this. It is made an essential condition of Colonel Spencer having the liferent of Teaninich that he shall (to read short the language used by the truster) assume and constantly thereafter use as his surname and designation the surname and designation of Munro of Teaninich as his proper surname and designation in addition to his own surname and designation. (I omit the provision as to arms, about which there is no dispute.) This seems to me clearly to indicate that the name Munro was intended to come last. In common parlance the testator intended that the beneficiary should become a Munro. According to the proposal, the liferenter of the estate will not be Munro of Teaninich, but Munro-Spencer of Teaninich. To show how far the argument of the third party can be carried, reference may be made to the case of one of the possible liferenters under this settlement—Alexander Redmond Bewley Warrand. The first is a Christian name, the others are, properly speaking, surnames. According to the argument for the third party, and the judgment of your Lordships, it would be compliance with the condition prescribed by the testator if the beneficiary called himself Alexander Munro Redmond Bewley Warrand of Teaninich. It appears to me this would be altogether inconsistent with the intention of the testator as expressed in his settlement.

It is maintained that the testator's intention cannot receive effect because of the case of *Hunter* v. *Weston*. That case was different from the present. The question there as put by the Lord President was this—"Whether the entailer has required more than that the name of Hunter shall be assumed, there being no further or more precise condition inserted in the deed, and the whole words of it being that the heir 'shall be obliged to use, bear, and constantly retain the surname of Hunter.'" The answer was in the negative. Here the addition of the words "of Teaninich," and the provision that Munro is to be the beneficiary's "proper surname," are in my opinion farther and more precise conditions which make the decision not an authority in favour of Colonel Spencer's view.

The case of *D'Eyncourt* v. *Gregory*, L.R., 1 Ch. D. 441, a judgment of Jessel, M.R., as it is inconsistent with *Hunter's* case, cannot be effectively cited against the third party here. In *Mildmay* v. *Mildmay*, 1900, 1 Ch. 96, where Byrne (J.) held the prescribed name could be used either before or after the devisee's family name, the direction was merely to use the former "alone or together" with the latter. In the judgment some weight was attached to the fact that in the books on English conveyancing practice a form of clause is given prescribing which surname should come last. In the present case I am of opinion there is sufficient in the terms of the settlement to show which surname the testator intended should stand last. The third party being a liferenter, the condition can be effectively enforced against him, and it is unnecessary to consider what a fiar could do after he got the estate.

I therefore am unable to take the same view as your Lordships. I do not think the case of *Hunter* v. *Weston* is sufficient to defeat the intention of the testator. I am of opinion that the question should be answered in the negative.

LORD JOHNSTON was absent.

The Court answered the question of law in the affirmative.

Counsel for First and Second Parties—D. Anderson. Agents—Skene, Edwards, & Garson, W.S.

Counsel for Third Party—D.-F. Scott-Dickson, K.C.—A. R. Brown. Agents—Elder & Aikman, W.S.

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*Wednesday, March* 20.

## FIRST DIVISION.

[Lord Hunter, Ordinary.

## HOWDEN & COMPANY, LIMITED *v.* POWELL DUFFRYN STEAM COAL COMPANY, LIMITED.

*Contract—Arbitration Clause—Construction — Applicability — Right to Legal Remedies.*

An arbitration clause in a contract for the erection of electric plant provided that any dispute or difference arising between the parties as to the construction of the contract, or the rights or liabilities of parties, should be referred to arbitration, "provided that no such dispute or difference shall be deemed to have arisen or be referred to arbitration hereunder unless one party has given notice in writing to the other of the existence of such dispute or difference within seven days after it arises." The buyers having rejected the plant, the sellers, more than seven days thereafter, wrote repudiating the rejection, and subsequently sued the buyers for the price. The defenders having pleaded the arbitration clause, the pursuers contended that it was inapplicable on the ground that no notice had been given of the dispute within seven days after it had arisen—which, they maintained, was the date of their repudiation of the rejection—and that, accordingly, they were entitled to their ordinary legal remedies.

*Held* that the dispute did not arise until the date of the pursuers' letter repudiating the rejection, but that the letter of repudiation was of itself notice of the existence of the dispute, and that, accordingly, the arbitration clause was applicable, and action *sisted.*

*Jurisdiction — Forum non conveniens — Defenders Resident in England — Contract to be Executed in Wales—Clause of Arbitration in English Form.*

A firm of engineers in Glasgow agreed to erect for a London company certain electric plant at the latter's power station in Wales. The contract was executed in England, and contained an arbitration clause in English form providing, *inter alia*, for the appointment of an arbiter under the English Arbitration Act 1889. In an action at the instance of the Glasgow firm against the company, who had rejected the plant, and against whom arrestments had been used *ad fundandam jurisdictionem*, the defenders contended that it was for the English Court to determine the scope of the reference, and that as the contract was an English one it would be more convenient to have the case tried in England, and pleaded *forum non conveniens*.

*Held* that as the defenders had failed to show that it would be more suitable for the interests of all parties and for the ends of justice that the case should be tried in England, there was no reason why the case should not remain in the Scottish Courts, and plea *repelled*.

*Held*, further, that the action must be sisted *in hoc statu* in order that the matters in dispute might be settled by arbitration in terms of the contract.

*Contract — Condition Precedent — Title to Sue — Certificate of Engineer.*

A contract for the erection of electric plant provided that the price should be payable by instalments, and that such instalments should be paid within fourteen days after production of the engineer's certificate that such instalments were due. The contract further provided—"The certificates other than the final certificate of the engineer, shall not be considered conclusive evidence as to the sufficiency of any work or materials to which they relate, nor shall they relieve contractors from any obligations under this contract. The engineer shall not be bound to give a final certificate if he is of opinion that the contractors have not performed all obligations under this contract, but any question arising under this clause as to whether the contractors have performed all their obligations shall be subject to the provisions for arbitration herein contained."

In an action at the instance of the sellers for payment of the price — the plant having been rejected by the buyer's engineer, who was the engineer under the contract — *held* that the engineer's final certificate had not been made a condition-precedent to payment, and that, accordingly, the sellers were entitled to sue the buyers for the price.

On 2nd July 1910 James Howden & Company, Limited, engineers, Glasgow, *pursuers*, brought an action against the Powell Duffryn Steam Coal Company, Limited, London, against whom arrestments had been used *ad fundandam jurisdictionem*, *defenders*, for payment of £10,109 odd alleged to be due under two contracts by which they (the pursuers) agreed to supply to and erect for the defenders certain electric plant at Aberamon, South Wales. The first contract was dated 6th July 1907, and the second contract, which was substantially a duplicate of the first, was dated 23rd February 1909. The material clauses of the contracts, which were expressed in the same terms, were as follows:—

Clause 4 (*a*)—"If the completed work or any portion thereof fails to pass the specified 'test on completion,' or be defective in any way, the engineer may reject such work or portion thereof, and the P. D. Company shall then have" certain options which were then set forth.

Clause 5—"The P. D. Company shall pay to the contractors for the said machinery the contract price mentioned in the said schedule by three instalments as follows, namely, 70 per cent. of the contract price on the said machinery being delivered on site, 20 per cent. on the said machinery having been tested to the satisfaction of the engineer, and being in working order as required by this agreement to the satisfaction of the engineer, and 10 per cent. six calendar months after the previous instalment of 20 per cent. due on completion of test has become payable (subject to the plant having worked satisfactorily); the said respective instalments shall be paid within fourteen days after the production of the certificate of the engineer that such instalments are respectively due and payable. In case the engineer shall at any time neglect or refuse without reasonable cause to give to the contractors his certificate in writing that any instalment is due and payable when such instalment is due and payable, the matter in dispute shall be referred to arbitration as hereinafter provided. The certificates, other than the final certificate of the engineer, shall not be considered conclusive evidence as to the sufficiency of any work or materials to which they relate, nor shall they relieve contractors from any obligations under this contract. The engineer shall not be bound to give a final certificate if he is of opinion that the contractors have not performed all obligations under this contract, but any question arising under this clause as to whether the contractors have performed all their obligations shall be subject to the provisions for arbitration herein contained."

Clause 18 — "Any question hereby directed to be referred to arbitration (including clause 4), and any dispute or difference arising between the P. D. Company, or the engineer on their behalf, and the contractors as to the construction meaning, or effect hereof, or any clause or thing herein contained, or the rights or liabilities of the parties hereto, or otherwise howsoever in relation to the premises, shall be referred to arbitration and determined by an engineer to be appointed by the president for the time being of the Institute of Electrical Engineers as arbitrator, and such arbitration shall be deemed to be a submission to arbitration within

the meaning of the Arbitration Act 1889 and subsequent Acts, provided that no such dispute or difference shall be deemed to have arisen or to be referred to arbitration hereunder unless one party has given notice in writing to the other of the existence of such dispute or difference within seven days after it arises."

The following narrative of the *facts* of the case is taken from the opinion of the Lord President—"The Powell Duffryn Steam Coal Company, Limited, of London, entered into a contract with James Howden & Company, Limited, engineers, of Glasgow, for the supply by them of a 2000 kilowatt turbo-alternator. The agreement was made in a regular contract, and had, as all engineering contracts of this sort have, a schedule and specification attached. The whole details of the machine I need not enter into. There was also a subsequent contract made for another machine of the same class. Now both the first and the second machines were erected in the Powell Duffryn Steam Coal Company's works at a place in South Wales. There were various disputes as to the working of the first machine after it was erected, all of which I need not go into, because I may pass at once to a critical communication which was made upon the 12th of August 1909, when the following letter was written by the engineer of the Powell Duffryn Steam Coal Company:—'Under contract of 6th July 1907, I hereby give you notice that the 2000 kilowatt turbine' in question 'is defective and does not comply with the agreement made between us, . . . and in exercise of the power conferred upon me by clause 4a of the said agreement I hereby reject the same.' That letter was written upon the 12th of August, and we may assume that it was received on the 13th. It was not answered till the 25th, in a letter in which Howden & Company maintain that the machine was conform to contract, that anything that had gone wrong was due to the persons who had worked it, and they say—'We cannot therefore accept your right or power to reject this turbine under the conditions of our contract.'

"A similar letter of rejection applicable to the second machine was written upon the 15th March 1910, and that letter was answered next day. Here again Howden & Company took up the same position and refused to recognise the rejection. That being the state of affairs, this action has been raised by Howden & Company, they having founded jurisdiction against the Powell Duffryn Company to recover the price of the two machines. Defences have been lodged by the Powell Duffryn Company in which they say that the machines were defective and therefore were properly rejected, and that they are not bound to pay for them. But they also plead that the matters in dispute fall to be determined by arbitration, and they have a plea of *forum non conveniens*."

On 17th January 1912 the Lord Ordinary (HUNTER) repelled the defenders' plea of *forum non conveniens;* found that the matters in dispute fell to be determined by arbitration in terms of the contracts; and accordingly sisted process *in hoc statu* until these matters had been settled by arbitration.

*Opinion.* — "[*After a narrative of the facts*]—"The defenders argued that I should *in limine* sustain their plea of *forum non conveniens* and dismiss the action. They do not dispute the jurisdiction of the Scots Courts, but found upon the circumstance that the jurisdiction is only constituted by arrestment in Scotland of property belonging to them. They say that certain of the witnesses are resident in London, where the defenders have their registered office, that the contract falls to be interpreted by English law, and that it would be more convenient for them to have the dispute settled in England.

"On the other hand, the pursuers argued that as the Scots Courts were seized of the cause and had jurisdiction, no adequate reason had been given for sustaining this plea. It was pointed out that Scotland was more convenient for them and also for a number of the witnesses, *i.e.*, workmen employed by them at the erection of the plant who are resident in Scotland. They also argued that although the contract was executed in England it was expressed in familiar English language; that no relevant averment of English law being different from Scots law, so far as the interpreting of such a mercantile contract between an Englishman and a Scotsman is concerned, had been made; and that as the place of fulfilment of the contract was Wales it was at least doubtful whether London would not be as inconvenient as Edinburgh for a certain number of the witnesses who would require to be examined.

"Several cases were cited to me as bearing upon the plea of *forum non conveniens*, but I do not think it necessary to examine them in detail. It appears to me to be settled, as was said by Lord Kinnear in the case of *Sim* v. *Robinow*, 19 R. 665 at 668, 29 S.L.R. 585, that 'the plea can never be sustained unless the Court is satisfied that there is some other tribunal having competent jurisdiction in which the case may be tried more suitably for the interests of all the parties and for the ends of justice.' So put the question cannot, I think, be answered by a mere balancing of the apparent considerations in favour of the courts of another country as against the considerations in favour of the courts of this country. Even upon this point I was by no means satisfied of the soundness of the defenders' contention. In the only cases, however, in which the plea has been sustained there have been exceptional circumstances such as I do not find in the present case. I shall therefore repel this plea.

"The next question that was argued was whether the action ought to be dismissed, or at all events sisted, in order that parties may have their disputes determined by arbitration. It was maintained by the defenders that as parties contemplated and provided for the appointment of an arbiter under the English Arbitration Act 1889, it was for an English Court to deter-

mine the scope of the reference clause, and that I should therefore either dismiss the action or at all events pronounce an interlocutor directing parties to prepare a case for submission to the English Courts in terms of the British Law Ascertainment Act 1859, in the terms adopted by the Inner House in the case of *Johannesburg* v. *D. Stewart & Company*, 1909 S.C. 860, 46 S.L.R. 657. There are, however, as it appears to me, no relevant averments of English law upon this point. I think what was said by the Lord President in the case of *Johannesburg* at the foot of p. 875 of 1909 S.C. is applicable to the present case, 'that where the whole question is one of the interpretation of the English language in an English contract, and no matter peculiar to the law of England enters into it, we are entitled to interpret that language—which we are supposed to know equally well with the English Judges.' I proceed therefore to consider the scope of reference.

"The first observation I make upon the clause of reference is, that it is not a mere executory clause, but is a general clause which refers to an arbiter all questions which may properly arise either upon the import and meaning or upon the carrying out of the contract. Examples of such clauses are to be found in the cases of *Mackay* v. *Parochial Board of Barry*, 1863, 10 R. 1046, 20 S.L.R. 697, and *North British Railway Company* v. *Newburgh and North Fife Railway Company*, 1911 S.C. 710, 48 S.L.R. 450. The claim in the present case is for money said to be due under the contract. That is disputed. It seems to me that this is a question of liability of one of the parties under the contract, and, *prima facie* at all events, falls to be determined by arbitration. The case for the defenders does not, however, rest upon a bald averment of not being liable. They found upon the rejection by the engineer of the turbines, and maintain that if the pursuers were dissatisfied with the rejection it was their duty to go to arbitration. In any event, they say that an action cannot be maintained by the pursuers under the contract unless they have got a final certificate from the engineer, or have got a finding from the arbiter that such certificate has been wrongfully withheld. No doubt the pursuers in reply say that a certificate is not necessary. That, however, appears to me to raise a question of construction of clause 5, and if so to be referred by clause 18 to the arbiter.

"It was strongly argued for the pursuers that the reference clause, being conditional upon notice in writing being given by one party to the other within seven days of the existence of a dispute or difference, could not be founded upon, with the result that the jurisdiction of the Court to deal with any matter of difference between the parties was restored. They say that the real question in dispute is whether the turbines were or were not conform to contract; that a dispute as to this existed upon their intimating to the defenders their repudiation of the engineer s rejection; that the defenders ought, within seven days from that date, to have intimated in writing to them the existence of such dispute, and that their failure to do so makes the reference clause inoperative. I do not accept this construction of the clause. I do not see why the defenders, who were satisfied with what the engineer had done, should have invoked arbitration. Suppose the question had been as to whether the engineer had rightly granted a final certificate, the pursuers' construction would apparently lead to this result, that if the defenders said they were dissatisfied with the granting of the certificate the pursuers would, after the lapse of seven days from the existence of the dispute, not be in possession of a final certificate, but would have to join issue with the defenders upon any question arising under the contract in a court of law. That does not appear reasonable. In my opinion the proviso has not the effect, if the condition is not purified, of destroying the reference clause and restoring the jurisdiction of the Court, but operates within the reference to the effect, it may be, of curtailing the rights of one or other of the parties, who must be held to have accepted the situation because he did not timeously give notice of the dispute. Apart from this consideration, I do not see why the question as to the defenders' liability under the contract, and the plea that the pursuers ought to have a final certificate before suing for payment, ought not now to go to arbitration. The defenders say—and this is not disputed—that within five days after the service of the summons they wrote to the pursuers' agents requiring that the matters in dispute should be determined by arbitration in terms of the contract. [*His Lordship here dealt with questions with which this report is not concerned.*]

"The defenders maintained that if in my opinion the arbitration clause applies I ought to dismiss the action, because in an English arbitration nothing requires to be done in court. Against this view it has to be observed that the jurisdiction of the courts is not ousted by a reference clause which remits to another tribunal the merits of the case. I propose to pronounce an interlocutor in the terms approved by the House of Lords in the case of *Hamlyn*, 21 R. (H.L.) 21, sisting procedure *in hoc statu* in order that the matters in dispute may be settled by arbitration in terms of the contract between the parties. As pointed out by Lord Watson in that case, 'Such an order will leave the parties at liberty in the course of the reference to avail themselves of the provisions of the Arbitration Act 1889, and will enable the Court of Session, in the event of any lapse of the reference, to dispose of the merits of the case.'"

The pursuer reclaimed, and argued—(1) The proviso in the arbitration clause required the party intending to invoke arbitration to give formal notice of his intention so to do within seven days of the existence of the dispute. That had not been done

here, and the arbitration clause was therefore inapplicable. The dispute did not arise until the pursuers wrote declining to accept the defenders' rejection of the plant, and as arbitration was not formally invoked by the defender within seven days thereafter, there had been no "ouster" of the jurisdiction of the courts, and the pursuers were entitled to their ordinary legal remedies. (2) The plea of *forum non conveniens* had been rightly repelled by the Lord Ordinary for the reasons stated in his opinion. (3) The engineer's certificate was not a condition-precedent to payment; it was only part of the machinery for ascertaining the due date of payment, and the pursuers therefore were entitled to sue for the price of the plant without it.

Argued for respondents—The proviso in clause 18 of the contract had not been complied with, for notice of the dispute had not been timeously given. The rejection of the plant took place on 12th August, and the pursuers did not challenge that rejection till the 25th, *i.e.*, more than seven days thereafter. That being so, and the arbitration clause being therefore inapplicable, the engineer's rejection was final, and the respondents were entitled to absolvitor. The pursuer's remedy under this contract was to have invoked arbitration within the specified period, and as they had not availed themselves of it the remedy was gone. Alternatively the Lord Ordinary was right in holding that the dispute between the parties fell within the arbitration clause. The clause was a very wide one and covered the question at issue, viz., whether rejection had or had not been rightly made—*Hohenzollern Actien Gesellschaft* v. *City of London Contract Corporation, Limited* (1886), *vide* Hudson on Building Contracts (3rd ed.), vol. ii, p. 96; *Robins* v. *Goddard*, [1905] 1 K.B. 294. (2) The Lord Ordinary was in error in repelling the plea of *forum non conveniens*. It was clear from the language of the arbitration clause that parties intended that their rights thereunder should be determined by the law of England—*Hamlyn & Company* v. *Talisker Distillery*, May 10, 1894, 21 R. (H.L.), 21, 31 S.L.R. 642. That law gave the parties certain rights which they could not have in Scotland, viz., an appeal from the arbiter. Besides, it was more convenient for all parties that the case should be tried in England. (3) The pursuers were not entitled to payment without the engineer's certificate, for the contract made him the judge of the sufficiency of the plant. His certificate therefore was a condition-precedent—*Chapman* v. *Edinburgh Prison Board*, July 16, 1844, 6 D. 1288.

At advising—

LORD PRESIDENT—[*After the foregoing narrative of the facts*]—The Lord Ordinary, after having heard the parties, repelled the plea-in-law of *forum non conveniens*, and found that the matters in dispute fell to be determined by arbitration in terms of the contracts founded on, and accordingly sisted the process *in hoc statu* until these matters have been settled by arbitration, reserving the question of expenses. Against that interlocutor a reclaiming note was taken by the pursuers, and they moved for a proof. But the defenders took advantage of that reclaiming note, as they were entitled to do, and argued before your Lordships that so far as the first contract was concerned they should be assoilzied altogether, and this plea comes logically first, and must, I think, be disposed of before one goes further with the other portion of the case.

These matters depend upon the contract and upon the contract alone, and there are several clauses to which I shall have to call your Lordship's attention. The fourth clause deals with the erection of the machinery. I do not think I need to go through it, because I think it is quite clear (and I do not think really parties contended otherwise) that it has nothing to do with the machinery as a whole, but is only intended to give a power during the period of erection to reject what I may call improper bits. It is a clause which gives an engineer a right to say—"You shall not put in such a pulley, or such a piston, or so on, because of improper material." But the material clause is 4A, which says—"If the completed work or any portion thereof fail to pass the specified 'test on completion,' or be defective in any way, the engineer may reject such work or portion thereof," and the Powell Duffryn Company shall have several options, which are set forth. And then comes the clause upon which the whole matters in argument really turn. It is the 18th, and is in these terms—"Any question hereby directed to be referred to arbitration (including clause 4), and any dispute or difference arising between the Powell Duffryn Company or the engineer on their behalf and the contractors, as to the construction, meaning, or effect hereof, or any clause or thing herein contained, or the rights or liabilities of the parties hereto, or otherwise howsoever in relation to the premises, shall be referred to arbitration and determined by an engineer to be appointed by the President, for the time being, of the Institute of Electrical Engineers, as arbitrator, and such arbitration shall be deemed to be a submission to arbitration within the meaning of the Arbitration Act 1889, and subsequent Acts." And then comes a proviso with which I shall deal afterwards.

Now I think that you cannot read that arbitration clause without seeing that it is of a very wide description, and that it is the expressed wish of the parties to this contract that any engineering dispute which arose should be decided by a professional engineer as arbiter appointed in terms of the clause and not by the courts of law. That is the initial view that I gather from this contract. But then comes this curious proviso which both parties seek to make use of—"Provided that no such dispute or difference shall be deemed to have arisen, or be referred to arbitration hereunder, unless one party has given notice in writing to the other

of the existence of such dispute or difference within seven days after it arises." Now the defenders, in taking advantage of the reclaiming-note, as I understand, seek to use this clause in this way. They say—"If you do not give intimation within seven days of the existence of the dispute, and say you are going to arbitration upon it, then the rejection by the engineer is a final rejection." I personally think that is an impossible construction.

In the first place, the clause here does not provide that the parties shall say that they are going to arbitration. All it says is that they are to give notice of the existence of such dispute or difference within seven days after it arises. Well, now, I do not think a dispute can be held to have arisen until you have two parties to the dispute; it takes two to make a quarrel; and therefore I do not think that when one party gives a notice to the other that they reject the machinery as being disconform to contract, that intimation by itself creates a dispute. The consequence is that in my view the letter of 12th August 1909 did not create a dispute. The letter of 25th August 1909 did show that a dispute had arisen, because it repudiated the view of the letter of the 12th August, and therefore there was a going dispute. But the letter that, so to speak, created the dispute also gave notice of it, and therefore to my mind the letter itself was a notice in terms of the clause. The clause does not require that you must necessarily say, "I propose to refer this to arbitration," and accordingly I reject this view of the defenders that the matter of the rejection of the machinery can no longer be called in question.

The defenders use the argument I have been discussing only with regard to the first contract, because under the second contract their letter rejecting the machinery was answered next day, that is, within seven days.

I think the argument which the pursuers use in order to get rid of this contention of the defenders really puts them out of Court upon the next question. Mr Macmillan argued that inasmuch as there had been no intimation of an intention to go to arbitration within seven days of the existence of the dispute, which he said, and I think properly said, was matured upon the 25th August in the case of the first machine, then there could be no arbitration at all, and the parties were referred back to their rights in the courts of the country. I think that is met by exactly the same reasoning which I have used to dispose of the plea of the defenders. I think, therefore, that there again that view is untenable.

It may be as well that I should say what I think the real meaning and use of the proviso is. I think, as I have already said, you cannot read the clause without seeing that the *voluntas* of the parties is arbitration. I think that proviso is put in solely in order to make it certain that there should not be arbitration upon disputes that were merely verbal. I think the meaning of the clause is this. If there is a dispute which has not been reduced to writing at all, then neither side shall be listened to on that dispute unless within seven days the fact that there is a dispute is put in writing. I think the clause was really inserted with a view to meeting cases that arose during the execution of the contract, and that it has no application at all to the question which arises at the end of the day, whether the machinery is or is not in conformity with the contract.

Accordingly upon the whole matter I think that the Lord Ordinary is right. The form of his interlocutor has been carefully modelled upon the interlocutor which the House of Lords pronounced in the case of *Hamlyn*, and I may here add that it seems to me that that also disposes of the plea of *forum non conveniens*, because in *Hamlyn's* case, as here, the contract was an English contract, and the arbitration was to be an English arbitration. Notwithstanding that, the House of Lords held that there was no reason whatsoever why the action should not remain in the Scottish Courts in order to get the benefit of the assistance of the Court, either in getting a decree more easily than it could be got from an arbitrator, or in the event of the arbitration breaking down for any reason.

I should just mention one other matter to show that I have not omitted it. There are certain provisions as to the prices being paid by instalments; they are to be paid, twenty per cent. after test, and ten per cent. six months afterwards. It is possible to phrase a contract so that the possession of an engineer's certificate should be made a condition-precedent to any action whatsoever. All I can say is that that has not been done here. I think the action as an action is quite a good action, and, in other words, the case is just in the same position as *Hamlyn's* case.

I should like to add one word more as to what the pursuers, who are sent away from this Court, ought to do. They are in a position, I do not doubt, to invoke the arbiter on the question whether the rejection was proper or improper. The contract provides for the appointment of an arbiter in order that the *ipse dixit* of the engineer should not be final upon that matter. But I think it may be easier for the pursuers if they call upon the engineer formally to give them a final certificate. Of course he will refuse it—he is bound to refuse it in view of what he has done in the way of rejection. In that way the pursuers can bring the whole question before the arbiter whether the rejection was a proper rejection or not. If it was, there the matter ends; and if it was not, then the pursuers will be able to say "We are entitled to get our final certificate."

LORD KINNEAR—I agree with your Lordship and with the Lord Ordinary.

LORD JOHNSTON—I have come to the same conclusion from a slightly different point of view. I think that the last clause in section 18 of the contract really is executorial of the contract merely, and has a somewhat different effect than that which

your Lordship has expressed. I regard it as properly intended to meet the case of some question arising while the contract is current, and to compel any question of that sort to be brought to a point and be determined incidentally so as not to interfere with the continuous execution of the contract as a whole. I do not think that it was intended to cover what comes at the end of the contract—the winding up of the relations between the contracting parties and a final settlement. There is no question that the rejection of either the whole machinery contracted for, or of such a large and important part of it as is here in question, raises in effect the matter of final payment. It certainly supports this view, that if Mr Clyde's clients had desired arbitration, instead of resisting it, their tactics would have been simple. They would have demanded a final certificate notwithstanding the rejection, and even though on their own reading of clause 18 they were too late to insist directly on taking the question of rejection to arbitration, and on a final certificate of payment being refused would have gone to arbitration, because, as I read section 5, its proviso as regards arbitration in the case of a disputed certificate for payment, whether interim or final, is not affected by the final clause of section 18.

I therefore agree that the Lord Ordinary has come to a correct conclusion as represented in the interlocutor he has pronounced.

LORD MACKENZIE—The agreement turns upon the construction to be put upon the arbitration clause in the contract. It is very wide in its terms, and there is not room for doubt that the dispute as to whether there was a right to reject the turbine supplied falls within the leading words of the clause. The contention is that there has not been compliance with the proviso. This, according to the defenders, entitles them to absolvitor *de plano*, the pursuers contending, on the other hand, that the clause cannot now be appealed to and that they are entitled to a proof.

Neither of these contentions is in my opinion sound. The proviso is badly expressed. I cannot construe it as meaning that when a dispute has arisen notice must be given within seven days by the party wishing arbitration. The clause does not say so. Nor can I construe it as meaning that if one of the parties takes a step which he is entitled to under the contract, *e.g.*, as here, if he rejects the work under 4 (*a*), then it is to be held there is a conventional acquiescence unless within seven days thereafter the other party disputes his right to do so. This is what the defenders' first contention came to, the result being that the engineer becomes final. A dispute cannot arise between two parties unless there is disagreement. When the engineer of the Powell-Duffryn Company rejected the work, Howden & Company might have either agreed or disagreed with his view. If they agreed there was no dispute. Until they disagreed there neither was, nor could it be deemed that there was, a dispute or difference. It is therefore impossible, in my view, to say that because the defenders did not write within seven days after the 12th of August 1909, on which date a dispute had not arisen, giving the pursuers notice that a dispute had then arisen, therefore recourse cannot now be had to arbitration. There was no dispute until the pursuers wrote on 25th August 1909 saying they could not accept the defenders' right to reject, and by writing the letter they necessarily gave notice of the existence of the dispute within seven days after it arose. The proviso does not seem capable of any very intelligible meaning, but there is not, in my opinion, any reason for construing it so as to render the leading words of the clause nugatory.

The result is that I think the defenders' alternative argument in support of the conclusion reached by the Lord Ordinary should prevail.

The Court adhered.

Counsel for Pursuers (Reclaimers)—Clyde, K.C.—Macmillan. Agents—J. & J. Ross, W.S.

Counsel for Defenders (Respondents)—Morison, K.C.—Crurie Steuart. Agents—Mackay & Young, W.S.

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*Wednesday, March* 20.

## SECOND DIVISION.

## DRYBROUGH'S TRUSTEES *v.* DRYBROUGH & OTHERS.

*Succession—Liferent and Fee—Annuity—Annuitant Born after Date of Deed—Right to Fee—"Held in Liferent"—Entail Amendment (Scotland) Act* 1848 (11 *and* 12 *Vict. cap.* 36), *secs.* 47 *and* 48—*Entail Amendment (Scotland) Act* 1868 (31 *and* 32 *Vict. cap.* 84), *sec.* 17.

*Held* that a share in an annuity, in security of which certain heritable property had been disponed to trustees by an antenuptial bond, was not estate "held in liferent" in the sense of the Entail Amendment (Scotland) Acts 1848 and 1868, so as to entitle an annuitant born after the date of the deed to payment of the fee.

*Succession—Accretion—Annuity—Lapsed Share of Annuity—Conditio si sine liberis.*

By an antenuptial bond of annuity D bound himself to make payment to trustees of an annuity of £200, disponing certain heritable estate in security, and provided that the trustees should hold the annuity for behoof of his intended wife "and the child or children of our said intended marriage, and the survivors and survivor of them, as an alimentary provision for them." He indicated in later clauses of the bond that the issue of a child were to take their parent's share. D and his wife were survived by three sons. In