My Lords, under the circumstances, I am of opinion that the decision of the Court below was right, and I must therefore move your Lordships that the interlocutors complained of be affirmed with costs.

Interlocutors affirmed with costs.

First Division.—Lord Murray, Ordinary.—Law, Anton and Turnbull, *Appellant's Solicitors.* Richardson, Loch, and Mac Laurin, *Respondent's Solicitors.*

JUNE 17, 1852.

THE ABERDEEN RAILWAY COMPANY, *Appellants*, *v.* BLAIKIE BROTHERS, *Respondents.*

Arbitration—Submission—Contract—Agreement—Clause—Construction—*A railway company's engineer was made by contract deed the arbiter as to the furnishings supplied by a contractor, with power to decide disputes as to the meaning of the contract, and the quantities and state of materials supplied. The arbiter decided these points, and awarded damages for breach against the company.*

HELD (partly affirming judgment), 1. *That there was a valid agreement to refer to arbitration; 2. That the arbiter named had power to construe the agreement of parties; but,* 3. *Not to assess the amount of damages for alleged non-implement of the agreement.*[1]

The pursuers appealed against the interlocutors of the Lord Ordinary (20th July 1849), and of the Court (28th Jan. 1851), in the process of *declarator*, for the following reasons: 1. Because the contract imposed no obligation on the appellants to take from the respondents all the materials, of the description specified in the schedule, which might be necessary for the construction of the railway and works. 2. Because the arbiter had no power or authority, under the contract or otherwise, to try the validity or assess the amount of the respondents' claim of damages for alleged non-implement of obligation, and any defence founded on the alleged clause of submission, as excluding the jurisdiction of the Court, was groundless. 3. Because there were no *termini habiles* for the finding in the interlocutor of the Lord Ordinary, that the contract was in full force, and obligatory on the parties; and because, even although it had been otherwise, the appellants were entitled to the declarations and reservations sought in the conclusions of the summons.

In the process of *suspension*, which in the Court of Session, it was conceded, should abide the fate of the declarator, they also appealed, maintaining in their *printed case* that the interlocutors in that process ought to be reversed for the following reasons:—1. Because the charge of horning was irregular and defective, in so far as the copy of the warrant prefixed to the charge had not been duly signed by the messenger. 2. Because, even if the contract and clause of submission empowered the arbiter to determine whether the appellants had or had not been guilty of any breach of obligation, and the extent, if any, of such breach, he was not empowered, and was not entitled, to assess and fix the amount of damage resulting from such breach, and to pronounce judgment for payment. 3. Because the claim and award, or decree-arbitral following thereon, dated in July 1850, were not warranted by, and were at variance with, the previous award or decree of 6th September 1849, which proceeded upon the claim of the respondents for alleged breach of contract; and any decree at variance with, or going beyond, the judgment of the arbiter of September 1849, must be regarded as *ultra vires* of him. 4. Because, in the circumstances, as connected with the unjustness of the claim and award, and the mode in which Mr. Gibb had proceeded and acted as arbiter—particularly as to this award, and his refusal to hear the appellants, to consult counsel, or to give any information as to the *data* on which his award proceeded, though he reserved farther claims as to the same matters—the decree and charge ought to be suspended *simpliciter*. 5. Because, even if the above reasons were not well founded, the note of suspension ought at all events to have been passed, in respect of the challenge of the contract and subsequent proceedings, including the decrees-arbitral, at present before the Court in the action of reduction, especially as the appellants had found sufficient caution.

The respondents, in support of the judgments of the Court of Session, (in the *declarator*,) generally referred to the grounds of opinion of the Judges. In regard to the *suspension* process, they maintained in their *printed case* that the interlocutors were well founded, because—1. A dispute and difference having arisen between the appellants and respondents regarding the true intent and meaning of the contract of 22d and 28th September 1847, and, in particular, regarding

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[1] See previous report 14 D. 66; 23 Sc. Jur. 237. S. C. 1 Macq. Ap. 461; 24 Sc. Jur. 537.

the quantity of materials contracted for, or the quantities that might require to be furnished by the respondents under the contract, that dispute and difference fell to be determined by the arbiter under the contract. 2. Because the arbiter, acting within his proper powers, having, by his award of 6th September 1849, decided, 1*st*, that, according to the true intent and meaning of the contract, the appellants were bound to take from the respondents, at the contract rates, the whole articles of the description specified in the contract, which might be required for the construction of the railway and works ; and, 2*d*, that the appellants were liable to the respondents in damages, for such loss and injury as they might be able to shew they had sustained in consequence of articles of the specified description being taken by the appellants from third parties, and not from the respondents, the latter were entitled to ask, and the arbiter to award, damages in respect of the articles of the specified description taken by the appellants from Mr. Henderson, builder in Aberdeen. 3. The appellants have been unable to assign any valid reason why either of the awards complained of should be set aside, or execution stayed.

Bethell Q.C., and *Anderson* Q.C., for appellants.—1. The company are not bound to take all the materials they require, from the respondents. Before we can define the powers of the arbiter, we must define the limits of the contract, for the arbiter is merely to interpret what he finds within the four corners of the written agreement. The rule of construction is the same in Scotland as here—Ersk. 3, 4, 9. Now the contract is one thing, and the provisions inserted in it are another thing, and are to be distinguished from the substance or body of the contract, just as a conveyance differs from the various stipulations which are bound up in it. The respondents confound the substance with the provisions of the contract. The real substance of the agreement was, that the respondents were bound to supply the amount of the schedule more or less, but more only if we should give orders for it. The measure of our obligation was defined by the schedule. Though the engineer and arbiter happened to be the same person, yet the contract contemplated these offices as distinct, and it was absurd to say that the company after providing for that, if they wanted more materials than the schedule contains, were to give orders through their own servant the engineer, and that they should nevertheless constitute him, who was their servant, the sole controller of the amount they were to take. The clause of arbitration was introduced for the protection of the company, and must be read in subordination to their power of ordering what additional materials they required. Hence the arbiter could not dispense with the necessity of getting an order from the company to authorize him, as engineer, to call on the contractors to provide the additional quantity. 2. All disputes were not referred to the arbiter, and he has exceeded his powers in assessing damages. Gibb's authority was confined to superintending the execution of the works, and seeing that the quantities ordered were of good quality—he was to be the domestic judge of the company, exercising his skill and science upon these matters ; but it would be absurd to say he was to be the judge of everything—that would be to make him sit in judgment on his own authority. A general submission is always to be construed with reference to some suit pending—*Steel* v. *Steel*, 22d June 1809. F.C. ; and in *Napier* v. *Wood*, 7 D. 166, a decree-arbitral was reduced because the arbiter chose to exceed his authority, which was construed to be confined to a superintendence of the works. So here, to assess damages was clearly *dehors* the contract, and power to do so is not contained in any of the three members of the arbitration clause. Besides, clauses of this general kind are always to be construed in subordination to the essential object and intent of the contract, which may be gathered from the recital, which is a valuable guide in cases of ambiguous meaning. Hence the word "hereinbefore," in the arbitration clause, ought to be read "herein," for we cannot extend the meaning beyond the actual words contained in such clause. To hold, therefore, that the arbiter has power to determine everything, and supersede a court of law, is to make a subservient clause a dominant clause, and is like making a covenant in a deed supersede the deed itself. As to the *second* appeal, the suspension was to protect the company from paying the money found by the arbiter to be due by way of damage. If, therefore, the arbiter had exceeded his powers, the suspension was competent, and ought to have been allowed.

Rolt Q.C., and *Young*, for respondents.—1. It is clear, that if the company are not bound to take more than the amount in the schedule, neither are they bound to take even that unless they choose ; for if the company are only to take what the engineer orders, the engineer may refuse to order. The phrase, "as the engineer may require," gives, as we contend, no arbitrary discretion to him, otherwise he would have it from beginning to end ; but it merely means, "as the company may need," implying that all the materials necessary were to be taken from us. 2. It was competent to the arbiter to assess damages. It is usual in Scotland to refer questions of law as well as fact to arbiters ; and Lord Campbell, in *Mackenzie* v. *Girvan*, 2 Bell's App. Ca. 55, thinks it is a better practice than what prevails here. Accordingly, the Court has refused to reduce a decree-arbitral on the ground that it involves the decision of a question of law—*Gray* v. *Brown*, 11 S. 353. Here the company break the contract deliberately. Who, then, is to judge between us? Obviously, the arbiter, to whom have been referred "all disputes and differences arising out of the execution, or failure to execute the contract."

[LORD CHANCELLOR.—Can the arbiter from time to time award damages for each breach in

succession? If an action were brought at law, one entire damage would be given; but you seem to say the arbiter can go on and award repeated damages—it may be a thousand successive times?]

We must admit he would have this power, and the contract seems to contemplate his giving out interim decrees.

[LORD CHANCELLOR.—Then, if a ton of iron is wrong, however petty the complaint, it is competent for you to go before him and claim damages?]

Yes; and there are many advantages in such an arrangement, for while in a Court of law you are not permitted to extend the conclusions of your action, here you can go before the arbiter at any time, and bring the matters before his notice as they occur. There is no averment that we have been harassing the company with petty claims.

[LORD CHANCELLOR.—Then, if one dispute arise, you can call on the arbiter to keep the matter open for the next ten years, to allow other disputes to be brought in afterwards?]

The dispute may be one, though the periods of the damage accruing may be different, as in the present case, and hence the propriety of interim decrees being pronounced. An arbiter's powers are extensive in this respect—*Pitcairn* v. *Drummond*, 1 S. 431; 1 W. S. 194; *Gray* v. *Brown*, *supra*. As to the *suspension*, most of the matter introduced here would belong more properly to an action of reduction. There was, in fact, no misconduct on the part of the arbiter. It is well known railway companies are in the habit of putting off and protracting proceedings, and it was to check this, that the arbiter acted as he did.

LORD CHANCELLOR ST. LEONARDS.—My Lords, in this case, which depends on a question of construction of the articles of agreement which were entered into between the parties, several questions were raised. The main point was, whether or not the arbiter had, under the articles in question, a power to determine the construction of all the covenants and obligations in the instrument. That led to a consideration of what was the true construction of the agreement, although they are very distinct questions. The third question was, whether he had exercised properly the power which he assumed, of assessing the damages for the breach, and continuing to assess those damages.

Now, my Lords, I am clearly of opinion that, by the true construction of the agreement, the parties were not bound to take all the materials which they required from the company. But the question of the construction of the arbiter's power, is quite a different question; for if, by that clause, power is given to the arbiter to decide upon the true meaning of all the obligations, it is then perfectly indifferent what my opinion may be in regard to the true construction, because, whether he has decided erroneously or correctly, if he had the power, that must be the construction adopted.

Now, my Lords, that is a mere question of construction, and not depending upon any rule of law. The words naturally import, no doubt, upon looking at them, that the arbiter had the power. Four Judges of the Court below were in favour of that construction. My noble and learned friend is of opinion with the majority. My opinion upon the true construction of the contract certainly would be, that the arbiter had not the power; but, as the matter stands, it is a question simply of construction; it is an ambiguous clause; and there being so much authority in favour of the construction of the Court below, that part of the judgment of the Court below will be affirmed. My noble and learned friend and myself have both agreed that the arbiter has exceeded his power as regards the assessing of the damages, and therefore that part of the interlocutor which affirms his proceeding in that respect, will be reversed; and the cause will be remitted to the Court below to do what may be just, and we will ask the learned counsel on both sides to draw up a minute of what they think should be the nature of that remit.

My Lords, with regard to the *second* appeal, we think there is no sufficient ground for that appeal; and, therefore, it will be dismissed with costs.

Mr. Anderson.—Will your Lordships allow me to mention, that that appeal will depend very much on the fate of the first appeal. That was a suspension.

LORD CHANCELLOR.—We cannot hear any new argument upon it. The interdict depends upon the second proceeding. We are of opinion against it, and we think the interdict cannot be maintained, and that, consequently, that appeal must be dismissed with costs.

LORD BROUGHAM.—My Lords, my noble and learned friend has very distinctly stated the three points which arose in this case. One point was, whether or not the construction, put on the agreement of the parties to the reference by the arbiter, was accurate or not, in which we differ from the arbiter. But, as my noble and learned friend has just observed, that is wholly immaterial in this case, because the real point is, whether or not the parties did intend to submit that among other matters to the arbiter. My noble and learned friend and myself unhappily differ upon the second point. It is quite unnecessary to say whether we agree upon the first; because, differing upon the second, and agreeing as my learned friend does in the propriety of our affirming upon that second view of the case, it becomes wholly unnecessary to consider which way the right is on the first.

My Lords, on the other point, namely, with respect to the assessment of damages, we are

entirely agreed; therefore, upon that point, there will be no difficulty as to the judgment to be pronounced. At the same time, it is well, as my noble and learned friend said, that the learned counsel should give in a scheme on both sides. I entirely agree with my noble and learned friend, that our course here would not be difficult if it was a mere question of law; but we consider this to be a question on the construction of an instrument, which is to a certain degree a question of law, inasmuch as these questions are for the Court, not for the jury; nevertheless, it is in the nature of a question of fact so far, that it is for the purpose of discovering what the intentions of the parties are, that you undertake the examination of that instrument; and, therefore, on that ground it is that we have come to this opinion.

Interlocutors in process of declarator *in part affirmed and in part reversed, with a remit.*
Interlocutors in suspension *affirmed with costs.*

First Division.—Lord Ivory, *Ordinary.*—James Davidson, *Appellants' Solicitor.*—Dodds and Greig, *Respondents' Solicitors.*

JUNE 28, 1852.

MRS. MARTHA STODDART, *Appellant*, *v.* DR. JAMES GRANT and others, (Trustees of the late Mrs. Agnes Barclay or Bell and Misses Murray,) *Respondents.*

Testament—Intention, Implied—Presumption—Clause—Construction—Revocation—*A lady died leaving seven writings of a testamentary nature, in construing which the Court of Session held that three of them were to be taken as revoking the others, and exclusively regulating the succession.*

HELD (reversing judgment), *that there were not sufficient grounds for holding that the three revoked the others; and held that the whole seven were to be dealt with as forming the will of the testatrix; and remit accordingly made to the Court of Session to consider the effect to be given to the declarations contained in the various writings.*

The fact that a legacy of the same amount is given to the same person in a subsequent will raises no presumption that the prior legacy was revoked.[1]

Miss Stoddart appealed against the judgment of the Court, stating in her *printed case* the following reasons:—1. Because, where a deceased executes a variety of testamentary writings relative to his succession, all which are found in his repositories at his decease, they are all understood and presumed, according to the law of Scotland, to form one settlement, unless either revoked *per expressum*, or by necessary implication, as being contradictory and incompatible with each other. 2. Because in this case, where there is admittedly no express revocation, the four testamentary writings executed by Mrs. Bell prior to 1844, and found in her repositories at her death, cannot be presumed or taken to be revoked by the deeds executed by her in 1844 and 1845, inasmuch as these deeds, in their material operation, are nowise incompatible with the latter deeds, and the whole series may receive effect—the amount of the succession of the deceased being quite sufficient to satisfy all the existing legacies left by all the deeds in question, and still to leave a considerable amount of residue as intestate succession to the next of kin. 3. Because, in addition to the general presumption in favour of the existence and operative character of all the testamentary writings executed by Mrs. Bell, there are in this case a variety of circumstances tending to exclude the inference, that the later deeds of 1844 and 1845 were intended to revoke all the previous testamentary deeds, and to form in themselves the only settlement of the deceased. For, (1.) The deed of 1828 expressly reserves *a power to revoke.* But the deed of 1845 contains no revocation of that deed, or of any prior testamentary writings;—though such a clause is matter of usual style where a revocation is intended;—though the deed of 1845 was prepared by the same man of business who framed the deed of 1828, and who could not be ignorant of the existence of the deed which he had himself prepared. (2.) The deeds of 1844 and 1845 confessedly do not form a complete settlement or testamentary deed disposing of the whole estate and effects of the deceased. On the contrary, these deeds, taken by themselves, would dispose only of a small portion of that succession. And as they contain no nomination of residuary legatees, and no such legatees were ever appointed by Mrs. Bell, the result, according to the views maintained by the executors, would be, to leave Mrs. Bell intestate as to the great mass of her succession. But the presumption of law being against intestacy generally, a similar presumption holds against increasing the amount of intestate succession, which would be the result of disregarding or holding as revoked the writings executed by Mrs. Bell prior to 1844. If the deeds executed in

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[1] See previous report 11 D. 860; 21 Sc. Jur. 241. S. C. 1 Macq. Ap. 163: 24 Sc. Jur. 555.