binding upon me, and I venture to think it would be very unfortunate if any other result had been arrived at. An administrative body which is not skilled in legal matters, and whose decisions may be influenced by popular considerations, ought not to be final on matters of law which affect the patrimonial rights of individuals, and I do not think that section 30 of the Valuation Act has this effect. The provision is that the valuation contained in the roll, properly made up, shall not be challengeable 'by reason of any informality, or of any want of compliance with the provisions of this Act, in the proceedings for making up such valuation or valuation roll.' This provision does not, in my opinion, exclude a challenge of the valuation roll, or at all events of the assessments depending upon it, where the administrative body who makes it up have acted wholly beyond their powers. I accordingly repel the objection to competency.

"The next question is whether the pursuers have been rightly placed on the valuation roll as proprietors of the fishings in question. This depends upon a construction of section 42 of the Valuation of Lands (Scotland) Act 1854, where the word 'proprietor' is defined as applying to liferenters as well as fiars, &c. 'or other persons who shall be in the actual receipt of the rents and profits of lands and heritages.' Now the pursuers are plainly not fiars, nor are they in receipt of any rents or profits of the salmon fishings in question. The defenders argued that they are constructively in receipt of profits, in the same way as a man who owns a house but refuses to let it. In my opinion the supposed analogy does not hold. No doubt if they chose to withdraw the restriction they might obtain a yearly payment from Messrs Sellar in respect of such withdrawal, but a mid-superior who is in right of a mere burden on another's property cannot, in my opinion, be said to be in the actual receipt of the rents and profits of land. It was admitted that superiors have never been entered in the valuation roll as proprietors of the lands over which the superiority extends, obviously for the very good reason that there cannot be two proprietors and that the Act refers to the proprietor who has the beneficial use of the lands. The pursuers here have no right whatever to fish in any portion of the sea, the salmon fishings in which they have feued to Messrs Sellar, and therefore they are not in the position of the man who owns property but declines to put it to a remunerative use. It was said that the whole series of transactions was a device for increasing the value of the river fishings by partially destroying the assessable valuation of the sea fishings in which the town of Banff is interested. I am not moved by this argument. A proprietor of a house may, if he chooses, allow it to go to ruin or destroy it, and so diminish, at his pleasure, the assessable value of his property, and it appears to me to have been equally in the pursuers' option, as proprietors of the salmon fishings, so to regulate them as to diminish the value of the fishings in one parish with the object of increasing it in another.

I accordingly reach the conclusion that the pursuers are entitled to have the interdict which they seek. As it is not necessary that the valuation roll should be corrected to give the pursuers a remedy, I shall give decree in terms of the declaratory conclusion and the conclusion for interdict only, and *quoad ultra* shall dismiss the action."

His Lordship gave decree in terms of the declaratory conclusion and conclusion for interdict.

Counsel for the Pursuers—Murray, K.C.—Chree. Agent—F. J. Martin, W.S.

Counse for the Defenders—Cooper, K.C.—Horne. Agents—Alex. Morison & Company, W.S.

HOUSE OF LORDS.

Tuesday, July 6.

(Before the Lord Chancellor (Loreburn), Lord James of Hereford, Lord Atkinson, Lord Gorell, and Lord Shaw of Dunfermline.)

JOHANNESBURG MUNICIPAL COUNCIL *v.* D. STEWART & COMPANY (1902) LIMITED AND OTHERS.

(In the Court of Session, March 19, 1909, 46 S.L.R. 657, and 1909 S.C. 860.)

Contract—Process—Jurisdiction—Arbitration—Foreign—Breach—Non-fulfilment—Damages—Contract, to be Deemed an English Contract, to be Implemented in the Transvaal, Containing Clause of Reference to Arbitration in England and in the Transvaal, English Law to Govern Arbitration, with Supplementary Contract having Clause for Arbitration in Transvaal, Transvaal Law to Govern.

A contract, declared to be an English contract enforceable in and subject to the jurisdiction of the English Courts, whereby a Scottish company undertook to supply engineering plant to the Johannesburg Municipal Council, contained this clause of reference—"In case any dispute or difference shall arise between the purchasers and the contractors . . . it shall, after the complete delivery of the material, be referred to the arbitration of a single umpire or referee to be mutually agreed upon between the parties, or failing agreement, to be nominated by the president for the time being of the Institution of Civil Engineers of London, or in the case of disputes with local contractors in Johannesburg to be nominated by the Lieutenant-Governor of the Transvaal . . . . and the arbitra-

tion shall be an arbitration within the meaning of the Arbitration Act of 1889 (England) and shall be conducted in all respects as therein provided."

A supplementary contract called "The Running Contract" contained this clause of reference—"In the event of any dispute between the contractors and the Council under this contract, the matter shall in the first place be referred to the engineers, but if either party refuses to accept the engineers' decision the matter in dispute shall be referred to a single arbiter or umpire to be mutually agreed upon, or failing agreement to be nominated by the Lieutenant-Governor of the Transvaal, and to hold the said arbitration in Johannesburg . . . . and the arbitration shall be deemed to be an arbitration within the meaning of the Transvaal Ordinance of 1904, and shall be conducted in all respects as therein provided."

The contractors having refused to continue the tests under the "Running Contract," the Council rejected the whole material as unsatisfactory and brought an action in the Scottish Courts in which they sought to recover the payment made to account and also two separate sums as damages under the "Main" and "Running" contracts respectively. The Court of Session directed the parties to prepare a stated case for the opinion of the English Courts on the ground that the scope and validity of the arbitration clauses fell to be decided by these Courts, and it was necessary for the proper disposal of the case to ascertain whether the arbitration clauses covered the dispute between the parties.

Held (1) that the question whether the dispute between the parties fell within the arbitration clauses was as much a question of fact as of law; (2) that the action should therefore have gone to proof in the ordinary way in the Scottish Courts; and (3) that these Courts would, under the law of England, have the power, but would not be under necessity, should they find the dispute to be within the contract, to refer any part thereof to arbitration if that course were convenient and in accordance with Scottish practice.

Per the Lord Chancellor — "If the cause of action which is really established be that there has been complete repudiation and breaking of this contract, then it would not be within the arbitration clauses in either of these contracts."

Opinion, *per* Lord Shaw, that the clauses of arbitration were executorial only and could not include a reference to an arbiter of the question whether a repudiation of the contract was justifiable, and further that the two contracts were so intermixed that procedure by arbitration was unworkable.

Cautioner — Beneficium ordinis — Arrestment on Dependence — Guarantee for Performance of Contract — Action of Damages for Breach or Non-fulfilment against Principal and Cautioner—Validity of Arrestments against Cautioner.

A Scottish company, by a contract which was declared to be deemed an English contract, contracted to supply certain engineering plant to a colonial municipal council. A bond, in English form, guaranteeing the fulfilment of the contract, was granted by an individual. The municipal council brought an action of damages for breach or non-fulfilment against the company and also against the guarantor, and used arrestments on the dependence against the latter.

Held (*rev.* First Division) that the action as against the guarantor was not premature, and that the arrestments should not be recalled. *Question* whether if the law of Scotland alone had been in question the decision would have been otherwise.

This case is reported *ante ut supra*.

The Johannesburg Municipal Council (pursuers) appealed to the House of Lords.

Clauses 33 and 34 of the "Running Contract," which are referred to by Lord Shaw, were as follows:—"33. *New works and alterations.*—The contractors shall at their own expense carry out the works set out in Schedule 'A' appended to this contract, which are hereby declared to be considered by both parties to this contract to be required for the successful completion of the works contracted for in the main contract." [Schedule "A," which was headed "A list of the more important additions, alterations, and adjustments to be made by the contractors," contained 41 different heads.] "34. *Further alterations and works.*—The contractors shall further, at their own expense, carry out such further details and do all things as may be necessary to attain complete success with the generating station and all the works under the main contract as early as possible."

At the conclusion of the arguments—

LORD CHANCELLOR—I think in this case it is impossible to sustain the order of the Court of Session. The order in the first place directs that a case shall be stated for an English Court, saying that "it is necessary for the proper disposal of the action that it be ascertained whether, under; h law of England, the clauses of arbitration founded on by the defenders cover the dispute between the parties." Now that is quite as much a question of fact and even more a question of fact than it is a question of law. If the cause of action which is really established be that there has been complete repudiation and breaking of this contract, then it would not be within the arbitration clauses in either of these contracts. If it be merely that a particular machine or a particular part of the contract has not been duly carried out, then that would normally be a question for arbitration within the contract. But the order of the Court of Session prevents the Scottish Court from deciding which it is; and that

is the first objection to the order of the Court of Session.

I must add another thing, and it is this—according to the English law (and this is a contract specifically declared to be an English contract) the arbitration clause, which contains a reference to the English Act of 1889, would not compel an English Court to refer any of these matters to arbitration. And accordingly, in my opinion, even if the subject-matters in dispute were all matters, and it was ascertained that they were all matters, that came within the terms of the two arbitration clauses to which we have been referred, it would not follow that they ought to be referred; and the Court of Session, in my opinion, is not bound to refer any one of these matters that come before them in the course of this trial under these arbitration clauses unless they think it is suitable, and in their discretion right, to do so, because the contract is an English contract.

I consider that the Court of Session has jurisdiction to entertain the entire case, and if it thinks fit and has the power, in accordance with Scottish law and practice, to refer any part of it to arbitration, then the Court in Scotland can do so; otherwise it need not do so. And it is possible, in my mind — although I do not in the least degree anticipate what will be proved as to the merits of the case—that a case may be put forward by the now appellants, by the pursuers, saying—"Here is a contract; you admit that every part of it has been broken; you admit that no part of the machinery has passed the test; you have stated you will do no more in the way of carrying out that contract" — I say the parties might put forward that claim and ask for damages upon that footing. Whether they will do so or not I do not know.

The other matter which has been decided by the Court of Session is that they have dismissed the surety William Beardmore from the proceedings. I must confess that I can see no reason for doing that. He was a surety for the performance of this contract, and under a bond which again declared that it was an English bond. And yet the Court of Session have struck him out of the case, apparently upon the ground that it was incumbent upon the creditor to prove the amount of his debt against the debtor before he could take any steps whatever against the surety.

That is not the law of England, I do not know without further inquiry whether it is the law of Scotland, but I understand it is not necessarily the law of Scotland either in all cases of sureties. At all events, I think it is wrong in this case, and that the order which dismisses Mr Beardmore and dismisses the arrestments is erroneous.

The result is that I think the order should be set aside and the case should go to proof in the ordinary way.

LORD JAMES OF HEREFORD—I concur.

LORD ATKINSON—I concur.

LORD GORELL—I concur.

LORD SHAW OF DUNFERMLINE—In this case there are two averments, the breadth of which has been too much left out of view in the arguments submitted to us. These averments occur in condescendence 21 and condescendence 23. In the former article it is stated that in breach of the contracts which are set out, the one party closed the work and ceased their endeavours to carry out their contract and implement the obligations binding upon them thereunder. So far as that point is concerned, that is a perfectly specific, relevant, and comprehensive averment. It is followed by the statement in condescendence 23 that following upon the closing and stoppage of the work the plant was rejected, intimation of the rejection was given, and a demand for a refund of the payments was made accordingly.

Standing upon those averments, the natural course of the case in Scotland would have been to remit them to probation. In addition, however, to those broad averments, a variety of statements were made by the pursuers, and in my opinion very properly made, so as to give notice to the defenders of the various stages which these transactions reached and at which the various steps of and leading up to repudiation took place.

I can perfectly understand the arguments submitted to us to the effect that if the documents referred to in substantiation of the pursuers' averments had been upon examination found to be so inconsistent with those averments as plainly to show that they were unfounded, then this Court would have been entitled to look at them for that purpose, because so to speak they would disestablish completely the pursuers' case. I have looked at these documents so referred to, and instead of upsetting the pursuers' case, I think, at first sight (although I make no final pronouncement upon them) they seem to confirm it.

Now the proof that is asked for has been refused by the learned Judges of the Court of Session upon two grounds. In the first place, they proceed to analyse somewhat minutely those documents, with a result of setting up certain inconsistencies with the shape of the pleadings—a result which does not seem to be borne out completely by the text of the documents themselves, and in the course of reaching which the broad and relevant averments to which I have referred have been, I fear, left on one side. In the second place, their Lordships find themselves confronted with the arbitration clause, and appear to attach considerable weight to it.

I can only say that having considered this both in the light of the arguments deduced from the law of England and the law of Scotland, I do not agree that the conclusion arrived at either by Lord Mackenzie or the Judges of the First Division is sound. I treat this case as a case of total repudiation upon the averments, and I demur to the argument that it is possible in a question as to proof to investigate the averments upon the other side, because you must take *pro veritate* the pursuers'

averment in a question of admission to probation.

But if that be so, this contract was wholly repudiated. It does not appear to me to be sound law to permit a person to repudiate a contract, and thereupon specifically to found upon a term in that contract which he has thus repudiated.

In the second place, on examination these contracts were not one but were three. In the first contract a certain arbiter in this country was named; in the second an arbiter in the Transvaal; and in the third no arbiter at all. If your Lordships look at clauses 33 and 34 of the running contract, it will be found that it is impossible to work out the running contract except as ancillary and supplementary to the main contract, and that these two contracts were so interlinked and intermixed as to make it most difficult and in all likelihood impossible to extricate by separate arbitration the rights emerging under the respective contracts. In these circumstances it does not appear to me that either under the law of Scotland or the law of England courts of law are bound by a judicial enforcement of an arbitration clause to place the parties in a situation not only embarrassing but unworkable.

Finally, the language of this contract appears to me to show that the arbitration was nothing but an executorial arbitration —a term perfectly familiar to the law of Scotland, and I suppose also to the law of England. But to read into an arbitration of that character a power such as I put plainly to Sir Robert Finlay, and which he, for the purposes of his argument, most properly admitted, namely, a power to the arbiter to determine that this repudiation upon the part of his clients was a justifiable repudiation, would be to throw the whole of these protracted proceedings again into the melting pot and to start again under the worst auspices before an arbiter even after he was selected. Upon these grounds I am of opinion that the judgment arrived at fails to achieve the true justice of the situation as between these parties; and I can only say in concluding this part of my opinion that I should not myself anticipate anything of the protracted nature which has been foreshadowed by way of argument. If, for instance, the averments of the pursuers should be substantially proved, they will go largely to dispel the necessity for any protracted inquiry with regard to detail. But upon the merits of the case upon that or other heads, I give, of course, no opinion whatsoever.

On the matter of the guarantee I desire especially to call attention to one passage in the opinion given by Lord M'Laren. He says that "until the failure" of the principals "is established by competent process, either in a court of law or in a court of arbitration, no claim arises against the surety." As your Lordship has pointed out from the woolsack, this contract falls by agreement of parties to be interpreted by the law of England, and so far as that proposition applies, it does not express English law. That being so, I am absolved from the necessity of pronouncing upon that as a Scotch matter, but it having been judicially affirmed in the Court below, I wish distinctly to intimate that I can have no part in such an affirmation, and must reserve my opinion upon any such point.

Their Lordships pronounced an order whereby they remitted the case back to the Court of Session with a direction to allow the parties a proof of their averments and to refuse the prayer of the petition for recal of the arrestments, with expenses to the appellants from the closing of the record.

Counsel for the Pursuers (Appellants) —Clyde, K.C. — Morison, K.C. — Mitchell. Agents—P. Morison & Son, S.S.C., Edinburgh — Faithful & Owen, Solicitors, London.

Counsel for the Defenders (Respondents) —Sir R. Finlay, K.C.—Macmillan—Hon. W. Watson—Fletcher Moulton. Agents—Davidson & Syme, W.S., Edinburgh — Nicholson, Graham, & Beesly, Solicitors, London.

Monday, November 15.

(Before the Lord Chancellor (Loreburn), Lord James, Lord Atkinson, Lord Gorell, and Lord Shaw.)

NORTH BRITISH RAILWAY COMPANY *v.* BUDHILL COAL AND SANDSTONE COMPANY, AND OTHERS.

(In the Court of Session, November 28, 1908, and February 4, 1909, 46 S.L.R. 178, 347, and 1909 S.C. 277, 504.)

Railway—Mines and Minerals—Sandstone —Railways Clauses Consolidation (Scotland) Act 1845 (8 *and* 9 *Vict. cap.* 33), *sec.* 70.

The Railways Clauses Consolidation (Scotland) Act 1845, sec. 70, enacts— "The company shall not be entitled to any mines of coal, ironstone, slate, or other minerals under any land purchased by them . . . . and all such mines . . . . shall be deemed to be excepted out of the conveyance of such lands. . . . ."

Held (*rev.* Second Division) that sandstone forming the ordinary rock of the district is not included in the statutory reservation.

Per Lord Chancellor—"In the first place, I think it is clear that by the words 'or other minerals' exceptional substances are designated, not the ordinary rock of the district. In the second place, I think that in deciding whether or not in a particular case exceptional substances are minerals . . . the Court has to determine 'what these words meant in the vernacular of the mining world, the commercial world, and landowners' at the time when the purchase