

there is, I think, room for argument, because at the time the testator wrote his will it was undoubtedly not his intention that this property should pass under the residuary clause. But, on the whole, I think that the presumption against intestacy is too strong.

The Court answered the first question in the affirmative, and the second and third in the negative.

Counsel for the First Parties—A. S. D. Thomson. Agent—Andrew Newlands, S.S.C.

Counsel for the Second Party—J. H. Millar. Agent—John Simpson, Solicitor.

Counsel for the Third Party—Sandeman. Agents—Macpherson & Mackay, S.S.C.

Counsel for the Fourth Party—John Wilson. Agent—Andrew Newlands, S.S.C.

Tuesday, February 28.

### FIRST DIVISION.

[Lord Low, Ordinary.]

#### BARR v. COMMISSIONERS OF QUEENSFERRY.

*Arbitration—Clause of Reference—Sist of Action till Questions Falling under Reference Disposed of by Arbitrator—Convenience.*

In an action raised by a contractor against his employer, the pursuer claimed (1) a sum due to him for work executed, and (2) damages for breach of contract on the part of the employer. The contract between the parties provided that all questions as to the execution of the work should be referred to an arbitrator; and the defender pleaded that the action should be sisted until the arbitrator had determined the amount of the first of the pursuer's claims.

The Lord Ordinary (Low) having allowed a proof, reserving however any questions which might arise under the clause of reference, the Court (*dub.* Lord McLaren) recalled the Lord Ordinary's interlocutor, and remitted to his Lordship to sist process in order that the questions falling within the scope of the reference might be first determined.

This was an action raised by William Barr, contractor, against the Commissioners of the Burgh of Queensferry, concluding for payment of £900.

The pursuer's case was that he had contracted with the defenders to execute the mason, brick, and plaster-work of certain swimming-baths which they proposed to erect, and that the contract price was £1531. He had executed work to the amount of at least £1200, receiving payment to account of £550, when the defenders' architect, professing to be dissatisfied with the work done, took the remainder of

the plaster-work out of his hands. This, the pursuer maintained, was a breach of contract. (Cond. 5) "By said breach of contract on the part of the defenders the pursuer has sustained loss and damage to the extent of at least £200." Payment of the balance of the amount due for work done had been refused.

The defenders founded upon a provision in their contract with the pursuer to the effect that in the event of any difference arising with respect to the execution of the work, "the parties shall refer and submit such differences to the determination of" the defenders' architect. They averred that many important questions with regard to the character of the work executed fell to be determined by their architect, who had meanwhile declined to certify any sums due to the pursuer. They denied breach of contract, and averred facts and circumstances tending to show that it was the pursuer who was in breach.

The pursuer pleaded—"(1) The sums sued for being addebted and resting-owing by the defenders to the pursuer, decree should be granted as concluded for, with expenses. (2) The defenders having by their actings condescended on broken their contract with the pursuer, are bound to make reparation to the pursuer for the damage he has thereby sustained."

The defenders pleaded—"(2) The action being barred by the arbitration clause in the contract, ought to be dismissed, or at all events sisted until the arbitrator has determined the matters in dispute between the parties."

On 22nd December 1898 the Lord Ordinary (Low) allowed the parties a proof of their respective averments, "under reservation of any question which may arise during the course of the inquiry, falling within the scope of the reference contained in the contract" between the pursuer and the defenders.

*Opinion.*— . . . "I think that it is plain that that clause does not empower the arbitrator to assess damages for breach of contract, and accordingly that part of the action is not excluded by the reference.

"The question of the ascertainment of the balance, if any, still due to the pursuer for the work which he has done is attended with more difficulty. The defenders argued that in order to ascertain the balance a number of questions required to be determined, which under the contract fell to be decided by the arbitrator, such as the question whether there had been undue delay in executing the work whereby penalties had been incurred.

"Now, the clause of reference in this case is to Mr Henry, not as architect, but as an individual, whom failing, to an arbitrator to be appointed by the Sheriff. That is a proper clause of reference, and not a mere executorial clause in the sense of being only a provision for the speedy settlement, during the course of the work, of questions naturally falling within the province of the architect for the time.

"I do not think, however, that the clause applies to the existing state of matters.



The pursuer's averment is that the defenders unwarrantably took a material part of the contract out of his hands, and that the defenders having thereby broken their contract, he, as he was entitled to do, declined to proceed further with the contract. Of course the contract did not contemplate and did not provide for such a position of matters, and I am therefore of opinion that the claim is not excluded by the reference clause. In arriving at that conclusion, I have, I think, followed the principles laid down in the following authorities:—*M'Cord*, 24 D. 75; *Tough v. Dumbarton Water-works Commissioners*, 11 Macph. 236; *Mackay v. Parochial Board of Barry*, 10 R. 1046; *M'Alpine v. Lanarkshire Railway Company*, 17 R. 113.

"I shall therefore allow a proof, but it may be that in the course of the inquiry questions may arise which are within the scope of the reference clause, and which would fall to be remitted to the arbiter. The proof therefore will be without prejudice to the right of parties to have such questions, if they should arise, disposed of by the arbiter."

The defenders reclaimed, and argued—The Lord Ordinary had taken a wrong course. There were two grounds on which the pursuer had based his action. One was the debt owing to him under the contract, and the other was breach of contract. That was how the total of £900 which he now sued for was arrived at. But the decision of the claim of damages for breach of contract depended in all likelihood upon the decision of certain questions as to the work executed which fell within the arbitration clause of the contract. The course taken by the Lord Ordinary was plainly inconvenient, for the proof allowed by him would almost certainly have to be interrupted in order that parties might proceed to the arbiter for his decision. The proper course would have been to sist the cause. Authority referred to:—*Wilson & M'Farlane v. Stewart & Company*, February 24, 1898, 25 R. 655.

The pursuer argued that the course taken by the Lord Ordinary was right, and presented no practical inconvenience. He founded on *Tough v. Dumbarton Water-works Commissioners*, December 20, 1892, 11 Macph. 236; *Kirkwood v. Morrison*, November 6, 1877, 5 R. 79; *Savile Street Foundry Company v. Rothesay Tramways Company*, March 20, 1883, 10 R. 821; and *M'Alpine v. Lanarkshire & Ayrshire Railway Company*, November 26, 1889, 17 R. 113, per L. P. Inglis, 121.

LORD ADAM—This is one of those cases where there are questions some of which must go to one tribunal and others to another. In this case some questions must be decided by the arbiter and other questions by the Court. Now, I think in such a case that reference to previous decisions is not of very much value, because it depends upon convenience and the various other considerations of each case, which is the most proper procedure in the circumstances.

Here there is no doubt that the leading

claim is one for the unpaid value of work said to have been executed under the contract by the pursuer. I think that that is a matter for the arbiter. On the other hand, the pursuer claims also a sum of damages on more grounds than one. That question must go to the Court and not to the arbiter, and the question now is, what is the course of procedure to be?

The course suggested by the Lord Ordinary appears to me to be one which is attended with great inconvenience. What he proposes, as I read his interlocutor, is that parties should begin to lead their proof on the question of damages. In the middle, a question falling within the jurisdiction of the arbiter may arise, and without it you cannot arrive at the amount of damages. The way of working it out, as I understand, is to be, to stop in the middle of the proof, to go to the arbiter, and to resume the proof after his decision. I see no other way of working out the Lord Ordinary's proposal.

Now, it seems to me that that would be a procedure attended with great practical inconvenience. Suppose the case were going to a jury how could such a proceeding be carried out? If that be so, the question is, what is the right and the most convenient way to deal with this case? The most important part of the case is the claim for the price of work done, and I think that as the leading part of the case it should be dealt with first. Though I am most unwilling to alter the judgment of a Lord Ordinary in such a matter, I think that the proper course is to sist the case, and let parties go to the arbiter and have the questions raised decided first.

LORD M'LAREN—There are two claims of the pursuer here, which are quite distinct and referable to different judges—firstly, a claim for damages, which must necessarily come before the Court, and, secondly, a claim for the cost of work executed, which must go to the arbiter.

It is plain that these two claims cannot proceed concurrently—one must be delayed till the conclusion of the other. The question is, which of the two should be allowed to proceed first?

I cannot, for my part, see anything impracticable in working out the procedure contemplated by the Lord Ordinary, and I should have been content to let that procedure take its course; but as the question is one of convenience, and your Lordships have a clear opinion upon it, I do not differ.

LORD PRESIDENT—I concur with Lord Adam.

LORD KINNEAR was absent.

The Court recalled the interlocutor of the Lord Ordinary, and remitted to his Lordship to sist process.

Counsel for the Pursuer—Jameson, Q.C.—Hunter. Agent—David Dougal, W.S.

Counsel for the Defenders—Campbell, Q.C.—Guy. Agents—W. & J. L. Officer, W.S.