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

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[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.

by the parties, to be nominated in the deed of submission; and in case of the failure of the oversman by death, non-acceptance, or otherwise, then to any other oversman whom the arbiters might choose; and, in the event of the pursuers and defender failing to agree on an oversman, then that there should be a reference to the arbiters; and, in case of difference in opinion between them, to any oversman they might choose: *secondly*, there was a conclusion for declarator, that the defender should be ordained to concur with the pursuers in executing a deed of submission accordingly; and further, that, in the event of the arbitration proving in any way ineffectual to determine the matter in dispute, it should be declared that, at the date of abandonment the minerals had become workable only at an evident loss; and that, on such being ascertained either by arbitration or by the Court, it should be found that the pursuers were entitled to give up the lease.

The Court of Session held, that the parties must first enter into an arbitration, and that it was premature to compel the parties to enter into the question as to an oversman.

Against the judgment of the Court of Session the pursuers appealed to the House of Lords, maintaining in their *printed case*, in reference to the judgment of 15th July 1859, that it ought to be reversed, for the following reasons:—1. Because in the tenth article of the heads of agreement between the late Mr. Campbell and the appellants, the arbiters were not named; and by the law of Scotland such a reference was ineffectual. 2. By the tenth article, there was not constituted an effectual obligation, binding the appellants to refer to arbiters either of the two questions embraced in that head of the agreement, viz. whether the minerals let had become exhausted, or whether they had become workable only at an evident loss under the lease; and because the alleged clause of arbitration was wholly ineffectual. 3. On a sound construction of the agreement, and, in particular, of the tenth head, the right of the appellants to give up the lease was dependent only upon the occurrence of one or other of these events, viz. that the minerals had become exhausted, or that they had become workable only at an evident loss under the lease, and did not depend upon two arbiters having previously determined the existence of such facts, or either of them. 4. According to the true construction of the agreement, the finding by arbiters, that the minerals had become exhausted, or had become workable only at an evident loss, was not only not a condition precedent to the exercise of the right to give up the lease, but was not an integral part of the contract of parties, and therefore the agreement to refer did not form an exception to, but fell under the rule of law, that, in order to constitute an effectual obligation to refer, the arbiters must be named. 5. There were no grounds for maintaining, that there was a valid nomination of arbiters by the parties in the correspondence and communings which took place prior to the date of action. 6. The appellants were entitled to a proof of their averments, and to have the question, forming the subject of dispute between them and the respondent, determined by the Court below, without recourse to arbiters; and, upon these averments being proved, to have decree pronounced in terms of the conclusions of their summons.

The *respondents* in their *printed case*, supported the judgment on the following grounds:—1. The lease of the minerals to the appellants, in the form of the heads of agreement between them and the proprietor, the late Mr. Campbell, followed by *rei interventus* or possession since 1844, was a valid and effectual deed in all its heads and clauses. 2. According to the proper construction of the tenth head, the clear meaning of parties was, that the ascertainment of the fact of working at evident loss, if at any time alleged, should be by arbitration, and not by the ordinary courts of law. 3. The tenth head made it a condition precedent, that working at an evident loss should be ascertained by the concurring opinion of two arbiters before the tenants could claim to give up their lease. 4. The arbitration section in the tenth head, whether technically expressed or not as a condition precedent to the tenants' relief, was an essential part of the article, which could not be separated from the privilege conferred on the tenants. The tenth head of agreement must therefore stand entire, or if any part of it, particularly the obligation for a reference to arbiters, were ineffectual, the whole agreement was at an end. The landlord could not be made to accept a renunciation of the lease unless the fact on which he was bound to do so was ascertained in the manner stipulated for by him, and not by an expensive process at law with a jury trial, which, if proposed to him, would have certainly made him refuse to enter into any lease on such terms; and which, consequently, could not be now imposed upon him. 5. If the arbitration under the tenth head were either a condition precedent to the tenants being entitled to give up their lease, or a vital part of the agreement, essentially united with it, the obligation to refer was not affected by the general doctrine, that in submissions of an actual dispute a submission to unnamed or uncertain arbiters was invalid; but fell under the exception of cases where an award by arbiters was requisite to liquidate a contract, or was so incorporated with it, that the privilege and its ascertainment could not be separated. 6. The exception, and not the general rule, applied with peculiar force to the present case, where there was in fact no arbitration in the proper sense of the word, but only provision made for the ascertainment by two men of skill of the fact of working at evident loss, in regard to which the respondent was entitled, without even giving a denial of the appellants' assertion, to require the stipulated attestation by

two men of skill. 7. By the nomination of two arbiters, (Messrs. Landale and Wood,) one by each party, there was a valid and special submission to two arbiters in existence, which was an effectual bar against an action to have it found, that the appellants were entitled to proceed with their claim at common law.

In reference to the judgment of 7th June 1860, the *pursuers* maintained in their *printed case*, that it should be reversed—1. Because, upon a sound construction of the agreement, and in particular of the tenth article, it was agreed, that the lessees should be entitled to give up the lease upon the occurrence of either of the two events therein mentioned, namely, that the minerals had become exhausted, or that they had become workable only at an evident loss under the lease, and that, altogether irrespective of the mode of ascertaining whether these events had come to exist or not. 2. Because the right to renounce was not made contingent or conditional upon two arbiters named by the parties concurring in deciding that the minerals had become exhausted, or workable only at an evident loss under the lease. 3. Because, according to the true construction of the agreement, the statement in the tenth article, with reference to the ascertainment by arbiters whether the minerals had become exhausted, or whether they had become workable only at an evident loss, was merely inserted for the purpose of securing a clause in the lease providing for the ascertainment, by an ordinary arbitration, of the occurrence of these events, if it should be alleged by the tenants, during the currency of the lease, that they or either of them had occurred. 4. Because, in an ordinary arbitration, according to the law and practice of Scotland, there was either an oversman expressly nominated in the deed of submission, or power given therein to the arbiters to nominate an oversman in the event of their differing in opinion. 5. Because the heads of agreement were mere jottings, or preliminaries, of a general description, written, not by professional persons but by the parties themselves, in a rough and incomplete manner, with a view to the preparation of a formal deed of lease by a conveyancer, which deed of lease it was expressly stipulated should contain the usual clauses of a mineral lease; and because, according to the usual style and clauses of a mineral lease in Scotland, relating to the right to give up the lease, should the minerals become exhausted or workable only at an evident loss, provision is made for the devolution of the submission on an oversman, so as to meet the contingency, which frequently occurs, of the arbiters differing in opinion, and to secure a decision. 6. Because, according to the tenth head of agreement, the lease, and the obligation to pay rent, did not continue in force until it should be determined that the minerals had become exhausted, or workable only at an evident loss under the lease, but, on the contrary, the right to give up the lease emerged to the appellants upon the occurrence of either of these events. 7. Because there had been no proper, valid, or binding nomination of arbiters by the parties in terms of the tenth article of the heads of agreement; and because the nomination of Mr. Landale by the appellants was insufficient in itself, and was made on the faith of an oversman being named in the deed of submission, or of proper provision being made for such nomination should the arbiters differ. 8. Because, according to the sound construction of the heads of agreement, the parties are bound to enter into a deed of submission, in which an oversman is either expressly named by the parties, or the arbiters are empowered to nominate an oversman, in the event of their differing in opinion, in order to render it effectual for ascertaining whether it be or be not true, as alleged by the appellants, that the minerals have become workable by them only at an evident loss under their lease.

The respondents supported the judgment, in their *printed case*, on the following grounds:—1. According to the sound construction of the agreement, the respondent was not bound to name, or to concur with the appellants in naming, an oversman, or to devolve on the arbiters the power of naming one. 2. A reference was made to arbiters mutually chosen, and to such arbiters only. 3. In the exercise of their powers under the tenth article, the parties had chosen arbiters, and the appellants were bound, *ante omnia*, to proceed with the arbitration thereby constituted.

Solicitor General (Palmer), and *Sir H. Cairns*, for the appellants, were stopped in their argument.

LORD CHANCELLOR WESTBURY.—At present our impression is, that all that you desire to secure by this appeal might be well effected for you in the following manner: Affirm the interlocutor pronounced in the second action, that is, the interlocutor of July 1859, and also the interlocutor in the first action, but declare that nothing contained in the interlocutor of July 1859, shall, in any manner, affect the right of your clients under the interlocutor pronounced in the first action, or by virtue of the conclusions of the summons, which are not disposed of by that interlocutor. Do I make myself intelligible to you?

Sir Hugh Cairns.—Perfectly, my Lord.

LORD CHANCELLOR.—That will prevent the operation of the first interlocutor being used, either directly or indirectly, to affect your rights in the first action, provided this shall occur, namely, that the reference to Mr. Landale and Mr. Wood shall fail, and become altogether abortive.

Sir Hugh Cairns.—My Lord, I think, in substance, and my learned friend the Solicitor-General agrees with me in saying, that that would answer all that we are entitled to ask at your

Lordships' bar. I was about to propose another means which would arrive at the same end, (your Lordships will judge which is best to be adopted,) namely, the directing either both or the first of these appeals to stand over, in order, that, if necessary, hereafter further proceedings might be brought up from the first action. In the contingency of the arbiters disagreeing, your Lordships will judge which of these means is the best. I agree that your Lordship's suggestion will give us all that we can ask for. We have said all along, that we are quite willing to go on with this arbitration, and if that decides the question, well and good. We do not wish to depart from that. We only wish that the matter may be kept free from any technical obstacle to the determination by the Court of what is to be done in the event of the arbiters disagreeing. And after your Lordship's intimation I think I could not properly occupy your Lordships' time in arguing questions which had better be left for the present.

Mr. Rolt (with whom was *Mr. Anderson* Q.C.), for the respondent.—My only objection to your Lordship's suggestion, as I understand it, is, that such a declaration appears to us to be entirely unnecessary, and entirely uncalled for. It agrees exactly with the terms of the interlocutor in the second appeal. It agrees with the reasons of the Judges, and I very much fear that, if such a declaration were made by this House, it might be said, that it was intended to make some qualification of the judgment which disposed of that appeal.

LORD KINGSDOWN.—If you take that view of it, we shall be anxious to hear what you have to say upon that point.

Mr. Rolt.—We ought to have the costs of the appeal. In the reasons of appeal in the first appeal there is no allegation, that the judgment was premature or ought to be suspended. The two points argued, and on which the appeal is brought, are, first, that there is no valid obligation to refer; and, secondly, there has been no valid appointment of arbitrators, and that the appellants have a right to go on and prove that the mines are exhausted, or cannot be worked at a profit. In the reasons of the second appeal there is no suggestion that there has been a miscarriage as to form.

LORD CHANCELLOR.—The impression of the House is, that if we make the order proposed, it will be an order only proceeding on the footing of greater caution, and that, unquestionably, the respondent would be entitled to the costs of the appeals.

Mr. Rolt.—We will then be content.

LORD KINGSDOWN.—I understood the other side to say, that the Court directed the second action, or at least suggested it.

Mr. Rolt.—That is a mistake. There was neither a direction nor a suggestion to that effect. The order of the House should contain no declaration that will reduce the effect of our being assoilzied in the first appeal.

Solicitor General.—The landlord in this case acted harshly, for he insisted on an arbitration, whereas there were no means of making it effectual. And as to costs, he would have acted more reasonably if he had agreed to the submission in the usual form to an oversman, by which means the costs of this litigation would have been entirely avoided.

LORD CHANCELLOR WESTBURY.—I think that your Lordships will agree with me, that this is a very plain and simple case, which has been embarrassed only by the nature of the proceedings in the Court below. The respondent agreed to let certain coal mines to the appellants, and there was a clause in the agreement which, in plain language, imported this, that when the mines were exhausted, or when they could not be worked except at plain and evident loss, the appellants might give up the lease; but if there was a contest about the reason for giving it up, the fact of the mines being exhausted or being workable only at a loss, should be ascertained by arbiters mutually appointed.

The appellants claimed the right to give up these mines in the year 1855, and after some controversy the respondent and the appellants mutually agreed on the nomination of arbiters to ascertain the fact that was in dispute, namely, whether a case for giving up the lease had arisen. After that was done a further dispute arose, whether the reference to the arbiters should also include a clause for the appointment of an oversman, and upon that they could not, in any manner, agree. Accordingly, the first action was raised by the present appellants, by a summons which, in its conclusions, adopted the clause of reference to arbitration as being valid, but sought a declaration that it involved the necessity of the appointment of an oversman or umpire, and then it went on to seek to have it declared, that in the event of the arbitration failing altogether, the Court would ascertain, and determine whether a case for surrender of the lease by the tenants had or had not arisen.

In the course of the discussions upon that action, it seems to have occurred to the appellants, that the relief they sought was too narrow, and less than they were entitled to, and that they had a right to take the matter higher up, and to have it declared, that the clause of reference contained in the agreement was altogether invalid and ineffectual, and that therefore it was the duty of the Court to ascertain, in the first instance, whether a case for surrendering the lease existed. Accordingly, instead of altering the conclusions of the first summons, (as to which, whether it was competent for them to do it or not, an interlocutor having been pronounced in the

mean time, it is not necessary now to consider,) they appear to have resolved to raise a second action, and in that second action they seek, first, a declaration that the clause of reference to arbitration, contained in the agreement, was ineffectual and invalid in law. And upon that declaration they repeat, in the second action, the same conclusions that were contained in the summons in the first action, but which in the first action were made dependent upon the event of the reference to arbitration failing.

The second action accordingly came on in its natural order, and was the first to be tried and determined, for it was absurd, of course, to trouble themselves about the preliminary conclusions in the first action, until it was ascertained whether the clause of reference was valid in law or not. And in the second action (which was the first tried) the Court of Session by their interlocutor of July 1859, found and adjudged, that the clause of reference was valid and binding, and then they proceeded in that interlocutor to assoilzie the defender altogether from the conclusions in the summons. And I think, if it had not been for some difference of opinion, and some expressions to be found in the judgments, the language of that interlocutor, properly construed, and strictly considered, would have been quite right. But then probably some difficulty arises from the fact, that the defender is by that interlocutor assoilzied *simpliciter* from all the conclusions of the summons in that action, which conclusions, your Lordships will remember, are, as to part, identical with the conclusions of the first action.

Then the action that was first commenced came on to be considered; and in that action the Court of Session pronounced an interlocutor which appears to my mind to be very correctly worded, and very well expressed, and quite unexceptionable. It is the interlocutor of June 1860, and by that interlocutor, in effect, the Court did this, namely, they assoilzied the defender from the conclusions in the first action, so far as those conclusions sought a declaration, that the reference to arbitration involved the appointment of an umpire, and in that interlocutor the Court said, "that according to the true construction of the tenth article of the heads of agreement, the question whether the minerals are exhausted or workable only to an evident loss, must in the first instance be referred to two arbiters." So far their interlocutor in this action, secondly heard, but first commenced, was founded on a judgment which they had already arrived at in the secondly commenced action, that was first heard, namely, that the agreement to refer was valid in law. And they then dispose of the argument of the present appellants, that the submission to arbitration involved the right of appointing an oversman, which they decree against, and then *quoad ultra* the interlocutor runs in this very correct form of expression: "*Quoad ultra*, in respect the parties have already named arbiters, in terms of the said tenth article, supersede consideration of the remaining conclusions of the summons, to enable the parties to proceed with the arbitration."

Now the whole of the conclusions of the summons—that is, the summons in the action first commenced, which are by this interlocutor so clearly and distinctly saved, are the conclusions by which the present appellants sought, that, in the event of the arbitration entirely failing and becoming abortive, the Court itself should try the question whether a case for the surrendering of the lease had or had not arisen. And I really think, that it required much ingenuity to find the possibility of any doubt being entertained upon these two interlocutors. But, as it has been suggested, that a doubt may be fairly entertained whether, having regard to some of the judgments that have been given, the interlocutor of July 1859, assoilzieing the present respondent from the conclusions in the second action, might possibly interfere with the power of the Court under the reservation made by the interlocutor of June 1860 in the other action, I would humbly submit to your Lordships, as a matter merely of precaution, that the order of this House should run in the following form of words, namely: "Affirm the interlocutor of the 15th July 1859, and also the interlocutor of the 8th June 1860; but declare, that the interlocutor of the 15th July 1859, and the affirmance thereof, is not to prejudice any question that may arise in the consideration of the remaining conclusions of the summons, which are reserved and superseded by the interlocutor of June 1860."

I consider this as in effect an indulgence granted to what we may denominate the timidity of the appellants; and I could hardly advise your Lordships to accede to this matter, which has in a great degree been dictated by apprehension, without imposing upon the appellants the obligation of paying the costs of these appeals. If, therefore, your Lordships should agree with me, I would humbly move, that the order of this House should run in the words I have mentioned; but that the appellants should pay the costs of the respondent in both the appeals.

LORD CRANWORTH.—My Lords, I have nothing to add to what has fallen from the LORD CHANCELLOR. I confess I think it is entirely unnecessary; and it appears to me to be the more clear that it is unnecessary, because, if there was ground for any of the apprehensions, that the appellants have contended for, it was a ground that would have prevented the possibility of making the order of 1860, because I think, if the Court had felt itself bound by the preceding order in the second suit, so as to be precluded from afterwards going into the question whether there might not, whatever might be the result of the arbitration, be some right on the part of the appellants, then it would have been quite wrong to have made the reservation of all questions,

until the arbiters should have made their report. I agree, that, if the interlocutors made in 1859 had been in the terms in which the Lord Ordinary has made it, there might have been some grounds for the apprehension, because the Lord Ordinary's decision goes upon the ground, that the finding by the arbiters was a condition precedent to the recovery of anything. But the Court did not adopt that view of the Lord Ordinary, but simply said, in this second suit, in which you have put your right against the landlord upon the ground that there is no agreement whatever to make a reference—upon that ground we differ from you entirely, and therefore assoilzie the defender. It appears to me, that the apprehension expressed by the appellants is an unnecessary one. At the same time I perfectly agree with what has been said, that there can be no difficulty in assisting the parties by putting in such a declaration as shall prevent the possibility of the question being hereafter raised.

LORD KINGSDOWN.—My Lords, I quite agree in the order proposed by the LORD CHANCELLOR, and I agree also that the costs should be paid by the appellants.

Interlocutor affirmed, with a declaration, that any remaining question in the conclusions of the summons in the first action shall not be prejudiced; and the appellants to pay the costs of both appeals.

For Appellants, Grahame, Weems, Grahame, and Wardlaw, Solicitors, Westminster.—*For Respondent*, Loch and Maclaurin, Solicitors, Westminster.

MARCH 27, 1863.

His Grace the DUKE OF MONTROSE, *Appellant*, *v.* SIR W. D. STEWART and Another, *Respondents*.

Superior and Vassal—Feu Contract—Teinds—Clause of Relief—Assignation—*In a feu contract granted in* 1705, *the granter "binds and obliges him and his foresaids to warrant the said teinds, parsonage, and vicarage to be free, safe and sure" to the grantee "from all ministers' stipends, future augmentations, annuities, and other burdens imposed, or to be imposed, on said teinds."*

HELD (affirming judgment), *In an action brought by a singular successor of the vassal against the superior for the purpose of enforcing the obligation, that it was a condition of the feu rights inseparable from the relation of superior and vassal; and that it was transmitted with the lands without being specially assigned.*[1]

This action was brought by Sir William Drummond Stewart, with consent of Mr. Kellie M'Callum, for the purpose of enforcing against the defender, the Duke of Montrose, an obligation of relief against augmentations of stipend, contained in a feu contract granted by the Marquis of Montrose on 1st January 1705. The obligation was expressed as follows:—"And further, in regard the said Mr. David Graham has payed as great a pryce for the saids teinds, parsonage and vicarage, as for the stock of the said lands, therefore the said James, Marquess of Montrose, binds and obliges him and his foresaids to warrant the said teinds, parsonage and vicarage, hereby disponed to be free, safe, and sure, to the said Mr. David Graham and his said son, and his foresaids, from all ministers' stipends, future augmentations, annuities, and other burdens imposed or to be imposed upon the said teinds."

The defender did not dispute, that the obligation was aptly expressed to form a claim for relief against augmentations if the question had arisen with the original parties to it, or if it had been properly transmitted to the pursuers; but he maintained, that it had not been so under the titles by which they acquired the lands. The titles were as follow:—By feu contract, dated 1st February 1705, James, Marquis of Montrose, feued the lands of Braco to David Graham, in liferent, and to James Graham, his son, and a certain series of heirs therein mentioned, in fee; whom failing, to the said David Graham, his heirs and assignees whomsoever. The feu contract contained the clause of relief above quoted.

In virtue of the feu contract David Graham and James Graham were infeft, for their respective rights of liferent and fee, on 23d May 1705.

James Graham having contracted debt, several of his creditors, after the death of his father, David Graham, obtained decree of adjudication against the lands of Braco, viz. Thomas Andrew

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[1] See previous report 22 D. 755; 32 Sc. Jur. 308. S. C. 4 Macq. Ap. 499: 1 Macph. H. L. 25: 35 Sc. Jur. 420.