factor foresaid, was bound forthwith to denude and divest himself of the said subjects, and to convey the same to the pursuer and her heirs and assignees as her and their absolute property, under reservation always of, and without prejudice to, certain burdens and rights in security or otherwise, and in any event, that upon the extinction of the liferent right of the defender Thomas Wright Smeaton, and upon the pursuer paying off or puting the defender Thomas Barnby Whitson, as judicial factor foresaid, in funds to pay off the heritable securities affecting the said subjects and others, the said last-mentioned defender would be bound to denude and divest himself of the said subjects and others, and to convey the same to the pursuer and her heirs and assignees as her and their absolute property, under reservation always of, and without prejudice to, the right of liferent of the defender Mrs Mary Margaret Young or Smeaton, and the right of the defender Thomas Wright Smeaton to the free yearly annuity of £200 out of the said subjects and others in the event of said liferent and annuity, or either of them, still subsisting at the date of such conveyance; (Third) In the event of its being found and declared in terms of the first alternative of the second conclusion above written, to have the defender Thomas Barnby Whitson, as judicial factor foresaid, decerned and ordained forthwith to denude and divest himself of the said subjects and others, and to convey the same to the pursuer and her heirs and assignees as her and their absolute property, under reservation always of, and without prejudice to, certain specified burdens and rights in security.

The pursuer, *inter alia*, pleaded—"(1) The pursuer is entitled to decree of declarator in terms of the first conclusion of the summons, in respect that (1st) she was, prior to the marriage contract referred to, proprietrix of the subjects specially described in said conclusion under and by virtue of the disposition of the said Patrick Burgh-Smeaton, dated 10th April and recorded 4th October 1872, and the decree of special and general service in her favour as heir under said disposition; (2nd) said marriage contract contains no destination of the fee of the said subjects to the children of the marriage, and no other destination of the fee applicable to the contingency which has occurred, namely, the dissolution of the marriage by decree of divorce in the lifetime of the pursuer; (3rd) by virtue of her radical right in the said subjects, the full beneficial interest in the fee thereof, or otherwise the fee itself, is vested in the pursuer, under reservation of and without prejudice to the burdens and rights in security validly affecting the same. (2) In respect