MARCH 12, 1863.

EARL OF KINTORE, *Appellant, v.* UNION BANK, *Respondents.*

Arbitration—Reduction—Competency—Personal Bar—Accession, Deed of—*A submission to arbitration by A and the creditors of A, (who had granted his estate by trust deed for behoof of his creditors,) included all differences as to the claims of creditors and as to ranking.*

HELD (affirming judgment), *That this included claims founded on deeds which A alleged to be fraudulent.*

QUERY, *Whether the submission included a debt not included in the affidavit of the creditor's claim.*[1]

The pursuer, the Earl of Kintore, granted a trust deed (dated 1st June 1860) for behoof of creditors, in favour of the pursuer Edmond. The creditors, and among others the defenders, the Union Bank of Scotland, acceded to the trust by a deed of accession, which contained the following clauses relative to the settlement of disputes arising in regard to the debts:—"We being desirous, that all differences that may arise among us, either with respect to the claims which we may severally have against the said Earl of Kintore, or with respect to the method and principle of ranking us, or our said constituents respectively, upon the trust estate and effects conveyed by the said trust disposition, may be settled in an amicable manner, and that joint measures may be followed by us, do therefore hereby not only accede and agree to and ratify and approve of the foresaid trust disposition, . . . but also we, the said creditors and agents for creditors hereto subscribing, do hereby, for ourselves and our said constituents respectively, and our and their heirs, executors, and successors, and I, the said Earl of Kintore, for myself and my heirs, executors, and successors, do hereby, in case any dispute and difference shall arise concerning the same, submit to Edward Strathearn Gordon, Esquire, Sheriff of Perthshire, whom failing, to George Young, Esquire, Sheriff of Inverness-shire, whom failing, to George Moir, Esquire, Sheriff of Stirlingshire, as sole arbiter, all claims, debts, and demands which we, the said creditors acceding to the said trust disposition by ourselves, or our agents as aforesaid, or our heirs and successors respectively, have against the said Earl of Kintore; with full power to the said arbiter to determine the extent of the several debts due by the said Earl of Kintore, and to rank and prefer the several creditors upon the trust funds, estate, and effects disponed and conveyed as aforesaid, and free produce thereof; and to take the oaths of the several creditors upon the verity of their debts, and all other probation necessary for instructing the claims of the said creditors respectively; and the deductions to be made in ranking the same upon the trust estate, in respect of special securities held by any of the said creditors, and to give forth and pronounce decreets arbitral, one or more, upon the matters hereby submitted, determining the same in whole or in part, any partial decreets being hereby declared to be final, so far as concerns the matters thereby determined."

Some time after the trust deed and deed of accession had been executed, the Earl of Kintore and his trustee brought this action to have it found—(1.) with reference to a bond and disposition in security over unentailed lands for £8000 sterling, granted (on 17th June 1834) by the Earl and Countess of Kintore, in favour of Messrs. Blaikie, who at one time acted as the Earl's factors, and with reference to an assignation thereof in favour of the Union Bank, (dated 16th May 1856,) that—"the said pretended bond and disposition in security, and assignation thereof, do not constitute any good ground of debt or obligation against the pursuers, the said Lord and Lady Kintore and Francis Edmond, as trustee foresaid, or any of them, in favour of the defenders, or any of them, and that the said pursuers, Lord and Lady Kintore, and Francis Edmond, as trustee foresaid, are not indebted to the defenders, or any of them, in any sum of money in respect of the said bond and disposition in security and assignation thereof; and that the said bond and disposition in security and assignation thereof, do not constitute or form any valid security over the lands therein and herein before referred to."

The summons then concluded, that the disposition and assignation should be reduced. It next concluded (2.) in like manner for reduction of a promissory note for £15,000, granted by the Earl in favour of Messrs. Blaikie, and indorsed by them to the defenders; or otherwise, that

[1] See previous reports 24 D. 59: 34 Sc. Jur. 320. S.C. 4 Macq. Ap. 465: 1 Macph. H. L. 13: 35 Sc. Jur. 320.

the Earl should be credited, as in reference to that promissory note, with two sums of £3940 and £8670 2*s.* 5*d.*, alleged to have been paid to the defenders on account of it. It then concluded (3.) for reduction of three accepted bills drawn on them by the defenders, amounting together to the sum of £2500.

The pursuers' statement was, that, in May 1854, Messrs. Blaikie, having overdrawn their cash account with the bank to the amount of £64,000, besides incurring liabilities on bills and otherwise to the amount of £20,000, fraudulently appropriated money belonging to clients with the knowledge of the bank, in order to reduce the liabilities. They averred that, under the pretence of correcting a mistake in the Earl's marriage settlement, Messrs. Blaikie fraudulently presented for his signature, and that of the Countess, the above mentioned bond in their favour over certain portions of his unentailed lands, for £8000; that the Earl and Countess signed the deed under the belief that it was for the purpose stated; that the Earl then neither desired to borrow, nor received any part of the £8000 in loan, nor any other consideration whatever for the bond; that, two years afterwards, the bond was assigned without the pursuer's knowledge to the Union Bank, in consideration of a sum of £8000, which never was paid, or even credited, by the bank to Messrs. Blaikie; that, at the date of receiving the assignation, the Union Bank were well aware, that the bond represented no real transaction between Lord Kintore and Messrs. Blaikie; that they knew, that it had been granted without consideration, and that the Earl was never indebted to Messrs. Blaikie to any extent in respect thereof; that they were also well aware, that the assignation was granted without any communication with or authority from Lord or Lady Kintore; that notwithstanding of this knowledge on the part of the Union Bank, the assignation was fraudulently taken from Messrs. Blaikie, with the fraudulent purpose of holding Lord Kintore and the lands mentioned in the bond responsible, to the extent of the sum contained in it, for the liabilities of Messrs. Blaikie, with which the bank well knew Lord Kintore had no concern, and that they sought now fraudulently to enforce the alleged responsibility against Lord Kintore and the lands.

With reference to the note for £15,000, the pursuers averred, that it had been fraudulently obtained by Messrs. Blaikie from the Earl, on the false allegation, that he owed them the amount for advances in the management of his estates; that it was indorsed to the defenders, who received it with the full knowledge, that it had been fraudulently obtained; that the defenders gave no value for it, but merely put it to the credit of Messrs. Blaikie; that, to meet this note, they borrowed £12,670 2*s.* 5*d.* on the security of Lord Kintore's estates; that (with the exception of £60) they paid this amount in two sums to the defenders; and that, by a fraudulent arrangement between the defenders and Messrs. Blaikie, only £5000 of this sum was placed to the credit of the note, the remainder having been placed to Messrs. Blaikies' private account.

The averment with reference to the three acceptances, amounting together to £2500, was, that they had been placed blank in the hands of Messrs. Blaikie, for the purpose of being employed in certain speculations in Australia, and had been fraudulently transferred by them to the defenders, who (it was said) gave no value, and were aware of the fraudulent misapplication.

The pursuers pleaded, with reference to the bond and disposition in security, *inter alia,*— 1. That, having been fraudulently impetrated, and the bank not being *bonâ fide* onerous assignees, the bond and assignation thereof did not constitute a good ground of debt against the Earl or Countess or his Lordship's trust estate, and ought to be reduced. 2. That the bond having been subscribed without any consideration, and never having constituted a good ground of debt in favour of the grantees, and the bank not being *bonâ fide* onerous assignees, the bank had no good claim of debt against the pursuers, Lord and Lady Kintore, or his Lordship's trust estate, in respect of said bond and assignation thereof, and the same ought to be reduced.

The pursuers stated similar pleas with reference to the promissory note and bills.

The defenders, in their defences against satisfying the production, pleaded that—The action, and the pursuers' title to prosecute it, and the jurisdiction of the Court to entertain it, were excluded by the trust deed and deed of accession, and the contract of arbitration therein contained.

The Court of Session held, that the action of reduction was incompetent though it was alleged, that the documents had been obtained by fraud to which the creditor was accessory.

The Earl of Kintore appealed, maintaining in his case, that the judgment of the Court of Session should be reversed—1. Because, on a sound construction of the clause of arbitration, contained in the deed of accession, it did not apply to, nor comprehend, the questions raised in the present action. 2. The clause of submission founded on could not be held to apply to, or comprehend the decision of, false and fraudulent claims, inasmuch as such claims neither were within the contemplation of the parties at the date of the submission, nor fell within the terms of the reference. 4. The respondents, having acted fraudulently, were not entitled to avail themselves of the submission, or thereby to exclude the jurisdiction of the ordinary courts of law. 4. Because there were other pursuers of the action who were not parties to the submission, and whose interests could not conveniently or competently be considered separately from those of Lord Kintore and his trustee. 5. Because the Court of Session had dismissed the action *in toto,*

and had neither granted nor refused decree as craved, after investigating for themselves the grounds of action, or considering the award of the arbiter.—*Lauder* v. *Wingate*, 14 D. 633; Stair, 1, 7, 9; Erskine, iii. 1, 16; *Ranken* v. *Marshall*, 22 D. 351.

The respondents in their case supported the judgment on the following ground:—The subject matter of the appellant's action being comprehended by the contract of arbitration, and the arbiter therein named having full power to determine whether the documents objected to by the appellants constituted good grounds of debt, the appellants' action in the Court of Session, and the jurisdiction of that Court to entertain it, were excluded, and the action was correctly dismissed, in so far as pursued at the instance of the appellants.—Bell on Arbitration, p. 20; *Macgrowther* v. *MacWatt*, 6 S. 825; *MacCaul* v. *Monkland R. Co.*, 9 S. 522; *Robertson* v. *Johnstone*, 13 S. 289; *Stewart* v. *Lang's Trustees*, 2 D. 167; *Campbell* v. *Macfarlane*, 13 S. 641; *Phipps* v. *Edinburgh and Glasgow R. Co.*, 5 D. 1025; *Turnbull* v. *Macbride*, 20 D. 514; *M'Donald*, 7 S. 765, as explained by Lord Justice Clerk in *Hawkins* v. *Wedderburn*, 4 D. 924; Bell's Com., 5th ed. vol. ii. p. 486; Erskine's Institutes, iv. 3, 32; *Pitcairn* v. *Drummond*, 1 S. 431; 1 W. S. 194.

Rolt Q.C., and *Cairns* Q.C., for the appellant.—The interlocutor below was wrong. The question depends on the true construction of the clause in the deed of submission. The parties, when entering into that deed, never contemplated such a case as that which has arisen, viz., where the documents of debt had been fraudulently obtained. They only intended to include *bonâ fide* debts, and hence the parties entered into it in the capacity of creditors. They agreed on the hypothesis, that there was a real debt between them, and it was only the extent and amount of the debt which they referred to the arbiter. Questions of fraud, and the consequent vitiation of documents on that ground, are not proper subjects of such a reference; they can only be set right by a court of law. Thus, in *Lauder* v. *Wingate*, 14 D. 633, Lord Cuninghame, in a similar case, said an injury inferring damages was no more within an ordinary reference of matters in difference between partners, than if one had committed a criminal assault on the other in the highway. The jurisdiction of an arbiter is not to be enlarged by mere inference, and even a clause of a general form is cut down to a particular subject matter according to the relative situation of the parties. In *Aberdeen Rail. Co.* v. *Blaikie*, *ante*, vol. i. p. 119; 24 Sc. Jur. 537, it seems to be decided, that questions of fraud were impliedly excepted from a general clause of reference. Moreover, there are other parties to the deed who are not bound by the arbitration; thus Lady Kintore is prejudiced by the terms of the interlocutor. But there was another objection to the interlocutors. The Union Bank in their affidavit of debt do not mention their bond and disposition for £8000; therefore they have proved for one debt, but not claimed for the other. They are not bound by the submission as to the latter debt. The Court below had assumed, that the respondents had claimed in respect of that bond, whereas they have never done so. The interlocutor, therefore, cannot be right in sustaining the preliminary objection as to the bond and disposition in security.

The Solicitor General (Palmer), and *Anderson* Q.C., for the respondents.—The appellants have raised a new point, which was never taken in the Court below, as to the £8000 bond; but it was not necessary for the respondents in their affidavit to include this bond, for their accession to the deed impliedly brought that debt also within the scope of the submission. By the deed of accession the creditor waived all other remedies which were open to him at law.

[LORD CHANCELLOR.—Your accession to the deed would not *per se* entitle you to payment of your debt; you must prove it. Now you had not proved for the £8000 bond. Are you barred by the deed of accession from recovering on that bond? Would the finding of the arbiter be *res judicata*?]

Yes, it would be *res judicata*, and a release of all the debts due to the respondents. As to the other point, the clause of submission is wide enough to include the disposal by the arbiter of the objections to the validity of the documents of debt, whether they are objections founded on fraud or otherwise.

LORD CHANCELLOR WESTBURY.—My Lords, the question to be decided upon this appeal, or rather the question upon which the appeal depends, is whether the respondents have or have not submitted to arbitration in respect of the entirety of their several debts and demands against the appellant, the Earl of Kintore.

In the Court below it has been found and declared, that the preliminary defence of the respondents, rested on the fact of there being a submission to arbitration, was a sufficient ground of defence to an action of reduction brought by the Earl of Kintore; and I think, that you will agree with me, that, with regard to all these several debts of the respondents which are included in their affidavit, by which they sought to qualify themselves to rank as creditors under the trust deed—that that preliminary defence was correctly allowed by the Court below. But there arises a material circumstance, and one upon which it is a matter of regret, that the point does not appear to have been clearly and directly called to the attention of the Court below. That material circumstance is, that the bond, accompanied by a security for £8000, being one of the items of the claim of debt held by the respondents, the Bank is not included or mentioned in that

affidavit, and accordingly in respect of that bond, the respondents did not claim, so far as the affidavit is concerned, to be ranked as creditors under the trust deed. The contention on the part of the respondents is, that it was unnecessary to make any mention of that item of their claim in the affidavit, because they contend, that the simple execution of the trust deed was in itself an accession to that deed *in omnibus*, with regard to their demands; and accordingly, that this debt of £8000, though not specified in the affidavit, is one of the debts in respect of which they are bound by that submission to arbitration.

Now, a circumstance which I think will weigh with your Lordships, is this fact, that certainly it does appear, that in the Court below a conclusion was arrived at by that Court, that the present respondents had sought, and sought directly, to be ranked as creditors in respect of that bond, and accordingly I find the Lord Ordinary speaking of their position in that respect in a manner and in language perfectly incompatible with a notion that he was referring directly to the fact, that, in respect of that debt they had any other claim to be ranked as creditors than by their execution of the deed of accession, for the Lord Ordinary's language is, they have advanced a claim to be ranked on the trust estate, first, for a sum of £8000; and then afterwards, in the latter part of the note, the Lord Ordinary repeats, that "there is in substance nothing involved but the validity of a debt sought to be ranked under the trust;" and I am not surprised at the Lord Ordinary arriving at that conclusion, because I find in the 4th article of the respondents' statement of facts, that the respondents had stated erroneously in point of fact, that they had intimated to the pursuer, the trustee under the deed, the debts owing to them under and by virtue of the vouchers and securities referred to in the conclusion of the summons, and have no doubt therefore that it was taken for granted—erroneously taken for granted—that there had been a distinct application to prove in respect of that particular debt.

Now, upon adverting to the language of the trust deed, it will appear upon that deed, though it is unnecessary for your Lordships to pronounce any opinion upon it, that a creditor holding a specific security is, *quoad* that security, left at liberty to realize it, and is not at liberty to come upon the estate until he seeks to prove in respect of the balance of his debt, after realizing the security appropriate to it, or until he has a surplus in his hands over and above that debt resulting from the sale of that security.

And therefore it might appear, that the respondents were right in what they have done, namely, in seeking to prove only in respect of the other debts, not including this bond and disposition in security. But, under the circumstances, I shall humbly submit to your Lordships the propriety of not pronouncing upon that point any definite opinion, by extending your order thus far, and thus far only, namely, to reverse the interlocutor complained of, so far as relates to the bond and disposition in security, and to remit the case to the Court below to proceed in the cause, with a declaration that your Lordships' order is not to affect or prejudice any question that may hereafter arise upon the closing of the record, because I take it, that in reality the conclusion at which your Lordships will now arrive, that this preliminary defence ought *in hoc statu* to be repelled *quoad* the bond and disposition in security, is arrived at only for the purpose of allowing this particular matter, which appears to your Lordships important to be considered and decided, to be again submitted to the Court below, it being apparent, in the view which I have taken the liberty of laying before your Lordships, that in reality a fact was assumed in the Court below, which was not correct. If that fact had been according to the assumption, your Lordships probably would have agreed altogether in the propriety of the interlocutor of the Court below. That, however, is a point left utterly undetermined by your Lordships' present decision. I therefore shall humbly move your Lordships to reverse the interlocutors complained of, so far as relates to the bond and disposition in security, and that without prejudice to any questions that may arise hereafter upon the record, but reserving those expenses to be considered and dealt with hereafter in the cause, as the Court of Session shall think right; and to affirm the interlocutor in all other respects.

LORD CHELMSFORD.—My Lords, I have no difficulty in agreeing with that part of the interlocutor which states, that, so far as respects the balance of the £15,000 upon the promissory note and the bills of exchange amounting to £2500, the action of declarator and reduction is excluded by the trust deed and the deed of accession.

It has been argued, that the trust deed and the deed of accession did not empower the arbiter to consider any question of fraud which might be alleged in answer to any claim for debt of any creditor coming in under these deeds; and it was argued, on the part of the appellants, that the word "creditor" in the trust deed does not apply to the case of a person who claims a debt, which turns out in the result to be founded in fraud. Now, it is perfectly clear, that that word "creditor" is not used in that sense; but that it is used in the sense of a person having a claim to a debt, the validity of which is to be ascertained in the way provided for by the deed. Well, the deed provides, that the arbiter is to determine the amounts of the different debts; and he is to take the oaths of the several creditors upon the verity of their debts, and all other probation necessary for instructing the claims of the several creditors respectively. It is clear, that the creditors are to establish the validity of their debts to the satisfaction of the arbiter; and if it

turns out, that the debt is invalid by reason of its being founded in fraud, there is no more reason why the jurisdiction of the arbiter should be excluded from the consideration of that particular ground of invalidity than from the consideration of any other ground upon which the debt cannot be claimed against the estate. Therefore I think it perfectly clear, that the question of fraud is a question which is open to the arbiter under this deed.

With respect to the question arising as to the £8000 bond, I certainly cannot help very much regretting, that the question was not raised before the Lord Ordinary, as it might have been, and before the Inner House; and even when the appellant comes before your Lordships, he does not state in his reasons of appeal anything respecting that bond debt of £8000. I agree with the noble and learned Lord on the woolsack, that it will be desirable not to express any opinion with regard to that debt of £8000. And I agree, therefore, that the course which has been suggested will be the proper one for your Lordships to adopt on the present occasion.

LORD KINGSDOWN.—My Lords, I concur.

Interlocutors in part reversed, and in part affirmed.

For Appellants, Patrick, M'Ewen, and Carment, W.S., Edinburgh; Dodds and Greig, Solicitors, Westminster. — *For Respondents*, Walter Duthie, W.S., Edinburgh; Loch and Maclaurin, Solicitors, Westminster.

MARCH 26, 1863.

MESSRS. MERRY AND CUNINGHAME, *Appellants*, *v.* JAMES BROWN, Trustee on the Sequestrated Estate of the late W. F. Campbell, Esq. of Islay, *Respondent.*

Arbitration—Submission—Obligation to Refer Oversman—*A missive of lease of minerals, on which possession followed, contained a stipulation, that, " should the minerals become exhausted, or workable only at an evident loss, the tenants shall be entitled to give up the lease, on the same being ascertained by arbiters mutually chosen."*

HELD (affirming judgment), *That, although arbiters were not named, a valid obligation was constituted to refer to arbitration the question, whether the minerals were workable only at an evident loss.*

HELD further, *That such a missive did not impliedly bind the parties to appoint an oversman or umpire, should the arbiters differ.*

In 1844 Mr. Campbell of Islay entered into "heads of agreement," by which he agreed to let the coal and ironstone in his estate of Woodhall to Messrs. Alison, Merry, and Cuninghame, for thirty one years, at a fixed yearly rent of £4000, or of certain lordships. The tenth head of agreement was—" Should the minerals become exhausted, or workable only at an evident loss, the tenants shall be entitled to give up the lease, on the same being ascertained by arbiters mutually chosen."

The thirteenth head provided that the lease contemplated to be executed, in conformity with the heads of agreement, was "to contain the usual clauses of a mineral lease."

The tenants proceeded to work the minerals, and in 1855 they intimated their abandonment of them, as being workable only at an evident loss. A correspondence ensued, in which the tenants called on the defender (trustee on the sequestrated estate of Mr. Campbell) to enter into a submission in terms of the tenth head, and the pursuers intimated that "the arbiter on our part is Mr. David Landale, mining engineer, Edinburgh."

The defender at first maintained, that the obligation to refer was not binding, but afterwards he stated that he agreed to refer, and " Mr. Nicholas Wood of Newcastle is to act on our part."

The pursuers' agent then prepared a draft of a submission containing a clause empowering the arbiters to name an oversman; but the defender declined to agree to any clause providing for devolution on an oversman; and so no formal deed of submission was executed.

The pursuers then raised the present action concluding for declarator—*first*, that the defender was bound to enter into a submission referring the question whether, at the date of abandonment, the minerals had become workable only at an evident loss, to two arbiters to be mutually chosen by the parties, and, in case of difference of opinion, to an oversman to be jointly chosen

---

[1] See previous reports 21 D. 1337: 22 D. 1148: 31 Sc. Jur. 733: 32 Sc. Jur. 528. S. C. 1 Macph. H. L. 14; 35 Sc. Jur. 417.