

Wednesday, May 26.

FIRST DIVISION.

HUNTER v. MILBURN.

Arbitration—Building Contract—Competency of Ordinary Action. A building contract contained a clause of reference. Disputes having arisen, the builder proposed to go before the referee, but the house-owner declined, whereupon the builder brought an action for the balance of the contract price. Action held competent, but consideration superseded to enable the parties to go to the referee.

The pursuer contracted for the mason-work of a house about to be erected for the defender, the contract containing a clause whereby it was provided "that in all matters of dispute relating to the carrying out of the several works to the full intent and meaning of the plans and specifications already required, or which shall from time to time be required and prepared by the said John Henderson, shall be referred to the said John Henderson, and that his decision shall be final and binding on all the aforesaid parties." Henderson was the defender's architect.

The pursuer now sued the defender for the balance of the contract price.

The Sheriff-substitute (CAMPBELL) pronounced this interlocutor:—"Finds that the present action is brought to recover payment of a certain sum of money as 'the balance due on the agreed on and ascertained price of estimate, and other mason work, executed by the pursuer' for the defender: Finds that the pursuer has failed to set forth on record any relative averments instructing that the alleged price has either been agreed on or ascertained: But finds, on the contrary, that it appears from the pursuer's revised condescendence that the work in question was done under a contract or agreement, containing a clause of reference of all disputes between the parties to a Mr John Henderson, but that the pursuer has not submitted his claim for the said balance, or under the said contract or agreement, to the said arbiter, although he pleads that the clause of reference, and any award which may be pronounced by the arbiter under the same, are binding and conclusive between the parties: Therefore finds that the present action as laid cannot be maintained by the pursuer, and dismisses the same and decerns: Finds the defender entitled to expenses," &c.

The Sheriff (DAVIDSON) adhered.

The pursuer appealed.

CLARK and BALFOUR for appellant.

SHAND and ORPHOOT for respondent.

At advising—

LORD PRESIDENT—I believe none of us have any doubt that the Sheriff-substitute and Sheriff have gone wrong in dismissing the action. The building contract here contains a clause of reference, and there is no reason for doubting that that is binding on the parties. It occurs in an English contract, but it is not said that there is any peculiarity in that law to prevent it from being as binding as if it had occurred in a Scotch deed. I think the pursuer proceeded correctly in terms of the contract when he called on the defender, if he objected to the work, to go before the arbiter and have the dispute determined. It is not denied that the pursuer took that course, and that the defender refused to go before the arbiter. In these

circumstances, I think the pursuer was entitled to bring this action; and, having brought it, it must be observed that the defender does not plead that the action is excluded by the clause of reference, and yet the Sheriff-substitute and Sheriff have dismissed the action as if the defender had pleaded, and was entitled to plead, that it was excluded. It is plain that these interlocutors cannot stand. The next question is, How is the case to be disposed of? Nothing was said by the defender to create any doubt in my mind as to this reference being a binding reference of all disputes between the parties relating to the carrying out of the work; and, that being so, Henderson, the referee, is the proper person to settle the dispute on its merits. I do not think the subsistence of the reference, and the necessity of it going on its merits to Henderson, affects the validity of this action in this Court, and the practical course which I suggest is, that, after recalling this interlocutor, we should supersede consideration of the action for some time for the purpose of allowing the parties to bring the disputes before the referee.

LORD DEAS—This is an action by a builder for payment of the balance due on a building contract, on the allegation that his work has been properly performed. The defender maintains that in various respects the house is not properly constructed. The builder says there is a clause of reference as to that. The answer to that is a declinature of the reference, and a plea that the clause of reference has no application. The first question is, What was the builder to do? It is said that he should have gone to the referee. I don't think so. His proper course was this action. The other party not only declined the reference, but pleaded that it was inapplicable. The builder was quite right in the course he has taken. The defender is not entitled, by declining to go into the reference, to defeat the pursuer's *jus quesitum* to have the disputes set right by the referee. The result is, that we must give an opportunity to the pursuer to go before the referee and state the dispute which has arisen; and, if the defender refuses to go, the referee will dispose of the matter without him, and then we will consider whether or not to give effect to that award. I think the clause of reference is clearly expressed so as to cover the disputes which have arisen.

LORDS ARDMILLAN and KINLOCH concurred.
Agents for Appellant—G. & H. Cairns, W.S.
Agent for Respondent—H. Buchan, S.S.C.

Wednesday, May 26.

WALKER v. MARSHALL.

Landlord and Tenant—Incoming Tenant—Value of Fallow. Where a landlord who had been in personal occupation of a farm let it to a tenant, held that the landlord was in the same position as an ordinary out-going tenant, entitled to claim from the in-coming tenant the value of fallow, manure, and seed, of which the in-coming tenant reaps the benefit.

The respondent is proprietor of the lands of Machan, in the parish of Dalsersf and county of Lanark. For some years he had these lands in his natural possession, cultivating them himself as tenant. In 1866 he had prepared 12 acres for seed for a crop of wheat for 1867, 11 acres and 1 rood being summer fallow, and the remainder being in