legitimate purpose of making the landlord's preference effectual by the sale of the sequestrated effects under warrant of the Sheriff; but was used with the design, so far as possible, of enlarging the landlord's right of hypothec, while leaving the tenant in the possession and apparent administration of his estate. In accordance with this arrangement, the whole sequestrated effects, excepting this stack of hay, were sold by Fraser at his displenishing sale in May 1880, and the stack in question was sold by Fraser to the pursuer also at a publicly advertised sale on 21st July of that year. There can be no doubt that Fraser had Lord Lovat's authority to sell this stack, as well as the other effects, in his own name. It was part of the arrangement that Fraser should account to Lord Lovat's factor for the price. But this is a condition which could not in reason be binding on a purchaser unless disclosed to him. A purchaser of goods from an exposer duly authorised is entitled to pay to the exposer, unless it is a condition of the sale that payment shall be made in some other way. Here there were no conditions; the pursuer paid the price in good faith to Fraser, and is not the less entitled to delivery because Fraser failed to account to the landlord's representative.

On the second question the facts were that Fraser vacated the farm after the sale and before delivery of the hay. Mr Peter informed the pursuer that he "would not allow him to remove the hay seeing it was hypothecated." Mr Peter instructed Lawson, the new tenant, not to allow the hay to be removed, and also told the forester to put a fence round it. When the pursuer went for the hay Lawson said he had got word from the factor "to tell him that he would not get the hay." Then the pursuer adds, "he stopped loading."

The defender contends in all this he did nothing more than assert a legal claim. I think he did more—he was in possession through his tenant Lawson, and Lawson by his instructions refused to give possession. If the pursuer, after what occurred, had attempted to take the hay by force, I think he would have put himself in the wrong, because he had no right to be on Lawson's farm for that purpose after he had been ordered to cease loading. I am therefore of opinion that the hay was detained by the defender—wrongfully detained—because the defender was bound to allow delivery to be taken by the person to whom Fraser had sold with his authority. The sum concluded for is £35, but there is no evidence that hay had risen in value between July and November, when delivery was refused. The damage must therefore be limited to £17, the price of the stack with interest from the date of citation, as prayed for.

Lords Craighill and Rutherfurd Clark concurred.

The Lord Justice-Clerk and Lord Young were absent.

The Court pronounced the following interlocutor:—

"The Lords . . . find (1) that the stack of hay in question was sold to the pursuer by Donald Fraser, the tenant of the farm of Platchaig, with consent of the defender; (2) that the defender prevented delivery of the said stack to the pursuer when delivery was required; (3) that the defender having consented to the sale, was not entitled, by reason of the sequestration previously used, or on any other ground alleged, to prevent delivery; (4) That the want of the hay purchased by the pursuer was a cause of loss and damage to him, and that £17, being the price, with interest as concluded for, is a sum at which the damage may reasonably be fixed: Therefore sustain the appeal; recal the interlocutors of the Sheriff-Substitute appealed against; ordain the defender to make payment to the pursuer of the said sum of £17 with interest," &c.

Counsel for Pursuer (Appellant)—Campbell Smith—Rhind. Agent—William Officer, S.S.C.

Counsel for Defender (Respondent)—Mackintosh—Guthrie. Agents—John Clerk Brodie & Sons, W.S.

Thursday, June 21.

SECOND DIVISION.

[Lord Kinnear, Ordinary.

MACKAY *v.* PAROCHIAL BOARD OF PARISH OF BARRY.

Arbitration—Clause of Reference—Exclusion of Ordinary Action.

A contract to execute certain waterworks for a local authority contained this stipulation—"Should any dispute arise as to the true nature, sufficiency, times, or extent of the work intended to be performed under the specification and drawings, or as to the works having been duly and properly completed, or as to the construction of these presents, or as to any matter, claim, or obligation whatever arising out of or in connection with the works, the same shall be submitted and referred to the amicable decision, final sentence, and decreet-arbitral of" M., the engineer by whom the specifications were prepared. These specifications also contained a stipulation that "alterations, additions, or modifications made on the original plans during the execution of the works should be deemed part of the contract, and be valued according to the schedule of prices attached to the original contract." After the works were executed, with certain departures from the original plans, made by order of the engineer, the contractor sued the local authority for a further sum (in addition to what he had been paid under the contract) which he alleged to be due in consequence of extensive alterations, amounting to independent works, which had been ordered during the carrying out of the contract. *Held* that the alterations described by the pursuer were of the nature anticipated in the contract, and that the action was excluded by the clause of reference.

The defenders in this action, the Parochial Board of the Parish of Barry, as the local authority for that parish under the Public Health Act, having resolved to introduce a supply of water from the Brax Spring, nearly two miles distant, into

Carnoustie, within the parish of Barry, advertised for tenders for the construction of the necessary works. The tenders were to refer to specifications of the work prepared by Alexander M'Culloch, civil engineer, Dundee. George Mackay, contractor, on 3d February 1881 sent in an offer in the following terms:—"Gentlemen,—I hereby offer to furnish the materials and execute the work required to be done for introducing a supply of water into the 'Special Water Supply District' of Carnoustie, within the parish of Barry, in accordance with drawings and specification and general conditions thereof prepared by Alexander M'Culloch, civil engineer, Dundee, and to your and his entire satisfaction, and to uphold, maintain, and keep in repair the whole of the materials furnished or works executed, as the case may be, by me during their progress, and also for the specified period of maintenance after the date of completion of the several contracts, for the following sums, viz." The offer then proceeded to divide the contract into several heads or sub-contracts, named "Contract No. I.," and so on, making five in all, with special schedules annexed to each, and each being again sub-divided into separate items at separate sums. The total sum offered for the whole contract was £5077, 19s. 7d. The offer concluded with the following clause:—"And I further offer and agree to execute any additional work, or deduct for work not executed, at the rates contained in the relative schedule, which rates include everything necessary to the execution of the works, and are those upon which my tender is based; and I also hereby agree, in the event of my tender being accepted, to enter into a regular stamped contract for the execution of the works (the expense of which to be borne by you), should you desire it.—I am, &c." The offer was stamped with a sixpenny agreement stamp. It was accepted by Mr M'Culloch, on behalf of the Parochial Board, on 11th February following. No regular stamped contract was ever entered into, and the agreement of parties stood on the offer and acceptance. The specifications prepared by Mr M'Culloch, which were docquetted and signed by M'Kay as relative to the offer, contained, *inter alia*, the following clauses:—"(1) SUPERINTENDENCE.—All the works mentioned in this specification are to be executed to the entire satisfaction of Alexander M'Culloch, civil engineer, 22 Euclid Crescent, Dundee, who is hereafter referred to as the engineer; and to the satisfaction of any qualified resident engineer or inspector who may be appointed to represent him; and in accordance with the drawings" furnished and to be furnished. "(2) ALTERATIONS.—Power is reserved to the engineer at all times to make such alterations, additions, or modifications as may be considered necessary during the progress of the works, and such alterations, additions, or modifications shall not in any way invalidate the contract, but, on the contrary, shall be deemed a part thereof, and the value of the same (if any) should no agreement be come to regarding them before they are commenced, shall be to the schedule of prices to be lodged with the engineer before operations are commenced, and where these do not apply according to the judgment of and measurement and valuation to be made by the engineer; but no alteration, addition, or modification of any kind shall be allowed unless the order for the same be given in writing by the engineer . . . . (21) ARBITER.—Should any dispute arise as to the true nature, sufficiency, times, or extent of the work intended to be performed under the specification and drawings, or as to the works having been duly and properly completed, or as to the construction of these presents, or as to any matter, claim, or obligation whatever arising out of or in connection with the works, the same shall be submitted and referred to the amicable decision, final sentence, and decreet-arbitral of Alexander M'Culloch, C.E., associate member of the Institute of Civil Engineers, Dundee, whom failing Robert Blackadder, C.E., Dundee; and the fact that the said Alexander M'Culloch is or may continue to be the engineer of the local authority shall in no wise affect his appointment as or his acceptance of the office of arbiter, or his powers to take up and decide all matters of dispute and difference; and the decree or decrees-arbitral, interim or final, of the said arbiter shall be final and binding on all parties." Mackay thereafter entered upon the contract and proceeded to construct the works, and in May 1882 water was introduced into Carnoustie by means of them. During the construction various alterations, modifications, and additions were made on the original plan. These included an enlargement of the area of the reservoir, an alteration on the materials and form of the embankment of it, an increase in the width of several drains, and other minor changes.

Mackay had been paid by instalments on certificates by the engineer from April 1881 till February 1882 to the amount on the latter date of £5950. The parties thereafter failed to agree as to the further remuneration to be paid to Mackay, and consequently he in July 1882 raised the present action against the Parochial Board for payment to him of the sum of £1248, 11s. 11d., which he alleged to be the balance still due to him at contract sales for the works executed.

He averred that he had completed the works according to contract, and that they had been taken off his hands by the defenders. "(Cond. 7) The works as indicated on the drawings and as contained in the specification are not really the works that have been executed. Numerous and extensive alterations were made both in the design and character and materials for and construction of the works. These were made under written and other orders by the engineer Mr M'Culloch, acting in name and on behalf of the defenders. They were not of the nature of a mere alteration, or addition, or modification of the specified works, such as ordinarily occurs in the carrying out of such contracts, but many of them were independent works or modes of construction of works, and formed the subject of specific bargain between the pursuer on the one hand and Mr M'Culloch as representing the defenders on the other." "The alterations on the reservoir," he averred further, "really amounted to an abandonment of the original specification, and the substitution of altogether different work."

The defenders denied that, though used for conveying the water, the works had been completed according to the contract, or taken by them off the pursuer's hands. They maintained

that the alterations, additions, and modifications "did not make any material or radical change in the agreement or contract, or departure from the plans and specifications." They averred that the payments which had been made to the pursuer were so made in conformity with the agreement between the parties, and as certified by the engineer, and that the amount which, according to the engineer's measurements, would become due at the expiry of the period of maintenance was £6091, 19s. 2d., leaving a balance, after deducting the £5950 already paid by instalments, of £141, 19s. 2d. still due to him. They stated that they were willing to pay this balance on the production of the engineer's certificates, and on the pursuer's guaranteeing the maintenance for the stipulated period. They also stated that they had intimated to the pursuer that his claim fell to be disposed of by the arbiters in terms of their agreement.

They pleaded—The subject-matter of the action falls to be determined by the arbiter under the contract.

The Lord Ordinary pronounced the following interlocutor:—"Finds that the pursuer contracted with the defenders to execute the work sued for on the conditions contained in the specification: Finds that the claims made by the pursuer in this action fall within the clause of reference to Alexander M'Culloch, C.E., the defender's engineer, contained in the 21st article of the said specification: Finds that the said Alexander M'Culloch is not disqualified from acting as arbiter under the said clause of reference; therefore supersedes further procedure *in hoc statu*, in order that the parties may have the pursuer's claims submitted to arbitration as aforesaid, reserving in the meantime all question of expenses, and grants leave to reclaim.

"*Note.*—The case appears to me to be ruled by *Trowsdale & Son* v. *Jupp*, November 15, 1865, Macph. 31, and *Scott* v. *The Carluke Local Authority*, February 1, 1879, 6 R. 616."

The pursuer reclaimed, and argued—His claim did not fall under the clause of reference in the specifications. That comprehended only questions as to materials and workmanship. A special clause of reference was required to cover a dispute as to price of work done. The clause was merely executorial to prevent the stoppage of the works by litigation of disputes about materials, &c., and came to an end with the completion of the works. The question of price was left to the common law. There could not be read into this clause an agreement binding the parties to exclude the jurisdiction of the Court in a dispute about price. In no case had a clause in these terms been held to cover such a dispute. The pursuer was entitled to a proof and the judgment of the Court on the question raised by the action.

Authorities—*Kirkwood* v. *Morrison*, Nov. 6, 1877, 5 R. 77; *Tough* v. *Dumbarton Waterworks Commissioners*, Dec. 20, 1872, 11 Macph. 236; *M'Leod* v. *Adams*, Nov. 22, 1861, 24 D. 75; *Pearson* v. *Oswald*, Feb. 4, 1859, 21 D. 419; *Beddow* v. *Beddow*, April 17, 1878, L.R. 9 Chan. Div. 89.

The defenders replied—This was an executorial clause and something more. It was wider in its terms than any of those which had not been held to cover a like dispute, or even than in those relied on by the Lord Ordinary as conclusive against the pursuer's contention.

Additional Authorities — *Aberdeen Railway Company* v. *Blaikie*, Jan 28, 1857, 13 D. 527; *Birrel* v. *Dundee Jail Commissioners*, March 9, 1859, 21 D. 640.

At advising—

Lord Rutherfurd Clark—In this action the pursuer sues for a balance alleged to be due to him for work done under or in connection with a contract into which he entered with the defenders.

The defenders plead that the claim of the pursuer falls within the clause of reference contained in the contract, and the Lord Ordinary has sustained this plea. It is necessary therefore to examine what the claim of the pursuer is.

By this contract the pursuer engaged to execute certain works for a lump sum. There were five different pieces of work, to each of which a specific price was attached. But in substance there was but one contract. No formal deed was executed. The contract stands on the pursuer's offer and the defenders' acceptance, which embody the general conditions annexed to the specification. In this way these conditions form part of the contract. They contain a very usual provision by which power is reserved to the engineer to alter, add to, or modify the specified works. "Such alterations, additions, or modifications" are to be "deemed a part of the contract, and the value of the same, should no agreement be come to regarding them before they are commenced, shall be according to the schedule of prices to be lodged with the engineer before operations are commenced, and where these do not apply, according to the judgment of and measurement and valuation to be made by the engineer."

As was to be expected, various alterations were made on the works as they proceeded, but I do not think that the alterations either by way of suppression, addition, or modification were in excess of the power reserved to the engineer. The alterations are described as being "numerous and extensive," but they are not the less under the contract. They involved an enlargement of the reservoir, an alteration in the manner of forming the embankment, and the like; but I fail to see how such alterations can be held to be beyond the power of the engineer. They cannot be brought under such a category by the mere allegation that they were "really new works." I hold therefore that in so far as the original plan was modified the modifications were within the contract.

There is an averment of the pursuer which deserves special notice. While he alleges that some of the works which he was required to execute were but alterations, additions, or modifications within the meaning of the contract, he says that many of them were independent works, or modes of construction of works, and formed the subject of specific bargain between the pursuer and the engineer. If by this it is meant that any new contract or contracts were made which superseded or modified the original contract, the pursuer might sue on these contracts; but if so, he was bound to set them out. They could not be the subject of probation under the present record, for they are not averred. Accordingly, I can pay no

regard to this general allegation. I must hold that the work was done under the original contract, and, as I have already said, additional or altered work is just as much contract work as any other when power to add and alter is given by the contract, and when the consequences of such modification are, as here, regulated by the contract.

It follows that the claim of the pursuer is for the balance of the price of the contract work.

The pursuer proposes that the claim should be settled by proof. I cannot conceive a more inconvenient form of inquiry. The defenders contend that it should be settled by the arbiter appointed by the contract. I should imagine this to be the best course for both parties. But unless the pursuer has submitted his claim to arbitration he is entitled to have his case tried in the ordinary way.

I need not quote the clause of arbitration. It is expressed in very comprehensive terms. It is a reference to individuals—not to the engineer as such. The defenders might change their engineer from time to time—they could not change the arbiter. The decision of the arbiter is to be given in the form of decree-arbitral—either interim or final; in short, it is a clause of arbitration of the most formal and extensive kind.

There is referred to the arbiter the decision of any "matter, claim, or obligation whatever arising out of or in connection with the works." I am of opinion that these words include and refer to the arbiter the pursuer's claim. Any other construction would, to my mind, be very unnatural. For if there is a clause of reference at all, I cannot conceive of anything that would more naturally fall under it than the settlement of claims on either side, and I can give no other description of the claim made in this action than that it is a claim arising out of the works.

It is said, however, that the reference is a reference executorial of the contract, and that it terminated with the completion of the works, or at least when, as the pursuer alleges was the case here, the works were taken off his hands. The pursuer relied on various cases in which a reference was held to be merely executorial in the sense which I have just mentioned. But in inquiring how far these cases are authorities for the decision of the present case, we must pay very close regard both to the terms of the reference and to the question which it was proposed to submit to the arbiter.

The contracting parties may create a tribunal for settling differences which may occur in the course of executing the works, and which has no other function. But of course they may do more, and extend it to the decision of any claim which may arise out of the contract. In this sense the reference is not less executorial of the contract than when it is confined to the settlement of questions which may arise during the execution of the works. It is or may be otherwise with respect to questions based on allegations of breach of contract, and it is true that without express power an arbiter cannot assess damages.

The first case to which the pursuer referred was the case of *Pearson*, 21 D. 419. There the clause of reference occurred in a lease of minerals and was thus conceived—"In case any disputes or differences of opinion shall arise as to the meaning or execution of these presents, the same shall be referred to the decision and decree-arbitral of John Geddes mining engineer." The questions which did arise were 1st—Whether a working contract between the tenant and a third party was in truth an assignation beyond the powers of the lease: and 2d, Whether the tenant was liable for damages in respect of excessive working? The Court held that these questions did not fall within the reference, on the ground that the true purpose of it as a reference to a mining engineer was to facilitate the mere execution of the contract. In other words, that mere mining questions were referred to the mining engineer who was chosen as the arbiter, and that he could not decide questions as to the legal powers of the tenants under the lease, or assess damages for an alleged breach of contract. In fact, the claims of the landlord depended in each case on alleged breach of contract by an illegal assignation or its equivalent, and damages for illegal working.

The pursuer further appealed to the case of *M'Leod*, 24 D. 75. It had regard to a building contract under which any dispute which might arise previous to the commencement, during the progress, or after the completion of the works, was referred to the "architects." Here there was no reference to any individual, but to the person or persons who might for the time be the architects, and whose appointment depended on the will of one of the parties. It was held that the reference was executorial in the limited sense, or, to use the words of the Lord Justice-Clerk, "the clause does nothing more than provide a mode of determining such questions as in the course of the work would naturally fall to be decided by the architect." There was no proper arbitration at all, for the arbiter depended on the will or claim of one of the contracting parties. The reference as a general reference was bad, as the arbiter was not named.

Nor do I think much assistance can be drawn from the case of *Rough*, 11 Macph. 236; for it was clear that several of the claims which were made by the pursuer did not fall within the reference, and the Court allowed the case to proceed on the footing that a reference should be made to the arbiter to settle any claims which have been referred to him.

The case of *Kirkwood*, 5 R. 79, presents more difficulty. There the clause of reference was thus expressed—"Should any dispute or difference of opinion arise connected with the contract or the execution of the work, the same shall be referred to the decision of H. Muirhead." Mr Muirhead was the architect, but the reference was to him as an individual. The work was finished, and the only question between the parties was, what was the true measurement of the work, and the consequent price? It was held that this question did not fall within the reference. The Court seems to have taken the view that this was not an architect's question, and that the parties only meant to refer to Mr Muirhead what fell properly within his province as architect.

But in this case the clause is more comprehensive. Indeed it is more comprehensive than the clauses which are found in any of the cases which I have mentioned. It refers to the decision of the arbiter any dispute as to "any matter, claim, or obligation whatever arising out of or in connection with the

works. I do not know how these words can be construed as not to comprehend a claim for the price. This is a claim which must arise. It is the natural and indeed necessary incident of the contract. If any claim is to fall within the reference, I can see none which more naturally falls under it. Nor can I see any ground for thinking that the parties did not intend that it should be decided by the tribunal which they have created. It seems to me to be far more suitable for the determination of the question which has been raised, than a suit in court. So far, therefore, I agree with the Lord Ordinary.

The pursuer, however, argued that the arbiter was disqualified. He has no such averment or plea on record; but he says that the statements of the defenders show that the arbiter has already pronounced adversely to his claim. But the arbiter has done nothing which did not fall within his ordinary functions as the engineer of the works, and if so, the case referred to by the Lord Ordinary seems to be conclusive against the argument of the pursuer.

I am therefore of opinion that the interlocutor of the Lord Ordinary should be affirmed.

Lord Craighill and Lord M'Laren concurred.

The Lord Justice-Clerk and Lord Young were absent.

The Court adhered.

Counsel for Pursuer (Reclaimer)—D.-F. Macdonald, Q.C. — Johnstone. Agent — J. Smith Clark, S.S.C.

Counsel for Defenders (Respondents)—J. P. B. Robertson — Hay. Agents — Rhind, Lindsay, & Wallace, W.S.

Thursday, June 21.

SECOND DIVISION.

[Lord M'Laren, Ordinary.

LINDSAY (MACGREGOR & CO.'S TRUSTEE) *v.* COX AND OTHERS.

Ship — Freight — Hypothecation of Freight for Advances on Ship—Ship's Husband — Trustee in Sequestration.

The managing owners and ship's husbands of a vessel obtained from shipping agents, whom they employed to collect the freight, advances to account of freight, and, without any authority from the other owners, empowered them to retain the freight when collected in extinction of these advances. The ship's husbands having become bankrupt, the trustee on their sequestrated estate sued the owners of the ship for the amount of disbursement made by them on behalf of the ship. The owners claimed to take credit for the freight which the agents had retained as against the ship's husbands, in terms of their agreement. The trustee refused to admit their right to compensation. *Held* that the receipt of the freight by the sub-agents on the instructions of the ship's husband must be held to be equivalent to receipt by the ship's husband, and that therefore the owners were entitled to take credit for it in accounting with the trustee.

In this case Thomas Steven Lindsay, as trustee on the estates of the firm of D. R. Macgregor & Co., shipping agents, Leith, which had been sequestrated on January 11, 1878, sued Messrs Cox and others, the owners of the steamship "Mikado," for payment of the sum of £14,577, 0s. 11d., being the balance of freight and disbursements brought out by the accounts of the ship. The sum sued for was composed of three sums, viz., £654, 17s. 7d., £3861, 3s. 8d., and £10,060, 19s. 8d., which several sums were averred to be due in respect of three voyages made by the "Mikado." The present case was practically restricted to the pursuer's claim against the defenders in respect of the third voyage of the ship from London to Shanghai and back, which took place in 1877, the sum alleged to be due on it, being £10,060, 19s. 8d. This voyage was commenced from London on 10th May 1877, and the ship arrived home in October.

The defence was that the trustee had failed to carry to the credit of the ship's account a sum of £12,640, for which they were entitled to credit in accounting with Macgregor & Co. In support of this contention the defenders averred that on the 24th July 1877 Macgregor & Co., without their knowledge or authority, had employed Adamson & Ronaldson, shipbrokers, London, to attend to the ship on arrival, and to collect the freight; that an arrangement was made between them by which Macgregor & Co. were allowed to draw bills in anticipation of the freight, and Adamson & Ronaldson were empowered by Macgregor & Co. to retain the freight in repayment of advances made on this footing—in pursuance of which arrangement, Macgregor & Co. in July 1877, or three months prior to the arrival of the vessel in London, received advances from Adamson & Ronaldson, directly or through the intervention of other firms, to the amount of £11,137, 11s. 2d. or thereby, in security of which advances they hypothecated the freight which would fall to be collected in October, the date of the ship's arrival. This freight they averred that it was the duty of Macgregor & Co., to collect and to credit to the defenders their co-owners, which had not been done. They averred further that Messrs Adamson & Ronaldson collected £12,318, 16s. 2d. between 19th October, when the ship arrived, and the 31st December 1877, and a further sum of £321, 11s. 3d. between 1st January and 1st May 1878.

The pursuer in answer to these statements denied that the freight was received by Macgregor & Co. from Adamson & Ronaldson. He maintained, on the contrary, that the alleged advances were made for and applied to the general purposes of the business of the firm of Macgregor & Co. under an arrangement between them, which was not authorised by the owners, nor necessary for the ship.

He also founded on proceedings which had taken place in an action in the Lord Mayor's Court, London, of the following nature. In April 1878 Adamson & Ronaldson sued the present defenders, and also D. R. Macgregor, in that Court for payment of £817, 7s. 2d. as the balance alleged to exist in respect of advances to Macgregor & Co., and of disbursements for the "Mikado" after