Still, whatever may have been the writer's motive, it was undoubtedly, though not perhaps very grossly, libellous to say or imply that the pursuer had been more than once convicted of shebeening if such was not the fact. And I cannot say that the words used, though used in the form of putting a question, were not capable of the meaning that the pursuer had been convicted more than once.

That being so, I think the pursuer is entitled to have the verdict of a jury on the question whether the words were used in that sense or not. The innuendo is not an unreasonable or forced one, and it is only when an innuendo is unreasonable or forced that a Court is entitled to reject it.

I am therefore for recalling the Lord Ordinary's interlocutor and allowing the issue.

The Court recalled the interlocutor reclaimed against and approved of the issue proposed.

Counsel for the Pursuer and Reclaimer—G. Watt, K.C.—Spens. Agents—Bryson & Grant, S.S.C.

Counsel for the Defenders and Respondents—T. B. Morison. Agents—Macpherson & Mackay, S.S.C.

Wednesday, July 19.

FIRST DIVISION.

[Lord Kincairney, Ordinary.

GOODWINS, JARDINE, & COMPANY, LIMITED *v.* CHARLES BRAND & SON.

Arbitration—Reference—Sub-Contract Incorporating Specification relative to Principal Contract including Arbitration Clause Contained therein—Application of Arbitration Clause to Dispute between Contractor and Sub-Contractor.

One of the parties to a contract (the defenders) entered into a sub-contract for part of the work with a third party (the pursuers). The sub-contract was constituted by an offer on the part of the pursuers which was accepted by the defenders. The acceptance contained the following provision:—"The whole work to be executed to the satisfaction of the engineers of the railway company" (the other party to the principal contract) "and according to plans and specifications, and to be finished within the period mentioned in the specification." The specification in question contained an arbitration clause by which all disputes were referred to arbitration.

Disputes having arisen between the parties to the sub-contract as to the price of the work done, the pursuers raised an action for payment of a balance alleged to be due. The defenders denied that the sum sued for was due, and pleaded the arbitration clause, which they maintained had been imported into the contract between the pursuers and themselves (the sub-contract).

Held (*rev.* the judgment of Lord Kincairney, Ordinary) that the arbitration clause had not been imported into the sub-contract *quoad* matters outwith the subject-matter of the principal contract.

This was an action at the instance of Goodwins, Jardine, & Company, Limited, mechanical engineers, registered under the Companies Acts 1862 to 1886, and having their registered office at 19 St Swithin's Lane, London, and James Watson Stewart, C.A., Glasgow, the liquidator thereof, against Charles Brand & Son, contractors, 172 Buchanan Street, Glasgow, in which they sued for certain sums of money.

On 20th June 1890 the defenders Charles Brand & Son (who had contracted with the Caledonian Railway Company for the formation of part of the Glasgow Central Railway under two contracts called the Bridgeton contract and the Trongate contract) made a sub-contract with the pursuers, Messrs Goodwins, Jardine, & Company, Limited, for the supply of the girder work required for these two contracts.

The contract between the pursuers and defenders was constituted by an offer and acceptance. The offer had been lost, but the acceptance was contained in a letter written by the defenders to Goodwins, Jardine, & Company, which was as follows:—

"*20th June* 1890.

"*Glasgow Central Railway.*
"*Contracts Nos.* 1 *and* 2.

"Dear Sirs,—We hereby accept your tender for all the girder work on these contracts, as per schedule sent by you, and at the prices therein stated, less 2½ (say, two and a half) per cent. Should we elect to take delivery of any portion of these girders at the station, and erect the same, a reduction is to be made by you of 20s. (say twenty shillings) per ton. The whole work to be executed to the satisfaction of the engineers of the railway company, and according to plans and specifications, and to be finished within the period mentioned in the specification. We shall furnish you within four weeks with copies of all the contract drawings of iron work, and will from time to time give you drawings or instructions of any alterations that may be ordered, and also instructions with reference to our requirements from time to time, it being understood that you will supply us with the iron as the works proceed. A formal minute of agreement to be entered into containing all usual and necessary clauses. — We remain, Yours truly, CHARLES BRAND & SON."

The principal schedules referred to in the above letter had disappeared, but the following is an excerpt from one of the copy schedules produced:—

"BRIDGETON CONTRACT.

Ironwork.

Description of Work.	Quantity.	Rate.	Amount.	Total Amount.
RETAINING WALLS.				
No 1.—South of Strathclyde Street on east side of Railway.				
Cast-iron standards similar to those on adjoining retaining wall .	No. 25	6/	£ 7 10 0	
Wrot.-iron tubing 2" dia. and ¼" thick, screwed at joints . .	lin. ft. 304	1/6	22 16 0	
No. 2.—North of Strathclyde Street on east side of Railway.				
Cast-iron standards as above	No. 22	6/	6 12 0	
Wrot.-iron tubing 2" dia. as above . .	lin. ft. 260	1/6	19 10 0	
				£56 8 0"

Appended to the copy schedule relative to the Bridgeton contract was a docquet in the following terms:—"Twenty-four thousand and eighty-one pounds and eightpence stg. net, erected complete, in conformity with drawings, specification, and conditions, 11/6/90."

Appended to the copy schedule relative to the Trongate contract was a docquet in these terms—"Fifty-three thousand one hundred and sixty-eight pounds two shillings and ninepence stg. net, erected complete, in conformity with drawings, specification, and general conditions, 11/6/90."

The pursuers did not admit, however, that they had written these docquets on the principal schedules, or that they were appended thereto, and no satisfactory evidence was adduced at the proof to establish the defenders' contention that they were so appended.

Under their contract with the Railway Company the defenders were paid by instalments as the work advanced and was certified, and in like manner the defenders made payments to Goodwins, Jardine, & Company. At the date of the liquidation of the pursuers their part of the contract had been only partly fulfilled, but they continued to implement the contract as required. The sums now sued for were the balances which they alleged to be due to them by the defenders.

The defenders denied that the sums sued for were due, and averred—"(Stat. 6) In their tenders, dated 11th June 1890, attached to the schedules filled up by them, the pursuers offered to complete the works 'in conformity with drawings, specifications, and general conditions.' The defenders accepted said tenders by letter dated 20th June 1890, and in said letter stipulated that the work should be executed 'according to plans and specifications.' The drawings, specifications, and conditions so referred to were those applicable to the contracts between the defenders and the Caledonian Railway Company above mentioned. Previous to the pursuers tendering to the defenders for said work, they had before them the said drawings, specifications, and conditions of said railway contracts, including the general specification of works. Said conditions and others were intended to and did form part of the contract made as aforesaid between the pursuers and defenders, and the pursuers' tender and the defenders' acceptance was made and given on the footing that said conditions and others were incorporated in the contract between them. By article 180 of the said general specification it is provided as follows:—'Should any disputes arise as to the true intent and meaning of this specification, and the relative plans, sections, drawings, detailed estimate and special specification, and the contract to follow thereon, or as to the extent of the works intended to be performed thereunder, as to the works having been duly and properly completed, or as to the expense of any additional work, or deduction from that specified, or any alteration which may be more or less expensive than the work specified, or as to the measurements of the works as executed, or as to any extension of time for the completion of the works beyond the date or dates mentioned in the special specification, or as to the liquidated and ascertained compensation payable by the contractor, in the event of delay in completing the works, or as to any claim of damages at the instance of the contractors against the company, or as to any notice or plans requiring to be served or delivered by the company in compliance with the said Acts, or as to any other matter, claim, demand, or obligation whatever arising out of or in connection with the contract, or as to any other matter specially referred to the arbiter in this or in the special specification, the same shall, subject to the provisions as to arbitration contained in the foresaid sections of the Special Act, be referred to John Wolfe Barry, civil engineer, Westminster, whom failing to Benjamin Baker, civil engineer, Westminster, whom failing to Sir Douglas Fox, civil engineer, Westminster, notwithstanding that they are or may be holders of shares in the stock of the company, or hold or may have been or may be appointed to any situation or employment under the company, and the decision, interim or final, of the said arbiter shall be finally binding and conclusive upon both parties, and the arbiter is hereby authorised and empowered to decern for such sum or sums, interim or final, as he may find to be due by the contractor to the company or by the company to the contractor, and also to decide all questions of expenses, interim or final, and to decern therefor.' In terms of the said clause of submission, all disputes and differences between the pursuers and defenders arising out of the contract between them fall to be determined by Sir John Wolfe Barry, whom failing Benjamin Baker, whom failing Sir Douglas Fox, and the defenders are willing and hereby offer to refer the pursuers' claims accordingly."

They pleaded, *inter alia*—"(1) In respect that the pursuers' claims in the present action fall within the clause of submission which forms part of the contract between the said pursuers and defenders, the action should be sisted until the arbiter therein named has given his decision thereon."

On 30th January 1904 the Lord Ordinary (KINCAIRNEY) pronounced this interlocutor—"Finds (1) that the clause of arbitration in the 180th section of the general specification of the works undertaken by the defenders in their contract with the Caledonian Railway Company . . . has been incorporated in the contract between the pursuers and the defenders; (2) that the questions between the pursuers and the defenders in this action fall within the said clause of arbitration; therefore sustains the first plea-in-law for the defenders, and sists the cause that the record may be submitted to one of the arbiters nominated in said general specification." . . .

Opinion.—"This is an action on a subcontract by which the pursuers undertook to perform a part of the work for which the defenders had contracted with the Caledonian Railway Company. It is a contract carved, so to speak, out of that larger contract. At a former stage of this case I decided that a supplementary summons, by which it was endeavoured to enlarge the conclusions of the action, was incompetent. That judgment is now final, and that supplementary action is out of Court, and I have now been asked to decide the question raised by the defenders' first plea, which is that the pursuers' claims fall under a clause of reference. The contract with the Railway Company contains a very wide and careful clause of reference, and indeed it seems clear that neither that original contract nor the contract between the pursuers and defenders to which this action relates could be worked out without great inconvenience and expense without the aid of a clause of reference. Now, there is no clause of reference in the contract between the pursuers and defenders. But the defenders contend that the clause of reference in the contract between the defenders and the Railway Company must be held to be incorporated in the contract between the present parties. There are certainly difficulties, but I think that that contention should be supported.

"There is in the process a letter by the defenders to the pursuers, dated 20th June 1890, which bears to be an acceptance by the defenders of the pursuers' tender, about which acceptance no difficulty has been raised. It bears—'The whole work to be executed to the satisfaction of the engineers of the Railway Company, and according to plans and specifications, and to be finished within the period mentioned in the specification.'

"There is no mention in this letter of a clause of reference nor even of conditions in the specification. The reference is to the specification generally, but I think that that reference to the whole specification is, in the circumstances, sufficient to incorporate its clauses regarding the contract under consideration as truly a part of the general contract.

"The defenders aver that 'in their tenders, dated 11th June 1890, attached to the schedules filled up by them, the pursuers offered to complete the works in conformity with drawings, specifications, and general conditions.' The reference here to the general specification is closer than in the defenders' letter, but the difficulty seems that the tenders or tender cannot be found, and nothing but alleged copies are produced. These are not very satisfactory copies, and I could not act on them without some inquiry, but I have come to think that that would be an unnecessary expense, and that I may proceed on the letter of the defenders, and may hold that the reference in that letter to the specification is, in the circumstances, sufficient to incorporate the clause of arbitration. I suppose that the difficulty about the production of the tenders may yet be overcome.

"Counsel for the defenders quoted the case of *Weir* v. *Pirie & Company* (No. 1), 24th May 1898, 3 Com. Cases 263, which appears to give very important support to his argument."

The pursuers reclaimed, and on 2nd July 1904 their Lordships of the First Division pronounced this interlocutor—"The Lords, having heard counsel for the parties on the motion of the defenders, and it having been admitted by counsel for the pursuers that the principal document, containing the tenders made by the pursuers, referred to in the defenders' letter of acceptance, . . . has been lost and cannot be found, before answer allow the defenders a proof of their averments as to the terms of the pursuers' tenders, mentioned in statement 6 of the statement of facts, embodied in their defences, . . . and to the defenders a conjunct probation; appoint the proof to proceed before Lord M'Laren on a day to be afterwards fixed by his Lordship."

A proof was accordingly taken, which, however, need not be here referred to, as in the opinion of the Court it left matters precisely as they had been. (*Vide* opinion of the Lord President, *infra*).

Argued for the reclaimers—There was no agreement on the part of the pursuers to refer disputes to arbitration. The arbitration clause was not imported into the contract between the pursuers and defenders. The reference in the letter to "specifications" did not import general conditions like an arbitration clause. The reference clause applied only to the principal contract, and was only binding on the parties thereto. The defenders had made an independent contract with the pursuers. They made their own profit and paid the pursuers at agreed-upon rates—*Hamilton & Company* v. *Mackie & Sons*, July 17, 1889, 5 Times L.R. 677; *Runciman & Company* v. *Smyth & Company*, June 30, 1904, 20 Times L.R. 625. The case of *Weir* v. *Pirie & Company*, cited by the respondents, was inapplicable, as in that case the contract in question was between the same parties. Here there was a contract and a sub-contract, and the parties to each were different. It was clear from the specification as a whole that "contractor" did not include "sub-contractor." An agreement to abide by the results of an incidental arbitration might be implied, but that was quite different from a general consent to arbitration. *Quoad* clauses dealing solely with

and inseparable from the execution of the work, the pursuers might be bound by an arbiter's decision, but that was altogether different from a consent on their part to refer to arbitration all disputes that might arise between themselves and defenders, *e.g.*, the present dispute as to prices.

Argued for the respondents—The Lord Ordinary was right. The question really turned on the terms of the letter of 20th June, and of the docquets. The docquets had been appended by the pursuers, but even if not they only differed from the letter by the addition of the words "and conditions." The whole specification was imported into the sub-contract, and not merely the rates and quantities. The arbitration clause could not be limited to the mere execution and sufficiency of the works, for without the arbitration clause many of the clauses of the specification would be meaningless—*Weir* v. *Pirie & Company*, May 24, 1898, 3 Com. Cases, 263.

At advising—

LORD PRESIDENT—In this case Goodwins, Jardine, & Company sue Charles Brand & Son for the balance of prices under a contract which was entered into between them for the construction of some bridge work incidental to the formation of the Central Railway, Glasgow. Messrs Brand were the general contractors with the Caledonian Railway for the execution of the railway works, and, not being persons who did bridge work themselves, they entered into a sub-contract with the pursuers for the making of the bridge work. The bridge work was made, part of the price paid, and this is an action for the balance.

The contract between the pursuers and the defenders was constituted by an offer and acceptance. The offer has been lost, but the acceptance is contained in a letter written by Messrs Brand to Goodwins, Jardine, & Company, which is in these terms:—[*His Lordship read the letter of 20th June* 1890]. Now "the plans and specifications," parties are agreed, were the plans and specifications which formed part of the general contract between the Caledonian Railway Company and the Messrs Brand. The defenders plead that they are not due the sum which the pursuers conclude for, but before answering further and going into inquiry on these matters they tabled a special plea that the inquiry must not be in Court, because such matters have been remitted to arbitration in respect that the arbitration clause, which is one of the clauses of the general contract between Messrs Brand and the Caledonian Railway Company, has, by the terms of this contract, been incorporated into the contract between the pursuers and the defenders and rules all matters between them. The Lord Ordinary upon these pleadings pronounced this interlocutor:—"Finds (1) that the clause of arbitration in the 180th section of the general specification of the works undertaken by the defenders in their contract with the Caledonian Railway Company has been incorporated in the contract between the pursuers and the defenders; (2) that the questions between the pursuers and defenders in this action fall within the said clause of arbitration;" and therefore he sists the action in order that the matters may be submitted to one of the arbiters named. Against that interlocutor the reclaiming note was taken, and your Lordships on 2nd July 1904 pronounced this interlocutor—[*His Lordship read the interlocutor*].

That proof was taken, and the case has now come again before your Lordships for determination upon the proof, and on the matter of the Lord Ordinary's interlocutor. Now, I do not propose to go minutely into the proof, because I think that after this case was heard, your Lordships were all very clearly of opinion that the proof, though it was quite proper to grant it, really left matters precisely where we found them. I have already read the acceptance and letter, and truly the only matter of controversy between the parties at the proof may be detailed in a single sentence. The pursuers' manager is asked this—I am now reading from the proof—"At the end of each contract there is written a docquet, and the one at the end of the latter part of the document is, 'fifty-three thousand one hundred and sixty-eight pounds, two shillings and sixpence sterling net, erected complete, in conformity with drawings, specification, and general conditions. 11/6/90.' Did you ever write any docquet in these terms on any schedule in connection with this contract?" and the answer is—"No, I have no recollection of ever doing it." The other parties say, on the contrary, that a docquet was written in these terms, and they point naturally enough to the fact that upon copies, the authenticity of which I think is very satisfactorily proved, these words did occur. But, as I say, I really do not think that that matters, because your Lordships will notice that the whole difference between the docquet as I have read it and the letter of acceptance consists in this, that the letter says "according to plans and specifications," and the docquet says—"in conformity with drawings, specification, and general conditions." Now, specification in the "docquet" is used in the singular and "general conditions" are added. In the letter "specifications" is used in the plural. Now, we know of course there were two specifications. There is what is called the special specification, and there is also the general specification; and the general specification which we have before us is headed, "General Specification of the Works." Accordingly, really, the docquet and the letter truly agree, the only difference being that what the docquet calls general conditions, the other calls a specification.

I think it is abundantly clear that the same actual document is referred to in both, and that therefore there is no question but that the pursuers accepted this contract with reference not only to the special specification but to the general specification. The whole question of course remains, upon the merits, what was the effect of that acceptance. I am therefore

of opinion that your Lordships should proceed to consider the Lord Ordinary's interlocutor upon its merits.

Now, the Lord Ordinary in his note says—"I think that that reference to the whole specification is, in the circumstances, sufficient to incorporate its clauses regarding the contract under consideration as truly a part of the general contract." It does not appear to me that that way of stating the question is really completely accurate. For some purposes there is no doubt that the arbitration clause is incorporated. It is, I think, quite clear that for anything in dispute between the Brands and the Caledonian Railway Company the arbitration clause has effect, and the result arrived at under that arbitration clause is binding on the pursuers. In that respect it is just like all the other clauses in the specification. But the point is not whether it is incorporated at all, but whether it is incorporated in regard to another matter altogether, namely, the dispute about prices between the pursuers and the defenders. That is a matter outside the relations of the defenders and the Caledonian Railway Company. What is binding on the one is not binding on the other. Accordingly on this part of the case I do not agree with the Lord Ordinary. I think the contract incorporated was the contract so far as it existed between the principal contractor and the employer, that is to say, the Brands and the Railway Company, but that you cannot over and above cut out of the provisions of that contract one clause and make it apply, *mutatis mutandis*, to the rights *inter se* of the principal contractor and the sub-contractor, that is, the pursuers and the defenders, in a matter in which the employer never had and never can have any concern.

I am therefore for recalling the Lord Ordinary's interlocutor and remitting the case to him for proof.

LORD M'LAREN — I think it is clear enough that no principal contractor for a Railway Company would ever enter into a contract with a sub-contractor except on the condition that whatever the engineer or the referee decided as to the fulfilment of the contract between the principals should be binding on the sub-contractor. If it were not binding on him it would probably be a losing concern on the part of the principal contractor. The relations between the principal contractor and the company are such that the railway company's engineer, if dissatisfied with any of the material supplied either as to quality or dimensions, might require them to be altered, leaving for future consideration whether any allowance was to be made in respect of such alterations. It would be impossible to work a sub-contract unless an order of this kind was binding on the sub-contractor, as he alone supplies the materials. But then I think it follows that with regard to allowances to be made for extra work or for variations which in the course of the work have been found to be necessary, the decision of the arbiter upon such a point must always be binding on the sub-contractor who supplies the materials, the sufficiency of which is under consideration. For these purposes I should hold that the clause of arbitration was incorporated as one of the conditions that are necessarily binding in such cases. But then there may be other questions which concern only the relations between the principal contractor and the sub-contractor—as, for instance, the rate of payment as between them, or the commission or discount; and again, where delay has occurred and there has been responsibility for delay, whether that delay is to be charged against the sub-contractor. I only mention these as examples of possible questions between the principal contractor and the sub-contractor which are in no way covered by the clause of arbitration, because they affect only these two, and do not cover the relations between them and the Railway Company.

I therefore agree with your Lordship that it is necessary to distinguish between these things, and while we do not hold the clause of arbitration universally binding, if proof is to be allowed, it will no doubt show that there are many things that are substantially covered by the clause of arbitration, because whatever was to be decided as to working material between the Caledonian Railway Company and the principal contractor would also affect the question of the calculation of prices with the sub-contractor.

LORD ADAM and LORD KINNEAR concurred.

The Court pronounced this interlocutor—

"Recal the said interlocutor, allow the parties a proof of their respective averments on record, and remit to the Lord Ordinary to take said proof," &c.

Counsel for the Pursuers and Reclaimers—Clyde, K.C.—Hunter. Agents—Webster, Will, & Company, S.S.C.

Counsel for the Defenders and Respondents—Campbell, K.C.—C. D. Murray. Agents—Alexander Morison & Company, W.S.

Thursday, July 20.

SECOND DIVISION.

[Lord Low, Ordinary.

DRYBURGH *v.* FIFE COAL COMPANY.

Mines and Minerals—Subsidence—Damage—Mineral Tenant Bound to Work by Methods of Complete Excavation and to Make Good all Damage Caused to Surface—Feuar to have no Claim against Superior for Damage Caused by Mineral Workings—Reservation of Claims Competent to Feuar against Mineral Tenants in so far as Liable without having Recourse against Superior.

A was the proprietor of a certain piece of land under a feu-disposition, which