whether the tenant makes his profit from cropping the arable farm or from pasturing or breeding sheep or cattle. On the question of fact I think it would be quite idle to to say more than that I agree with the Lord Ordinary and with your Lordships. If the predominant character of the farm is pastoral, then it is settled in law that the legal character of the farm must be fixed with reference to that fact, and that it is of no consequence though any separate part of it may be in fact arable. The farm must be treated as if it were wholly arable or wholly pastoral, according to the extent to which the one or the other characteristic predominates.

If they are pastoral farms I presume there can be no question that the rents which in this case were conventionally payable at Whitsunday 1898 had become legally due at the preceding term of Martinmas 1897 as being the second part of the rent for the grass crop of that year. The tenants by their leases entered at Whitsunday, and the rent is payable at Whitsunday and Martinmas by equal proportions, the first term's payment at the Martinmas following entry, and the next term's payment at the Whitsunday following. These are conventional terms; and I think it is settled law that the legal term for the first payment is the first Whitsunday and not the first Martinmas. Therefore I do not think it open to question that the rents drawn by the defender at Whitsunday 1898 were legally due at the previous Martinmas. Then the question is whether these rents fall to the purchaser or to the seller, and as to that the clause of assignation of rents which we have to construe as it is interpreted in the statute is clear and is quite in accordance with the settled rules of law and with the obvious and necessary consequences of a contract for the purchase and sale of land, because it comes to this, that the purchaser is entitled to the rents which become due according to the legal terms for the possession following the first term of his entry, and that the rents for the possession prior to his term of entry belong to the seller. But the rent in question although collected by this defender was rent derived from possession prior to his entry as purchaser although it was payable at a term after that entry.

I therefore entirely agree with your Lordships that the Lord Ordinary has come to a right conclusion.

The LORD PRESIDENT was absent.

The Court adhered.

Counsel for the Pursuers—W. Campbell, Q.C.—Cook. Agents—Dundas & Wilson, C.S.

Counsel for the Defender—Guthrie, Q.C.—Craigie—Cooper. Agents—Millar, Robson, & M'Lean, W.S.

Tuesday, July 17.

SECOND DIVISION.

[Lord Kyllachy, Ordinary.

JOHN PATERSON & SON, LIMITED *v.* CORPORATION OF GLASGOW.

Arbitration—Decree-Arbitral—Reduction—Question Depending upon Disputed Facts — Misapprehension by Arbiter as to Question Submitted — Refusal to Hear Evidence — Right of Party to Have Legal Assistance—Award of Gross Sum where Separate Claims Referred—Ultra fines compromissi.

A firm of contractors undertook a contract to construct a sewer for the Corporation of Glasgow at certain scheduled rates. During the progress of the work it was found impossible, owing to the nature of the ground, to drive a tunnel by the ordinary method. The contractors were thereupon instructed to continue the work by means of the air-pressure system, which was more costly, and the Corporation agreed to refer the question of the amount to be paid to them "in respect of the extra cost incurred by the necessary adoption of the said system of air-pressure" to a certain arbiter who was a civil engineer. No formal submission was entered into. The parties subsequently agreed to submit to the arbiter certain items of the contractors' account other than those relative to the use of air-pressure, which they were unable to adjust. The arbiter issued an order for proof, and in a note appended thereto added—"Both parties having distinctly agreed that they were not to be represented by law-agents, the arbiter cannot now see his way to allow this arrangement to be broken unless mutually agreed upon." The contractors refused to accept a proof upon these conditions, and denied that they had entered into such an arrangement. The arbiter thereupon cancelled the order for proof and issued a decree-arbitral, by which he awarded a gross sum as "the total amount due in respect of the work done by the claimants in connection with this contract." The decree-arbitral did not show what sum was awarded in respect of the use of air-pressure, or in respect of the disputed items of the account.

In an action by the contractors for reduction of the decree-arbitral—*held* that it fell to be reduced, in respect (1) that the first matter referred to the arbiter was the extra cost properly incurred by the pursuers in consequence of the use of air-pressure, that such extra cost could only be ascertained by determining the amount of time and material properly expended for that purpose, that this was a question of disputed fact which the arbiter could not decide either by his own skill or by personal inspection, that consequently

he was not entitled to refuse to hear evidence, and that the condition prescribed by him that the parties should not have legal assistance was equivalent to such a refusal, the Court being of opinion that the alleged agreement to dispense with legal assistance was not proved; and (2) that by awarding a gross sum in respect of the total amount due in connection with the contract the arbiter had decided a question which was not submitted to him, and had not decided the questions which were submitted to him, viz., what was due to the contractors in respect of (*a*) the extra cost incurred by them in consequence of the use of air-pressure, and (*b*) the disputed items of the account.

This was an action at the instance of John Paterson & Son, Limited, contractors, Glasgow, against the Corporation of the City of Glasgow (Police Department), for the reduction of a decree-arbitral by William Robertson Copland, C.E., Glasgow, dated 25th February 1899.

By contract dated in April 1893 the pursuers undertook to construct for the defenders certain main sewers in the eastern district of the city at certain scheduled rates. The contract contained no arbitration clause. During the progress of the work the pursuers found that on account of the bad condition of the ground it was impossible to drive a tunnel for the sewer by any of the usual methods, and that it would be necessary to do so by means of air-pressure, a method which had then been only recently applied to that class of work, and which was more costly. This was represented to the defenders, who instructed the pursuers to proceed with the work by means of the air-pressure system where necessary, the question of the extra cost thereby incurred being left over to be subsequently dealt with. The pursuers did so, and in January 1895 they intimated to the defenders that the portion of the sewer requiring to be driven by air-pressure was completed. Meantime certain correspondence passed between the parties with reference to the pursuers' claims in respect to this portion of the contract, and ultimately the defenders' Sub-Committee on Statute-Labour, by minute of meeting dated 3rd August, and approved 17th August 1894, agreed to recommend "that as this payment is in respect of and applicable to the extra cost incurred by Messrs Paterson & Son in executing their contract by means of the system of air-pressure found by them to be necessary, Mr W. R. Copland be appointed arbitrator in the matter of the amount to be paid to Messrs Paterson & Son in respect of the extra cost incurred by the necessary adoption of the said system of air-pressure." The terms of this minute were intimated to the pursuers, who on 16th August replied that they agreed to the conditions stated therein. In June 1897, on the completion of the whole contract, the pursuers rendered their account to the defenders. This account showed separately the amount claimed by them for the work executed by the air-pressure system, which amounted to £5710, 14s. 11d., and that claimed in respect of the remainder of the contract, which amounted to £6044, 11s. 4d. The total sum claimed, before deducting £6150 paid to account, was £11,755, 6s. 3d. They subsequently, on 7th April 1898, lodged with the arbiter a detailed statement of the cost, time, and material expended by them in connection with the use of the air-pressure system. In their pleadings in the reference the pursuers averred (Stat. 7) "that the agreement was that they should execute the work on a time and material basis," and the defenders in their answers admitted this averment.

While this reference was proceeding it appeared that there were some items of the account of £6044, 11s. 4d. other than those connected with the use of air-pressure, which the parties were unable to adjust. By minutes of meeting of the Statute-Labour Committee, of date 31st December 1897 and 11th February 1898, and letter from the pursuers dated 9th February 1898, it was agreed "that the remaining items of differences arising out of said contract be referred to Mr Copland."

On 30th April 1898 the pursuers wrote to the arbiter—"A considerable time ago, on the suggestion of Mr Whyte, we agreed that the matter of the compressed air should be referred to you to adjust between us without the formalities of a legal arbitration, and with a view to an amicable settlement, so as to save legal and other expenses. We would like to know now if Mr Whyte departs from this position, because, if so, we must reconsider the whole matter and the terms of its submission."

On 4th May Mr Whyte, the defenders' clerk of works, wrote to the arbiter—"For the reason stated in my letter of 29th April, I consider it necessary that the legal aspect of the case should be put before you."

After sundry procedure, the pursuers' agents, on 6th August, wrote to Mr Lindsay, clerk to the Police Department—"It was, of course, originally intended that the parties should dispense with legal assistance, and they have hitherto done so, but as so much delay has already taken place, it has occurred to our clients that further delay would be obviated by having the case laid before the arbiter by the legal representatives of both parties. We would therefore suggest that the arbitration should be taken up by you and us at the present stage of the proceedings in order that the question may forthwith be settled. Our clients have no desire to enter into an elaborate arbitration, and they are quite willing that both parties should dispense with outside skilled witnesses."

Mr Lindsay replied on 25th August—"I submitted your letter of the 6th on the above to my committee on statute-labour at their last meeting, when, after consideration of your request that the case be laid before the arbiter by the legal representatives of both parties, and that the arbiter be authorised to appoint a clerk in the usual way, they resolved to recommend that the request made be not entertained or acqui-

esced in by the Corporation, in respect that the reference to Mr Copland was an informal one, and that admittedly it was to be conducted without recourse to formal legal procedure or the services of legal representatives."

Thereafter, on 26th November 1898, the arbiter issued a note of proposed findings, adding thereto the following note—"As the arbiter intimated to the parties' representatives when he met them, the foregoing decision has been arrived at without entering into a proof, which would almost certainly be prolonged. If desired, however, by either of the parties, he is quite prepared to hear proof and reconsider the whole question in the light of any evidence that may be led. On the other hand, if proof is to be dispensed with, he allows eight days for lodging written representations by either party against these findings, if so advised."

On 29th November the pursuers intimated to the arbiter that they were dissatisfied with his proposed findings, and requested him to fix a diet of proof.

On 17th January 1899 the arbiter pronounced an order appointing proof to be led on 27th January. He appended the following "*Note.*—While the arbiter has not thought it right to restrict the proof in any way, he hopes the parties will keep the evidence within reasonable limits, and that neither of them will seek to tender evidence which is not strictly pertinent to the question at issue, viz., What is the reasonable extra cost of constructing the sewers included in the contract between the parties by means of pneumatic pressure, so far as required. Both parties having distinctly agreed that they were not to be represented by law-agents, the arbiter cannot now see his way to allow this arrangement to be broken unless mutually agreed upon."

On 23rd January the pursuers wrote to the arbiter—"From the terms of the present order, and the note appended thereto, we observe that you only allow proof to be conducted by the parties themselves, without representation by their law-agents. We, however, cannot accept a proof on such a condition, and unless this condition is withdrawn we shall consider this restricted order as equivalent to a refusal to hear the proof which we would tender through our law-agents. We must respectfully take exception to the last clause in your note, because we never came under any agreement not to be represented by our law-agents. . . . We do not profess to be able, and cannot undertake the legal work of examining and cross-examining witnesses, as this is altogether beyond our province. Without agents we cannot do more than we have already done. We also observe from your note that you state the question to which the proof should be directed is 'what is the reasonable extra cost,' &c. We respectfully point out that in our opinion this statement does not contain the question which was remitted to you. The question referred to you is distinctly stated in the minutes of the Statute-Labour Committee, and we maintain that under the reference it falls to you to fix the amount of the extra cost incurred by us in the adoption of the system of air-pressure found to be necessary in executing the contract."

Thereafter the arbiter cancelled the diet for proof, and on 7th February he issued the following note of proposed findings—"The claimants having declined to avail themselves of the opportunities afforded of leading proof in support of their claim, the arbiter proposes to find as follows:—

1. The total amount due in respect of the work done by the claimants in connection with this contract, including depreciation of air-compressor plant, and an allowance for the use of Greathead's patent, is - - - - £8180 14 9
2. The amount paid to account is 6150 0 0
3. That the balance due and now payable is - - - - £2030 14 9

The arbiter further allows parties eight days to lodge written representations against these findings, if so advised.

"Wm. Robertson Copland."

On 9th February the pursuers wrote to the arbiter—"We have already explained to you fully our reasons for declining to attend the proof proposed by you, and we cannot accept these proposed findings as binding on us. We respectfully maintain that the proof was allowed on conditions which we were not bound to accept, and that these proposed findings are therefore invalid. We cannot recognise them in any way, and we reserve our whole rights in the matter."

On 25th February the arbiter issued a formal decree-arbitral giving effect to the findings above recited. Thereafter the pursuers raised the present action. They maintained that the decree-arbitral should be reduced on the following grounds:—(1) That the arbiter had refused to hear evidence as to the actual cost incurred by them in driving the tunnel by means of air-pressure, and as to other matters regarding which the parties were at variance. They averred that the sum awarded by the arbiter was several thousand pounds less than their actual outlays; (2) that the arbiter had proceeded *ultra fines compromissi*, in respect that, instead of determining the amount of the actual extra cost incurred by the use of air-pressure, he had professed to find what was a reasonable sum to be allowed for carrying out that system, which was not the question submitted to him under the reference; (3) that the decree-arbitral professed to determine the amount due for executing the whole contract without distinguishing between the sum awarded in respect of the use of air-pressure and that awarded in respect of the original contract, and that it dealt with items in the original contract amounting to £4003, 5s. 2d., which had been already adjusted between the parties, and were not within the limits of the reference; (4) that the arbiter had acted illegally in refusing to the pursuers a proof except on condition that they should not be represented by their law-agents.

The pursuers pleaded—"(1) The arbiter, in refusing a proof to the pursuers, except upon the condition that they should not be represented by their law-agents, having acted illegally, irregularly, and contrary to the essential principles of justice, the pursuers are entitled to have the said pretended award reduced. (2) The said pretended award or decree-arbitral mentioned in the summons being *ultra fines compromissi* and *ultra vires* of the arbiter, is *funditus* null and void, and the pursuers are entitled to decree of reduction as concluded for. (3) The pursuers are entitled to reduction of the said pretended decree-arbitral for the reason that it does not determine the questions submitted to the arbiter."

The defenders pleaded—"(1) The pursuers' averments are neither relevant nor sufficient to support the conclusions of the summons. (2) The pursuers' averments, so far as material, being unfounded in fact and untenable in law, the defenders are entitled to decree of absolvitor with expenses. (3) The pursuers are barred *personali exceptione* from insisting in the present action."

The Lord Ordinary (KYLLACHY) allowed a proof.

On behalf of the pursuers, John Paterson, a director of the pursuers' company, deponed— . . . "There was no agreement that I know of to the effect that no legal assistance was to be obtained by either party during the reference. The question cropped up through Mr Whyte always saying to me, 'We will manage to settle these accounts ourselves, and we will have none of the lawyers.' I was quite agreeable if we could do without lawyers, and that was the whole agreement about it. I did not consider we were bound not to employ lawyers, though I acquiesced in Mr Whyte's idea that we might settle the matter ourselves. . . . (Q) Did you tell Mr Whyte in Mr Peterkin's presence that the reference was an informal one, and that no skilled witnesses were to be present?—(A) It came from Mr Whyte first. No doubt I would acquiesce. I do not know whether I used the expression, 'It would be a pity to incur the expense of a full-dress debate,' but quite possibly I did. (Q) At that time your arrangement was that there were to be neither skilled witnesses nor lawyers, but that Mr Copland, as a practical man, was to state the whole points?—(A) I remember the lawyer question. I do not remember whether skilled witnesses were excluded or not." . . .

On behalf of the defenders, William Peterkin, C.E., in the employment of the defenders, deponed— . . . "(Q) Do you remember in January 1895 having a conversation with Mr John Paterson about a reference on the subject?—(A) My recollection is that I had one conversation with Mr Paterson at which he made both suggestions in presence of Mr Whyte. That was early in the negotiations, but I cannot condescend upon the date. I was called into Mr Whyte's room, and found Mr Whyte and Mr Paterson there. Mr Paterson was the spokesman. It was mentioned to me that the suggestion had been made by Mr Paterson that to save expense and time nobody should appear in the reference except Mr M'Connell on behalf of the pursuers, and myself on behalf of the Corporation, with our respective foreman and inspector. Mr Paterson said it would be a pity to go to the expense of a full-dress debate. His suggestion was acquiesced in by Mr Whyte. (Q) Was anything said about skilled witnesses?—(A) Skilled witnesses were one of the parties he described as being parties to a full-dress debate. (Q) Who was the other party?—(A) Lawyers. *By the Court*—Skilled witnesses were specifically mentioned as being to be dispensed with. *Examination continued*—When he used the expression that parties were not to be at the expense of a full-dress debate, he mentioned there and then what he meant by that term, viz., that skilled witnesses and lawyers were not to be brought into the matter." . . .

James Martin, Convener of the defenders' Sub-Committee on Contracts, deponed in reference to a meeting of the Sub-Committee with Mr Donald Paterson on 3rd August 1894— . . . "Mr Paterson was quite agreeable to accept Mr Copland, and we were to have no formal arbitration business; it was to be left entirely in Mr Copland's hands to see what amount of money they would get for the air-pressure. It was mentioned that our engineer was to appear for us, and the pursuers' engineer for them. (Q) Was auything said as to no lawyer or skilled people being there?—(A) That was part of the bargain. We did not want any lawyer. That was stated. All that was agreed to by Mr Donald Paterson, but it was not reduced to writing. This took place at a meeting of the Sub-Committee, which I reported to the Statute-Labour Committee half-an-hour afterwards."

William R. Copland, the arbiter, examined on behalf of the defenders, deponed—. . . "I understood that there was an agreement between the pursuers and the Corporation about an informal reference. (Q) You do not suggest that any agreement was made before you?—(A) No; I had no agreement with them, but they constantly talked of it as an arrangement between themselves. Nothing was said about skilled witnesses at that time. There was never a suggestion of witnesses at any time up till the time the idea was communicated to me that it would be necessary to conduct the case by law-agents. (Q) Was anything said to the effect that at no stage of the reference they should consult lawyers and take legal assistance?—(A) No; I am not aware of that. The principle on which we began was, that no lawyers were to be employed before me, and I would not shift from that unless the parties instructed me to the contrary. (Q) Was there an understanding that legal assistance was not to be got in connection with the reference at all?—(A) Unless by the subsequent agreement of the parties." , . . Mr Copland further deponed—"I did not make an inspection with a view of satisfying myself

as arbiter of the nature and difficulties of the work, but it was not necessary for me to do so in order to be arbiter. (Q) And you have never inspected any part of the work with a view of considering whether it was done in an efficient and proper manner? —(A) That was not disputed, and therefore I did not do so. It was admitted by the Corporation that the work was done efficiently. There was no challenge in point of quality; it was a matter of cost. The necessity of the expenditure depends on the nature of the ground, but not so much in air-pressure. (Q) And you say you never made any inspection of the ground when the work was in progress in order to determine what the difficulties would be?—(A) No; I should have done so if there had been any question as to the quality of the work. At first I knew that the only question I was to determine was the amount to be allowed for the air-pressure work. . . . It was my understanding, not at first, but afterwards, that the general account had been remitted to me, and I dealt with it upon that footing. Except for the fact that the contractors lodged a time and material statement, the question as to the arrangement being on a time and material basis did not come before me. I refer to the seventh head of the statement for the contractors and the remarks for the Corporation, but it never was brought before me except in that document. So far as I could discover the parties were not at one concerning the question that the contractors were to be paid on a time and material basis. If the account was to be paid on a time and material basis the Corporation would have put men on to keep notes of the time and material employed, but there was no such information. (Q) Then you went upon the footing that the account was not to be paid for on that footing?—(A) I went on the footing of the minute of the Corporation, a copy of which was supplied to me. I suppose the Corporation had an inspector on the job the whole time. I cannot tell what the object of the contractor was in lodging his statement of time and material. I did not inquire into the correctness of that statement. That was not my view of what was remitted to me; it was the amount of money that ought to be paid to the contractor for the extra work he had done in putting air-pressure into this job, and irrespective of what he had expended; if he had spent the National Debt it would not have affected me. (Q) And quite irrespective of whether he had expended it properly or not?—(A) No; the price of putting air into a sewer is common knowledge amongst us — so much per lineal yard of work done—and to go into a long account of time and material to settle that seemed to be an irrelevancy, and was not in accordance with the remit made to me. There were very few points of fact that were at issue between the parties. There were one or two measurements which I made myself, but beyond that it was an issue mostly as to what would be considered a fair price. In my view I had ample materials to decide the question when I issued my award, and no evidence was necessary, but as one of the parties thought it was, I was very unwilling to exclude anything that would give him an opportunity of challenging the view I had stated. . . . No representation, protest, or request was ever made to me to indicate any details of my award. Neither the pursuers nor anybody for them ever made any protest or request that I should distinguish the amounts awarded for the air-pressure section of the contract from the more general portions."

By interlocutor dated 16th February 1900 the Lord Ordinary assoilzied the defenders from the conclusions of the action.

Opinion.—"In this case, having heard and considered the evidence — evidence which in some directions went perhaps beyond what was strictly competent—I have come to the conclusion that the pursuers have failed to make good their grounds of reduction.

"As to the scope and terms of the reference, I think they are quite distinctly expressed in (1) the minute of the defenders' Sub-Committee of 3rd August 1894, communicated to and accepted by the pursuers' letter of 16th August 1894; and (2) the minutes of the Sub-Committee of 31st December 1897 and 11th February 1898, and letter from the pursuers of 9th February 1898 therein referred to. The agreement, as appears from these documents, I think simply was (1) that the pursuers should have such an allowance in respect of the use of air-pressure in constructing the sewer as Mr Copland should think proper; (2) that Mr Copland should also adjust as between the parties the amount due on the pursuers' general account, giving, of course, in doing so, effect to any partial adjustments made, or which might be made, by the parties themselves. That, I think, was the substance of the agreement of reference, and I can find no evidence that its scope and terms were afterwards enlarged or restricted.

"In the next place, as to the procedure, I think it obvious that the reference was intended to be, and was, an informal reference to be worked out by Mr Copland as a man of skill, with all the freedom of action which belongs to the office of arbiter in such circumstances. There was no minute of reference—no appointment of clerk—no minutes of procedure; nor in the proceedings before the arbiter was there any attempt to observe the formalities which are usual under a formal submission.

"Further, and in particular, I hold it proved that it was from the first the understanding of parties that neither counsel nor law-agents should be employed. That, as appears from their letters, was the proposition of the pursuers themselves, accepted—if not also urged—by the defenders' committee. I do not say that it was made a term of the reference so that either party might not at the outset have resiled from it; but it was an arrangement relative to the mode of procedure which those in charge of the reference were quite entitled to make, and, I think, did make; and it

was certainly an arrangement acted on throughout the proceedings, and up to the issue by the arbiter of the notes of his proposed award. It is not, I think, of much consequence whether the Corporation, as distinguished from its committees, was from the outset bound by the arrangement. It was an arrangement on which both parties acted, and that, I think, is enough.

"Taking these views of the nature and history of the reference, I may, I think, dispose of the pursuers' objections with comparative brevity.

"Their first point is that Mr Copland went *ultra fines compromissi* in fixing the allowance for the use of compressed air otherwise than (1) by ascertaining the pursuers' actual outlay; (2) deducting any particular outlay which he thought unnecessary; and then (3) adding an allowance for profit. It is said that it was a condition of the reference that the arbiter should proceed on those lines; that the figures of his award show that he did not so proceed, and therefore that his award is invalid.

"Now, it does not appear, and I doubt whether we are entitled to know, by what precise process Mr Copland reaches the figures in his award. But, assuming what is, I think, highly probable, that he did not proceed by the method suggested, it appears to me that there was nothing in the terms of the reference that required him to do so. I have already, I think, stated where, in my opinion, the terms of the reference are to be found; and I need only add that it seems to me to be vain to attempt to vary or add to those terms by reference to loose expressions in the defenders' pleadings. In point of fact, the manner in which the pursuers framed their final account makes it, to my mind, plain that the issue, as they themselves raised it, was not what was their outlay or extra outlay in connection with the use of compressed air, but what was the additional price per yard which should be allowed them in respect of the employment of that method.

"The next complaint was, I think, this—that the arbiter has not separated in his award the amount allowed by him upon the general account and the amount allowed by him for the use of compressed air; and that similarly he has not stated separately the amount allowed under the general account (1) in respect of admitted items; and (2) in respect of disputed items.

"It is here enough to say that I cannot discover any sufficient reason why the arbiter should not, if he thought proper, make his award in the lump. It is not said, and is certainly not proved, that he failed to consider both heads of the pursuers' claim; nor is it alleged or proved that he disallowed items admitted, or failed otherwise to give full effect to the parties' adjustments. Moreover, here also the way in which the pursuers' case was presented seems to justify, if justification were needed, the arbiter's action. The final account, and the comparative statement — which was throughout used, it appears, by both sides —present the pursuers' claim as a claim for a total sum of £11,755—a claim made up under different heads, but still a claim for a total sum. What the arbiter has in fact done is to allow £8140 instead of £11,755 so claimed. In doing so I do not think he has done anything wrong. Besides, the pursuers had an opportunity when the arbiter's notes were issued to ask for a breaking-up of the sum awarded under different heads. But I do not find that they made any request of that sort.

"Lastly—and this seemed the main complaint—the pursuers say that the arbiter, having necessarily or unnecessarily allowed a proof, was not justified in making it a condition that lawyers should not be employed. Upon this point I heard a good deal of argument, but in the end the question seemed to be brought to a comparatively narrow issue.

"It was not, I think, ultimately disputed that the arbiter had the power—if in his judgment he thought it right—to decline the assistance of counsel or agents. The decisions referred to in Mr Bell's book on Arbitration, p. 164, seemed too plainly in point to be got over. Neither was it, I think, left doubtful that Mr Copland himself did not consider the introduction of lawyers either necessary or desirable. He seems to have considered—and I must say I entirely agree with him—that the subject matter at issue was such, even when it came to leading evidence, that the work was likely to be much better done by the parties' engineers, who had throughout represented them, than by law-agents or counsel, who would probably have no technical knowledge and require to be instructed on every point.

"The pursuers, however, say that, whatever might have been said, if Mr Copland had proceeded on this ground, or had assigned no ground at all, his action must be judged by reference to the reason which he chose to assign, viz., that the parties had agreed to dispense with lawyers.

"Now, I am by no means prepared to affirm that, even if the agreement referred to was only an honourable understanding, Mr Copland was debarred from considering it in determining a point of procedure, as to which he had a discretion and was the judge. But in the view I take, and have already expressed, the agreement that lawyers should not be employed in the reference was something more than an honourable understanding. In my opinion it was a binding agreement, made binding by the actings of parties, if not otherwise; and being so, it would, I think, have been quite wrong if the arbiter had at the stage in question allowed one of the parties to resile from it.

"On the whole matter, therefore, I see no ground for interfering with the award, and shall therefore assoilzie the defenders from the conclusions of the summons, with expenses."

The pursuers reclaimed, and argued—(1) An arbiter was bound to hear parties, and failure to do so was a good ground of reduction. The condition imposed by the arbiter

here, that the parties should not be represented by their legal advisers, amounted to a refusal to hear the proof which he had allowed—*Mitchell* v. *Cable*, June 17, 1848, 10 D. 1297; *Holmes Oil Co.* v. *Pumpherston Oil Co.*, July 17, 1891, 18 R. (H.L.) 52, *per* Lord Watson. The arbiter was mistaken in holding that there was any agreement that the parties should not have legal assistance; the correspondence and communings on that matter were prior to, and were not made part of the submission. Such an error was fatal to the decree-arbitral—*Sharpe* v. *Bickerdyke*, Feb. 20, 1815, 3 Dow 102. In any view, the pursuers were entitled to resile from such an agreement if they found it necessary at any stage of the proceedings to employ legal assistance. (2) The arbiter had misapprehended the question submitted to him, and had gone *ultra fines compromissi* in deciding a question which was not within the terms of the reference. Such an error was fatal to the decree-arbitral — *Napier* v. *Wood*, Nov. 29, 1844, 7 D. 166; *Adams* v. *Great North of Scotland Railway Co.*, Nov. 27, 1890, 18 R. (H.L.) 1. The decree-arbitral professed to find "the total amount due in respect of the work done by the claimants in connection with this contract," whereas the only question submitted to him was to determine "the amount to be paid in respect of the extra cost" incurred by the use of air-pressure. That could not be ascertained without an inquiry into the amount of time and material expended by the pursuers, and it was admitted by the defenders in the arbitration proceedings that this was the basis of the contract. The arbiter had neither examined the work while in progress nor heard evidence, but had estimated the work at so much per lineal yard without reference to the actual cost to the pursuers. Further, the arbiter's own evidence was conclusive that he had misapprehended the question submitted to him. Such evidence was competent — *Duke of Buccleuch* v. *Metropolitan Board of Works*, 1871, 5 E. & I. App. at p. 462; *Dare Valley Railway Co.*, 1868, 6 Eq. 429. Again, by finding a lump sum due in respect of the whole contract, the arbiter had not distinguished between the unadjusted items of the general account, which alone were submitted to him, and those which the parties had already adjusted. As matter of fact these adjusted items, which were not within the reference, exceeded the total amount of the award. The two heads of claim, viz., in respect of air-pressure, and in respect of unadjusted items, were entirely separate, and it was the arbiter's duty to deal with them separately—*Rider and Fisher*, 1837, 3 Bingham's New Cases, 874; *Mortin* v. *Burge*, 1836, 4 Ad. & El. 973.

Argued for the defenders—(1) The questions in dispute were referred to the arbiter as a man of skill, and as such he was entitled to refuse to hear evidence if he thought it unnecessary—*Miller* v. *Millar*, March 10, 1855, 17 D. 689, at p. 724. It was also in the discretion of the arbiter to allow or disallow the employment of lawyers—Bell on Arbitration, 164; *Spearman* v. *Steele*, Feb. 28, 1828, 6 S. 645. But in the present case the evidence showed that the parties had agreed to dispense with skilled evidence and legal assistance. (2) The arbiter was right in his construction of the reference. The question was, what was a reasonable sum to be paid to the pursuers in respect of the use of air-pressure, and the arbiter as a man of skill was able to determine that question without proof. His evidence showed that it was never suggested to him that the pursuers were to be paid on a time and material basis. The parties had interpreted the reference by their conduct, and it was clear that they desired only one award. The arbiter's evidence showed that he was never asked to distinguish between the different heads of claim. In an informal reference the arbiter's evidence was competent—*Kid* v. *Walker*, Nov. 28, 1828, 7 S. 82. From the pursuers' own account, which contained all the items, adjusted and unadjusted, and the payments to account entered in a lump sum, it was plain that what they desired was a general award covering the whole matters in dispute.

At advising—

LORD JUSTICE-CLERK — The present case has arisen principally out of an innovation made upon a contract between the parties. The pursuers, in executing some sewer construction work for the defenders, came upon ground which could not be dealt with in the ordinary mode applicable to such work. Owing to the nature of the ground below the surface at that place, work by ordinary modes was difficult if not impossible, and tended to risk injury to the foundations of the neighbouring buildings. After unsuccessful attempts had been made the defenders became satisfied that a change of mode was necessary, and they gave instructions to the pursuers to proceed with the work by the air-pressure system, which was a recent invention, and of which there had not at that time been much practical experience, although where it had been adopted its use had been attended with success. As there would necessarily be considerable extra cost under the new system, it was agreed between the parties that payment should be made for it, and that the sum to be allowed for it should be determined by Mr Copland, civil engineer, and the terms were embodied in a minute dated 3rd August 1894, of the committee of the defenders who had charge of the work, which was adopted and made official by the defenders, the minute bearing—[*His Lordship quoted the minute*]. Later the parties entered into an agreement to refer also to Mr Copland "the items remaining unsettled in addition to those relating to the compressed air portion." This was done by letters which passed in February 1898.

Disputes and difficulties arose between the parties as to the conduct of the proceedings before the arbiter. The defenders maintain that it was a distinct condition of their entering into the submission that neither of the parties was to be represented

by legal advisers, or lead evidence. The pursuers deny that there was any such agreement, and I may say at once that the evidence which has been led in this case does not satisfy me that the pursuers debarred themselves by anything that passed before the arbitration proceedings began from asking for an allowance of proof, or from having the services of their legal advisers in conducting it.

The arbiter, without taking any evidence, issued proposed findings, but stated that if either party desired to lead evidence he was prepared to reconsider the whole question in the light of such evidence. The pursuers did propose to lead evidence, but the arbiter while allowing a proof, proceeding on what he considered a binding agreement, refused to allow parties to be represented by their agents, and the pursuers declined to examine witnesses without assistance, maintaining that they had entered into no such agreement, and pointed out that under the submission it was the extra cost incurred by them in consequence of certain parts of the work being executed with the aid of air-pressure that was the subject of inquiry.

Finally, the arbiter issued an award without evidence, and without ascertaining the extra cost actually incurred by the pursuers by reason of the use of air-pressure. That award was in the exact terms of the notes issued by him, and upon which the pursuers had asked to be allowed to lead evidence. The award took the simple form of lumping together what he thought should be allowed extra for the use of air-pressure, and what he thought covered the whole contract, including those remaining items separately submitted in February 1898, for all which together he brought out a sum of £8180, 14s. 9d., and deducting from this sum £6150 for cash already paid, he gave decree for the balance, viz., £2030, 14s. 9d.

It appears to me that at least two very formidable objections arise on the consideration of these proceedings. If the arbiter did not inform himself of the "extra cost" caused by use of air-pressure, by ascertainment of fact, he in my opinion did not deal with the case in terms of the submission. The "reasonable extra cost" depended on two matters, first, what the expenditure was, and second, whether any of the expenditure was not reasonably incurred for the necessary doing of the work. It is certain that this was not the manner in which he proceeded. He without inquiry and without explanation of party fixed a sum for himself, proceeding on general considerations as to what the cost of such work might be expected to be per lineal yard, and made up his figures on that item in that way. In my opinion he did not by so proceeding, which I have no doubt he believed was a proper way to proceed, carry out the submission made to him, which was to settle the extra cost. To ascertain the cost, to deduct from it whatever he might after due procedure hold did not constitute a reasonable part of that cost, and to award the remainder was, I think, the only course open to him if he was to carry out the remit made to him. This he certainly did not do, but proceeded in regard to work completed and covered up, and therefore which he could not inspect for himself, solely on what he thought the extra cost might be. I cannot hold that an award such as that on this submission, can be given effect to in the face of challenge.

The second point is that the arbiter has not distinguished in his award between the two matters separately submitted to him, but has awarded a lump sum. There is no means on the face of the award of ascertaining what he allowed under the submission of 1894 from what he allowed under the submission of 1898. Thus his award does not ascertain and state what parties were entitled to know under the agreement of submission of 1894, viz., what the pursuers were to be entitled to receive and what the defenders were to be bound to pay for the extra cost of the use of the air-pressure system. On the other hand the award does not inform parties of what sum the arbiter allows for the unadjusted items of the general contract submitted to him in 1898. Thus the award gives no definite answer on the matters submitted separately. It was the right of the pursuers to know what sum they are to receive under the separate submission for the cost of air-pressure work, that being what they consented should be ascertained as between them and the defenders by the submission of 1894. The award does not indicate this, and only gives an award relating to it in conjunction with other matters. All that is done is the ascertainment of a general balance, according to what the arbiter considers to be still due to the pursuers on an accounting for all claims they may have. This is not a dealing with the matters submitted to the arbiter, as they were submitted. I therefore hold that his award given in the form in which it is cannot be upheld.

On these grounds my opinion is that the pursuers are entitled to decree of reduction.

Lord Young—The contract between the parties was for the construction of sewers in the city of Glasgow, and the work had been completed, and, I understand, satisfactorily executed, before any dispute arose. The disputes which then arose regarded (*first*) the amount of the "extra cost incurred by the necessary adoption of the system of air-pressure" in driving a tunnel for the sewer in a certain specified locality, this being a system for which no provision was made in the contract; and (*second*) the amount of certain items of the pursuers' account for ordinary work under the contract as to which no change had been ordered or made. It is matter of admission that the adoption to the specified extent of the air-pressure system was authorised and indeed required by the defenders and acceded to and acted on by the pursuers, on the footing that it should be paid for on a time and material basis, as the amount

should be agreed on, or failing agreement, determined by an arbiter. I refer to the minute of 3rd August 1894 and the letters of the 15th and 16th of the same month. These indeed constitute the first and principal part of the reference under which the award sought to be reduced was pronounced. The second part of the reference, viz., that regarding certain disputed items for contract work unconnected with the air-pressure change, is contained in the letters of 9th, 10th, and 23rd February 1898. The whole contract work, including the part in which the air-pressure system was introduced, as I have explained, had been completed, and, I believe, satisfactorily executed, before the arbiter was called in or anything submitted to his consideration.

By decree-arbitral of date 25th February 1899 the arbiter decided that "the total amount due in respect of work done by the said claimants (the pursuers) in connection with the said contract" is £8180, 14s. 9d.

This decree is challenged on these grounds, viz. (*first*), that the arbiter improperly refused to receive evidence offered by the pursuers as to the amount of time and material in fact and properly expended in the construction of the tunnel on the air-pressure system; (*second*) that the decree does not intelligently or intelligibly determine what extra cost was in the judgment of the arbiter incurred by them in executing that work; and (*third*) that no notice whatever is taken of the disputed items of charge referred to him by the letters of February 1898.

Unwilling as I am to set aside a decree-arbitral, I do not, after the best consideration I have been able to give to the subject, see a good answer to any of these objections to this decree. I am surprised that the city authorities of Glasgow should have opposed the pursuers' desire to lead evidence of the actual cost to themselves of the work in question—admittedly good and satisfactory work.

Notwithstanding their opposition the arbiter by his interlocutor of 17th January 1899 allowed "both parties to lead proof," and appointed it to proceed on January 27. In his note to that interlocutor he says that "both parties having distinctly agreed that they were not to be represented by law-agents the arbiter cannot now see his way to allow this arrangement to be broken unless mutually agreed upon." The pursuers denied having at any time so agreed, and refused to proceed with the proof allowed, or indeed to proceed further in the submission, on the mistaken apprehension that they had, and must therefore proceed without any assistance or take other than professional aid, whether of advocate or solicitor, in leading the proof and stating their argument on it when led. They accordingly insisted that both parties were entitled to be represented by law-agents, and that the proof which had been allowed should proceed accordingly. The defenders objected to this, and the arbiter allowing their objection issued on 7th February his proposed findings. The decree sought to be reduced followed on 25th February.

The note of proposed findings issued by the arbiter on 26th November 1898 indicates that he then thought he might and ought to decide the matters referred without evidence and by simply naming a slump sum as the amount fairly due to the pursuers in his opinion, formed irrespective of the finished work. But the pursuers' representatives when they moved to be allowed a proof, no doubt then informing him what they were prepared to prove, removed that impression. Indeed the interlocutor of 17th January allowing a proof makes it reasonably certain that the arbiter had then come to see that his judgment might be influenced by such evidence as the pursuers offered. In any other view the allowance of proof, notwithstanding the defenders' opposition, was a sham. Why was the allowance (which I am sure was not a sham) practically recalled and the case decided without the proffered light? The only answer is that the pursuers "declined to avail themselves of the opportunies afforded of leading proof in support of their claim." But is this accurate? I think not. It was, in my opinion, the pursuers' right to insist on being represented by a professional man at the proof which had been allowed, who should conduct it for them, examining their witnesses and cross-examining those called by their adversary, and to decline to proceed with the proof or further in the submission on any other terms. The arbiter thought that both parties had agreed that they were not to be represented by law-agents. There is, in my opinion, no evidence of such an agreement, and although there may have been conversations (although between whom does not appear) indicating that it was thought desirable to conduct the submission simply and inexpensively, I cannot conceive an agreement between the Corporation of the City of Glasgow and a limited liability company, neither of whom could appear personally to examine and cross-examine witnesses, that they must respectively choose representatives who were not law-agents. No other restriction or limitation is suggested, and this seems, on the statement of it, unreasonable to the extent of absurdity.

I am therefore prepared to sustain the view urged by the pursuers that the arbiter was right when he allowed a proof, necessarily thereby signifying that he thought it reasonably possible that his judgment might be thereby influenced, and that it was unwarrantable to recall the allowance and decide without proof on the ground expressed in his interlocutor of 7th February 1899, and no other exists or has been suggested.

I should have been prepared to reduce the decree-arbitral on the sole ground that by simply naming a gross sum, as has been pointed out, it does not decide the distinctly specified matters referred to the arbiter by the minute and letters which I have already called attention to. But I have thought it right also to express my opinion regarding the allowance of proof and the recall of it and the ground of the recall, for the proced-

ure here was I think wrong, and I must own gives me an impression that possible and even probable injustice would be done to the pursuers if the decree-arbitral were allowed to stand. If their statements are true and can be supported by evidence, the decree pronounced without evidence does them injustice to the extent of a very large sum. The proceedings in the submission in no way prejudice or hinder the defenders in resisting the pursuers' demand if excessive or so far as excessive. I have already expressed my surprise that the defenders should have opposed the offer of evidence to show the actual cost to the pursuers of the change which was admittedly not merely agreed to but required by the defenders themselves as necessary in the public interest with which they were charged.

LORD TRAYNER—I agree with your Lordships that the interlocutor reclaimed against should be recalled, and decree granted in terms of the conclusions of the summons.

The parties referred to the decision of the arbiter two things—(1) the amount to be paid to the pursuers by the defenders "in respect of the extra cost incurred by the necessary adoption of the system of air-pressure," and (2) such items of the pursuers' account (apart from the charges connected with air-pressure) as the parties could not adjust themselves. These two matters were separate and independent of each other, and depended for their determination on different considerations. The decree-arbitral now sought to be reduced does not deal with these heads of the reference separately, but finds (and decerns) generally that the defenders are liable in payment to the pursuers of a certain sum as "the total amount due in respect of the work done" by the pursuers under their contract. Stated in that manner I think the arbiter decided something that was not referred to him. If he had decided separately the two matters referred to him, it would have been no objection, of course, to the validity of his decree that he had added the various items together, and stated the *cumulo* sum for which he gave decree. But the objection is that from the decree which he has issued (and the same may be said of the note of his proposed findings previously issued) it cannot be ascertained what judgment he formed on the question really submitted. The terms in which the decree-arbitral is expressed confirm the view urged by the pursuers that the arbiter had formed an entirely erroneous opinion as to the scope and purpose of the submission, and in acting upon that opinion had erred so as to make his final award invalid.

The matter referred to the arbiter under the first head of the reference was, as I have said, the amount to be paid to the pursuers in respect of the extra cost incurred by them in the necessary application of air-pressure in the working out of their contract. Now, from the decree-arbitral it is impossible to say what the arbiter found to be payable in respect of that cost, or whether he has found anything due on that account. He has found a slump sum as due under the contract, which includes an allowance, not separately stated, for depreciation of air-compressor plant, and for the use of a certain patent—a patent, I suppose, having some connection with the system of air-pressure, but which may, for anything to be ascertained from the decree-arbitral, have no connection with air-pressure at all. But in respect of "extra cost" to the pursuers, the arbiter has not found anything due to them. Nor could he, for the amount of that extra cost was never inquired into. And it is here, I think, that the arbiter has gone wrong. From the decree-arbitral (for I am dealing with it at present apart altogether from the arbiter's evidence) it appears that the arbiter considered himself called on and entitled to determine what was the fair price to be paid to the pursuers for the work done under their contract by means of air-pressure. Now, it appears to me that that is an erroneous view of the reference made to him. As I read the reference, the sum to be ascertained as due to the pursuers was the sum which they had necessarily (and probably beneficially) expended on the contract work in consequence of the use of air-pressure, which would not have been necessary under the system of tunnelling anticipated in the specification. The basis on which, or criterion by which, the pursuers' right to payment was to be ascertained was the extra cost to them. If I turn now to the evidence of the arbiter I find confirmed, what I should deduce, and have deduced from the terms of the decree-arbitral. The pursuers laid before the arbiter a statement of their extra cost. He says—"I did not inquire into the correctness of that statement. That was not my view of what was remitted to me; it was the amount of money that ought to be paid to the contractor for the extra work he had done in putting air-pressure into this job, and irrespective of what he had expended." Having regard to the terms of the decree-arbitral and the arbiter's evidence, I can come to no other conclusion than this, that through a misreading and misapprehension of the question referred to him, he has decided something that was not referred, and has not decided the question which was. On this ground, were there no other, I think the decree-arbitral falls to be set aside.

The second head of the submission had reference to certain items of the pursuers' claim under the contract (apart from the matter of air-pressure) on which the parties were at variance. Here, again, it is impossible to discover whether the arbiter has disallowed the whole of these items, or allowed them in part or in whole. He has said nothing about them, either in the decree-arbitral or in his note of proposed findings; and from anything that appears he has neither considered nor decided anything whatever under this second head of the submission. This also appears to me to be fatal to the validity of the decree-arbitral.

Another objection to the decree-arbitral is stated by the pursuers. They say that it falls to be reduced because the arbiter refused to allow them a proof of their statements which was necessary before any judgment could fairly or reasonably be reached. Here, again, I think the pursuers are right. I need scarcely say that where an arbiter is chosen on account of his skill to determine a disputed question, which that skill enables him to determine, he may competently refuse to hear any proof on the subject. He may also refuse to hear evidence in regard to any matter on which he can satisfy himself by personal inspection. But where the question to be determined depends wholly or partially on the ascertainment of disputed facts, then the arbiter cannot refuse to hear evidence. Now, here there was disputed fact which the arbiter's skill alone could not enable him to decide upon. The pursuers' claim for extra cost was not admitted. It should therefore have been made the subject of probation, as otherwise the arbiter could not be instructed on the subject or enabled to pronounce a decision.

In this case, however, we have the peculiarity that the arbiter allowed a proof, but refused to allow the pursuers to have recourse to professional assistance in leading it. The pursuers intimated that they were not competent to examine and cross-examine witnesses, and refused to go on with a proof on the condition prescribed by the arbiter. The arbiter therefore pronounced his judgment without any proof being adduced. The conditions prescribed by the arbiter were, in my opinion, conditions which he had no power to prescribe, and they were in the circumstances equivalent to a refusal to allow a proof. He refers as an explanation of what he did, to an agreement by the parties that professional assistance should not be resorted to by either. Well, in the first place, I find no evidence of any agreement that in no circumstances and at no stage of the submission should the parties employ professional assistance. But in the second place, if such an agreement had been made, I think that either party was entitled to resile from it whenever it appeared to them necessary to have such assistance, due notice of the change of mind or intention being given, so that the opponent was not put to any disadvantage.

LORD MONCREIFF was absent.

The Court recalled the Lord Ordinary's interlocutor, and decerned in terms of the conclusions of the action.

Counsel for the Pursuers and Reclaimers—Salvesen, Q.C.—Guy. Agents—Alexander Morison & Co., W.S.

Counsel for the Defenders and Respondents—Lees—Craigie. Agents—Campbell & Smith, S.S.C.

Friday, July 20.

FIRST DIVISION.

[Lord Stormonth Darling, Ordinary.

STEWART *v.* SHANNESSY.

Agent and Principal—Liability of Agent to Third Party—Engagement of Traveller by Sales Manager—Letter of Appointment Signed by Agent in his Own Name without Qualification—Master and Servant—Sales Manager — Traveller — Contract — Written Contract—Parole Evidence.

Where a person signs a contract in his own name without qualification he is *prima facie* to be deemed to be a person contracting personally, and in order to prevent this liability from attaching, it must be apparent from other parts of the document that he did not intend to bind himself as principal.

S. was appointed "exclusive sales manager" for two trading companies over a certain district. By his agreement with one of them it was provided that the company were to pay all the expenses incident to their head office, including "clerks and servants' wages, travelling and other expenses," and he was to be at liberty to act as sales manager to the other company, and "to employ the clerks, servants, and travellers thereof." By his agreement with the other company it was provided that the company were to pay S. a fixed rate for every traveller who might be engaged upon their business, but the number of travellers who were to be so paid was not to exceed three without the written consent of the company.

S. engaged J, as a traveller, by a letter in the following terms:—"I beg to confirm arrangement made with you this day, and appoint you as representative for" the two companies, "on following terms:— 45s. per week salary payable monthly and 1¼ per cent. commission on all orders." . . . The letter was written upon paper belonging to one of the companies, with their name upon it. It was signed by S. in his own name without qualification of any kind, and did not bear to be granted by him in his capacity of sales manager to the companies.

In an action at the instance of J. against S. for payment of the amount due to him by way of commission, the defender maintained that in engaging the pursuer he had acted as agent for the companies, that the pursuer was aware of this, and that his only claim for commission lay against them.

Held that as the letter of engagement had been signed by the defender in his own name without any qualification, and there was nothing in the letter, as construed with reference to the surrounding circumstances, to indicate that he was not acting as principal, he was liable to pay the commission.