[HEARD 3rd—JUDGMENT 5th *August*, 1850.]

THE GLASGOW, BARRHEAD, AND NEILSTON RAILWAY COMPANY, *Appellants*.

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THE NITSHILL COAL COMPANY and OTHERS, *Respondents*.

Arbitration.—Lands Clauses Consolidation Act.—A reference to arbitration in terms of a statute must be conducted according to the provisions of that statute.

Ibid.—Ibid.—Statute.—Waiver.—A reference under the Lands Clauses Consolidation Act being once entered into, the parties cannot waive adherence to the provisions of the statute in the conduct of the proceedings.

Arbitration.—Power.—A power in parties to a submission to renew it, will not, when exercised, renew an appointment of an oversman by the arbiters, which had fallen on expiry of the reference.

THE Appellants, in the course of constructing their railway, entered on possession of part of the lands of Househill, after having satisfied the proprietor and agricultural tenant in regard to the value of the land so taken.

Some time afterwards, the Respondents set up a claim to minerals lying under this land, and a correspondence took place in September, 1846, under which it was agreed to have this adjusted by a reference. Accordingly, a deed of submission was entered into between the parties, which recited: "And whereas "the parties hereto, not agreeing whether any compensation is "due by the first party to the said second party, or as to the com- "pensation claimed by the said second party from the said "first party; the said parties have agreed to have the said "questions determined by arbitration, in terms of the Lands

" Clauses Consolidation (Scotland) Act, 1845, and the Railway " Clauses Consolidation (Scotland) Act, 1845 :" and appointed Murray and Drummond as arbiters " in terms of the said Acts" to decide the matters in dispute; " and in case of their differing " in opinion, and in so far as they shall so differ, of an overs- " man to be chosen by them, in terms of the said Lands Clauses " Consolidation (Scotland) Act, all claims of compensation and " damages whatsoever, competent to the said second party against " the said first party, under the said Glasgow, Barrhead, and " Neilston Direct Railway Act, 1845, and the said Lands Clauses " Consolidation (Scotland) Act, 1845, and the said Railway " Clauses Consolidation Scotland) Act, 1845, in consequence " of the said first parties' operations under the foresaid Acts, or " any of them; and with power to the one arbiter to act and decide " without the other, and for the oversman to act and decide, all " in the events and manner provided for in the said Lands " Clauses Act in general, with full power to the arbiters, or single " arbiter, or the oversman, to do everything necessary and pro- " per for bringing the matters submitted, to a just and speedy " issue, in terms of the said several Acts, and whatever orders " or decrees, interim or final, the said arbiters, or arbiter, or " oversman, shall give forth and pronounce, in terms of the said " Acts, the parties hereto bind and oblige themselves, and their " respective successors and representatives, to fulfil, perform, " and observe." This deed bore date the 16th and 23rd days of October, 1846.

On the 25th and 26th of November, a minute setting out in these words, " We the parties to the within submission," was endorsed on the Deed of submission, and subscribed by " John Tennent, Secretary" to the Appellants, Company, and by the Respondents, prorogating the submission indefinitely.

Upon the 26th November another minute was endorsed on the Deed of Submission, and signed by the arbiters, whereby they, for the first time, accepted the reference, and appointed

McCreath to be oversman "in terms of and with the powers "specified in the Acts of Parliament within mentioned, and "we also extend the time within which our award may be "pronounced to a period of six months from the date hereof."

A claim for the Respondents was lodged with the arbiters on the 19th December, 1846. Answers to this claim were lodged by the Appellants on the 9th of March, 1847. On the same day, the arbiters ordered replies by the Respondents. The replies were lodged on the 26th of March, and on the 2nd of April the arbiters allowed the parties a proof of their averments.

No further proceeding took place within the period to which the arbiters had enlarged the time for making their award. This expired on 26th of April.

On the 12th of July, 1847, a minute was endorsed on the submission by John Tennent, "on behalf of and as authorized "by" the Appellants' Company, and by the Respondents, renewing the submission "for the farther period of three "months."

On the same day witnesses were examined by the parties, and the same procedure took place on the 19th and 26th of July, and the 13th and 24th of September.

On the 12th of October a minute of prorogation for three months was endorsed on the submission, and was signed by the Appellants' secretary on their behalf. On the 21st of October and 4th November further evidence was led.

On the 27th of December another minute was endorsed on the submission, prorogating it "for two months after the 12th "of January next," and was also signed by the Appellants' secretary. On the 11th of January, 1848, the arbiters signed a minute devolving the submission "in terms thereof upon "William McCreath, the oversman already appointed by us."

The oversman issued notes of his judgment to the parties, and upon the 11th of March, 1848, executed a formal decree-

arbitral, bearing that it was made under the Deed of Submission between the parties, and decreeing the Appellants to pay to the Respondents the sum of 1,451*l.* 8*s.* 2*d.* as compensation for the minerals under the land which they had taken.

"XIV. By the 26th section of the Lands Clauses Consoli- " dation (Scotland) Act, 1845, it is enacted, that the arbiters " appointed in terms of the Act, 'shall, before they enter upon " 'the matters referred to them, nominate and appoint, by " 'writing under their hands, an oversman to decide on any such " 'matters on which they shall differ, or which shall be referred " 'to him under the provisions of this or the special Act.'

"XV. By section 30 of the said Act, it is enacted, 'If, " 'when more than one arbiter shall have been appointed, and " 'neither of them shall refuse or neglect to act as aforesaid, " 'such arbiters shall fail to make their award within twenty- " 'one days after the day on which the last of such arbiters " 'shall have been appointed, or within such extended time as " 'shall have been appointed for that purpose by both such " 'arbiters under this Act, the matters referred to them shall be " 'determined by the umpire to be appointed as aforesaid.'

"XVI. By section 35 of the said Act, it is enacted, 'If the " 'party claiming compensation shall not, as hereinbefore pro- " 'vided, signify his desire to have the question of such com- " 'pensation settled by arbitration, or if, when the matter shall " 'have been referred to arbitration, the arbiters or their " 'umpire *shall for* THREE *months have failed to make their or* " '*his award, the question of such compensation* SHALL BE " 'SETTLED *by the verdict of a jury,* as hereinbefore provided.'"

The Appellants presented a note of suspension of a charge under the decree-arbitral upon these preliminary grounds, besides objections to the merits.

"1. The submission had fallen before the award complained " of was pronounced; much more than three months having " expired from the date of the reference to arbitration.

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"2. It was incompetent either for the arbiters or parties to "prorogate the submission, the statute being imperative that, if "no award should be issued for three months after the date of "the reference to arbitration, the question of compensation "shall be settled by the verdict of a jury. Moreover, the "Complainers did not prorogate or authorize any prorogation of "the submission."

The Respondents pleaded, in answer to the preliminary objections, that

"1. The submission had not fallen before the oversman "pronounced his award, but was regularly renewed and pro-"rogated, and was in full force when the decree-arbitral was "pronounced.

"2. More particularly, the minute signed by the arbiters, "extending the time within which they were to issue their "award, was not *ultra vires*, but within the express provisions of "the Lands Clauses Consolidation Act; besides, the Complainers "not having objected to the minute at the time, supposing it "competent for them to have done so, but, on the contrary, "having recognized and sanctioned the same by obtempering "the order pronounced by the arbiters, and thereafter pro-"ceeding to answer the claim lodged by the Respondents, and "to lead proof, and to attend to all the other steps in the sub-"mission, and having themselves repeatedly prorogated the "submission on subsequent dates, were barred from pleading "such an objection, supposing it otherwise well founded.

"3. The Complainers' secretary was entitled, by the Acts of "Parliament founded on, to subscribe the submission; and "having done so, he was equally entitled to sign any renewal "or prorogation of the submission which might become neces-"sary in the course of the procedure thereon.

"4. At all events, the minutes having been signed by the "secretary of the Company, as representing the Complainers in "the submission, and acted on by all the parties thereto, the

" Complainers were bound by his acts, and were not entitled to " bring forward these very acts as grounds on which to have " the decreet-arbitral, and whole procedure in the submission, " set aside."

The Lord Ordinary, on the 25th August, 1848, refused the note of suspension, and on the 22nd of December, 1848, the Court adhered to his interlocutor.

The appeal was against these two interlocutors.

Sir F. Kelly and *Mr. Anderson* for the Appellants. I. As under the original submission the arbiters did not, in terms of the statute, appoint an oversman before entering upon the matters referred to them, subsequent proceedings under it would have been void, even had they been regular in other respects, but as likewise there was no decision given by the arbiters or oversman within three months after their appointments respectively, the reference fell to the ground, and the matter could only competently be settled by a jury; all proceedings after the lapse of the three months are a nullity.

II. The reference having fallen, there was no power under the statute to renew it. On the contrary, the inference from the provisions of the statute is, that there should not be any such power, the policy being to compel a speedy decision. But even if there had been a power to renew, that power had never been exercised. By the 24th section of the Lands Clauses Consolidation Act an appointment of an arbiter is to be " under " the hand of the secretary, or any two of the Directors." Tennent, the secretary, therefore, had power to sign the original submission, but that once done, he was *functus,* and a renewal of the submission once fallen could only be affected by a fresh resolution of the general body of Directors, again agreeing to refer, for *quoad hoc,* the secretary was a mere instrument to bind the Company to what the governing body should previously have resolved upon.

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III. But assuming that the submission was renewed by the minute of prorogation of 25th and 26th November, the subsequent proceedings are nevertheless void. The first act of the arbiters was to extend the time within which their award might be pronounced "to a period of six months." This apparently was done in exercise of the power given by the 30th section of the statute; but that power was controlled by the 35th section, which limited the period to three months. Three months were allowed, however, again to elapse without any award; nay, there was none even within the six months; so the renewed submission, supposing it to be effectual, likewise fell.

IV. The reference by the original deed, and by the minute of 25th and 26th November, having thus both fallen, the minute of prorogation of 12th of July may be said to have again revived the reference, and the subsequent minutes of 12th October and 27th December may be said to have still further kept it alive. But the proceedings under these minutes were void, inasmuch as the arbiters had not repeated the appointment of an oversman "before entering upon" the matters referred to them. The renewed reference under the minute of 25th and 26th November having fallen, the appointment of oversman had fallen with it, and required to be repeated at the outset of the proceedings under the subsequent minutes.

Mr. Solicitor-General and *Mr. Wortley* for the Respondents. I. The correspondence in September 1846 showed a voluntary agreement to refer, without regard to the statute, and the very claim which was the subject of that correspondence is expressly mentioned in the deed of submission. The provisions of the statute were imported into the deed by voluntary agreement. It was equally competent for the parties by agreement to have dispensed at the outset with these provisions, or to drop them afterwards. The latter was the course adopted by the minute of 25th and 26th November, with mutual consent; the reference

therefore ceased to be under the terms of the statute, and compliance with its provisions was no longer necessary; and all the proceedings are to be viewed without reference to them, but upon the ordinary rules applicable to references generally. In Fleming *v.* Wilson, 5 *S. & D.* 841, the omission to appoint an oversman until after the lapse of year and day, was held to have been cured by the parties having appeared and pleaded before the oversman, and similar objections were overruled in Hicks 8 *Taunt,* 694—Lawrence *v.* Hodson, 1 *Yo. & Jer.* 16, so here any defect in the reference was cured by the proceedings taken by the party.

[*Lord Brougham.*—The submission says that it is "in terms" of the statute. The question then is, whether the parties did not bind themselves to follow the Act?]

II. Even if the reference is to be treated as being under the statute, it was decided in Caledonian Railway Company *v.* Lockhart, 12 *D. & Y.* 338, that the provision in the statute as to a decision being made within three months, was in favour of the parties, and might consequently be renounced by them. The secretary, by signing the minute of prorogation, bound the Company. He was the officer whom the statute designated for the duty. It did not lie upon the Respondents to see that he had express authority for what he did. If he had power to enter into the submission, they were entitled to assume that he had power to prorogate it. The Company may have recourse against the secretary for excess of authority, but as between them and the world, his acts must stand; were this otherwise, it would be impracticable to deal with large bodies, such as these Companies. But, moreover, the secretary was also the law-agent of the Appellants, and conducted the proceedings under the reference. There can be no dispute that the Appellants are bound to recognize his acts in that character. By appearing then on their behalf before the arbiter, he adopted the prorogation for them, and bound them to confirm all that took place under it.

III. It was not necessary for the arbiters to repeat the nomination of an oversman. The oversman was clothed by the nomination on the 25th November, and as the arbiters did not accept the reference until the 26th of November, there was substantially no reference until that date. The appointment by the arbiters on the 26th November, therefore, was strictly within the terms of the statute, and it did not require to be renewed, for when the reference was revived by the minutes of prorogation, the appointment of the oversman was revived along with it.

Lord Brougham.—My Lords, this case assumes a considerable degree of importance from the manner in which the application of the statute respecting the formation of Railways has been dealt with below. I have frequently seen occasion to lament that the learned Judges sometimes do make a short step to get at what they consider substantial justice and the merits of the case, and do not always sufficiently distinguish trifling technicalities from those on which the construction of statutes depends; so that the very things which are thus treated as mere niceties, truly form in such cases the whole merits of the case where the question arises upon statute law. I, therefore, desire anxiously to look into the points made in this appeal, and into the statutory provisions on which it must turn. With this view I shall crave your Lordship's indulgence to allow this case to stand over till Monday next.

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Lord Brougham.—My Lords, from the view which I take of this case, it will not be necessary for me to trouble your Lordships with stating the ultimate question, namely, that regarding the award and the right of the arbitrators to deal with the subject-matter, a point which was ably and fully argued on both sides at the bar. But, after the best consideration which

I have been able to give the case, both during the argument and since, and after considering the Act of Parliament, especially in connection with the course of proceeding taken by the parties themselves, I am clearly of opinion that this judgment cannot stand.

My Lords, we have here another instance of great ingenuity and great subtlety among the learned Judges, as well as among the Counsel, thrown away, from not closely and accurately attending to the statutory provisions which the Court is called upon to administer, and by which it is strictly bound. To say that this case is not under the statute—to say that the parties have a right to repudiate the statute and its remedies, and to go upon a common law arbitration as if there were no statute under which they were acting, appears to be wholly impossible. They are stopped from saying this by their whole proceeding. It is all under the statute, from beginning to end. For example, if it is not under the statute, why all this prorogating of time? Why are they to enter minute after minute, first three months, then six months, to bring themselves within the terms of the Act? That is assumed. Then assuming that it can be cut down to three months, then three months more, and at last two months. It is perfectly clear from this, together with the appointment by the arbitrators of an oversman, which the parties took care should be made, or which the arbitrators took care should be made, that they might have an oversman before they proceeded a step. It is perfectly clear from this, as indeed it is from every piece of the process. But all is statutory. Their whole proceedings make a distinct reference by name to the two Acts of Parliament in question. Then it is statutory from beginning to end. The question is, have they complied with the statute? There is no doubt in the matter. They clearly have not, because the statute requires that the two arbitrators shall appoint an oversman or umpire before they break ground, before they proceed to the business. Well, they appoint

one, being aware that they are bound to do so—they appoint an umpire validly and legally in the first instance, and if within the first period, during the subsistence of his appointment and before the prorogation, the proceedings had taken place and the award had been made, past all doubt it would have been valid —it would have been valid even if the party had not consented and had not proceeded—it would have been valid altogether. But instead of that, they go on, the time expires, and it is prorogated, or rather I should say, there is a hiatus, and it must be renewed, it is making a new submission. The parties have a right to do that. Be it so, we need not dispute that. But there is a duty, not only on the parties, but on the arbitrators, as to the appointment of an oversman or umpire. The parties have no more to do than a stranger with the oversman. It is expressly provided that the arbitrators shall appoint the oversman, and they do not appoint him; but the parties are said to have appointed the oversman because they did—what? Because they prolonged the period of the submission. But my continuing A. B., who has the power to perform an act which I myself have no power to perform, continuing A. B. in possession of that power, does not continue the act which he performed before I renewed his appointment. He did, in execution of the power, something which expired when his own authority expired. Then I continue the authority. Does that revive what he had done before his authority had expired? Past all doubt it does not, supposing I have no power myself to do this act, and *ex concessis* I have no such power. The parties name the arbitrators; the arbitrators name the oversman; the parties who cannot name the oversman never can be held to name him by naming the arbitrators. If the parties had assumed to name the oversman, the Act would have been merely nugatory. But they have not even done so much. They have named the arbitrators, at least they are said to have continued a former nomination. But no act done by them can continue the act

done by others, and which act they had neither power to do nor to continue. They only continue the power, not its execution, or acts done in execution of it. And there are many obvious reasons why it should be the arbitrators, and not the parties who choose the oversman.

Therefore, I have no hesitation in advising your Lordships to reverse the interlocutors appealed from, the effect of which will be to find for the suspension and to pass the bill, and grant the interdict.

It is Ordered and Adjudged, That the said interlocutors complained of in the said appeal, be, and the same are hereby reversed, and that the said cause be remitted back to the Court of Session in Scotland, with directions to that Court to pass the Note of Suspension and grant the Interdict, and to do further in the said cause as shall be just, and consistent with this direction and judgment.

J. H. Lang.