

existence private rights, and absolutely terminating a trust designed to keep them alive, and we came to the conclusion that the words used were not sufficiently unambiguous to lead to this result. But I see no such improbability in reference to annual fruits, considered in relation to beneficiaries who, if existent, had failed to make any claim for nearly twenty years. In view of the circumstances already referred to, namely, the Commissioners' knowledge, which I must assume, of the receipt by the defenders of the income of this property for several years before the date of the scheme and their expenditure of that income on School Board purposes, as would appear in their accounts published annually, and their knowledge, which I must further assume, that the defenders were not entitled to uplift and administer money for other than School Board purposes, it seems to me a reasonable and, I think, a sound construction of clause 23 to hold that it authorised the defenders to receive and administer the fruits of the property in question as they had done until a claim should be made by the heirs of Dr Bell. I do not think that the defenders' position is prejudiced because they went further, and *bona fide* thought that they were entitled to deal with the subject itself as their property—a view which we have already negatived.

The Court adhered.

Counsel for the Pursuer — Sandeman, K.C. — A. M. Mackay. Agents — Dove, Lockhart, & Smart, S.S.C.

Counsel for the Defenders — Constable, K.C. — Macmillan, K.C. — Wilton. Agents — Henderson, Munro, & Aikman, W.S.

HOUSE OF LORDS.

Friday, December 14.

(Before the Lord Chancellor (Finlay), Lord Dunedin, Lord Atkinson, Lord Shaw, and Lord Parmoor.)

GLASGOW AND SOUTH-WESTERN RAILWAY COMPANY v. BOYD & FORREST.

(Vide 1912 S.C. (H.L.) 93, 49 S.L.R. 735, 1915 S.C. (H.L.) 20, 52 S.L.R. 205.)

Res judicata—Process—Decree of Absolutor—Petitory Action—Medium concludendi—Parties Seeking to Recover before Arbitrator under a Contract Sums Previously Sought to be Recovered in Petitory Action in which they Tabled no Claim on Basis of Contract Applying.

A firm of contractors brought a petitory action to recover from a railway company a sum of money as resting-owing for work done. The railway company defended on the ground that the work was done under a contract and that the sum due under the contract

had been paid. The contractors sought to set the contract aside on the grounds of fraud and of essential error, but in this they failed, and the railway company obtained a decree of absolutor. The contractors then presented to the arbitrator named in the contract, a claim for the same sum, made up in the same way, and maintained that the decree in the preceding action did not constitute *res judicata* as that action only settled that the contract applied.

Held that the matter was *res judicata*.

Authorities examined.

Levy & Co. v. Thomsons, (1883) 10 R. 1134, 20 S.L.R. 753, commented on by Lord Dunedin.

On August 21, 1916, the Glasgow and South-Western Railway Company, *pursuers*, brought an action against Boyd & Forrest, contractors, Kilmarnock, and John Strain, C.E., Glasgow, *defenders*, for declarator “(first) that under and in terms of an interlocutor of the Second Division of the Court of Session, dated 13th day of May 1915, applying the judgment of the House of Lords of date 1st March 1915, in an action at the instance of the present defenders Boyd & Forrest against the present pursuers, concluding for payment of the sum of One hundred and six thousand, six hundred and eighty-eight pounds, thirteen shillings and elevenpence sterling, with interest thereon at the rate of five per centum per annum, the summons in which was signeted on 15th November 1907, the present pursuers have been assoilized from all claims at the instance of the present defenders Boyd & Forrest against the present pursuers in respect of the construction by the said present defenders for the present pursuers of the line of railway known as the Dalry and North Johnstone Railway and the Dalry widening and relative works, all as more particularly described in the condescendence hereunto annexed, without prejudice to the right of the present defenders Boyd & Forrest if so advised to refer to the defender John Strain as arbitrator named in the contract between the present pursuers and the present defenders Boyd & Forrest for the construction of the said works, dated 14th and 18th September 1900, all claims whether for damages or otherwise under the said contract or in respect of breach thereof, provided such claims are condescended on in the condescendence of the present defenders Boyd & Forrest in the said action, and provided they relate to (a) the construction of the bridge 12a and diversion of the Paisley water-pipe, or (b) any delay on the part of the present pursuers in furnishing plans for dealing with water-courses encountered in the cuttings; and (second) that the present defenders Boyd & Forrest are not entitled to submit to the defender John Strain as arbitrator foresaid, and the defender John Strain as arbitrator foresaid has no jurisdiction to entertain, any claims at the instance of the present defenders Boyd & Forrest relating to the construction of the said works or to the execution of the said contract except such claims as are

condescended on in the condescendence of the present defenders Boyd & Forrest in the said action and relate to (a) the construction of the bridge 12a and diversion of the Paisley water-pipe, or (b) any delay on the part of the present pursuers in furnishing plans for dealing with water-courses encountered in the cuttings," with relative interdicts.

The pursuers *pleaded*—"1. The claims put forward by the present defenders against the present pursuers in the arbitration proceedings condescended on having been decided by a final judgment of the House of Lords against the said defenders, and being *res judicata* against them, except in so far as relating to the two matters specifically reserved in the said judgment of the House of Lords, the pursuers are entitled to decree in terms of the first declaratory conclusion of the summons. 2. The defenders Boyd & Forrest not being entitled to submit to the defender John Strain as arbiter foresaid any claims other than claims relative to the two matters specifically reserved in the said judgment of the House of Lords, decree should be pronounced in terms of the second declaratory conclusion of the summons."

The defenders *pleaded*—"2. The averments of the pursuers being irrelevant, the action should be dismissed. 3. Upon a sound construction of the judgment of the House of Lords of 1st March 1915, and of the interlocutor of the Court of Session of 13th May 1915, the claim of these defenders in said arbitration is competent. 5. The defender John Strain having jurisdiction to deal with the claim as lodged by these defenders, decree of absolutor should be pronounced."

The facts are given in the opinion of the Lord Ordinary (DEWAR), who on December 22, 1916, gave decree in terms of the conclusions of the summons.

Opinion.—"The pursuers in this action are the Glasgow and South-Western Railway Company, and the question they raise is whether the defenders Messrs Boyd & Forrest, contractors, Kilmarnock, are entitled to insist upon certain claims, which they have submitted in arbitration proceedings at present pending between parties, being adjudicated upon by the arbiter, the defender Mr John Strain, civil engineer.

"The circumstances in which the dispute has arisen are briefly as follows:—In the year 1900 the parties entered into a contract for the construction of the Dalry and North Johnstone Railway. It was a lump sum contract, the price being £243,000, together with additional payments for certain authorised extra work. The work was completed in April 1905, and the total sum paid by the railway company for contract and extra work was £272,030. The contractors were not satisfied with that amount, and made further claims, which the Railway Company declined to entertain. The contractors then brought an action in the Court of Session for payment of certain sums fully set forth in a detailed statement. These sums amounted in all to £88,850, 13s. 11d., and £17,858 of interest was also claimed,

making a total of £106,688, 13s. 11d., which was the sum sued for.

"The prices charged in the account sued for were higher than the rates set forth in the schedule which formed part of the contract. The Railway Company defended the action, and maintained that the prices stipulated for in the contract were binding on the contractors, and that the work specified in the account sued on so far as it fell within the contract had been included in the contract price, and in so far as it consisted of extra work had been included in the additional payments. In reply to this defence the contractors maintained that the contract was inapplicable as a basis of charge, and no longer binding on parties, in respect that it had been induced by the fraud and misrepresentation of the defenders, and that the work executed proved to be entirely different from that contemplated by the contract.

"After a protracted litigation the defence was sustained, and the House of Lords on 1st March 1915, reversing the judgment of the Second Division, remitted the case back to the Court of Session to assoilzie the defenders (the Railway Company) from the conclusions of the summons with expenses.

"On 13th May the Second Division applied the said judgment accordingly, and assoilzied the defenders from the conclusions of the summons, but under the declaration that 'the decree of absolutor is without prejudice to the rights of the pursuers, if so advised, to refer to the arbiter named in the contract between the parties all claims whether for damages or otherwise under the contract, or in respect of the breach thereof, provided such claims are condescended on in pursuers' condescendence in the present action, and provided they relate to (a) the construction of the bridge 12a and the diversion of the Paisley water-pipe, or (b) any delay on the part of the defenders in furnishing plans for dealing with water-courses encountered in the cuttings.'

"After this interlocutor was pronounced the contractors invoked the services of the arbiter under the contract and he accepted office. They then lodged claims, amounting in all to £98,612, 15s. 2d. Of this amount £9750 is claimed as damages for delay at bridge 12a, and for delay in furnishing plans. To that extent the claim is new. But the balance of £88,862 is admittedly the old account which was sued for in the Court of Session action. The same rates are charged, and the contractors maintained before the arbiter that 'the schedule rates do not apply to the work done.'

"In the arbitration proceedings the pursuers maintained that as this part of the claim had already been determined by a final judgment of the Court the arbiter had no jurisdiction to entertain it. But the arbiter rejected this contention, and by order dated 24th July 1916 found that the entire claim lodged was within his jurisdiction, and sisted proceedings to allow the pursuers to bring the order under the review of the Court.

"In these circumstances the pursuers have brought this action concluding for

declarator to the effect that they have been assoilzied from all claims in respect of the work executed by the defenders, except those specially reserved at the end of the interlocutor, and that the defenders are not entitled to submit, and the arbiter has no jurisdiction to entertain, any other claim; and there are relative conclusions for interdict against both the defenders and the arbiter.

“The arbiter in his very clear note has stated his reasons for thinking that he has jurisdiction to entertain the whole claims which the defenders have lodged. He takes the view that the only question raised in the Court of Session was whether the contract was binding on the parties, and although that question was decided adversely to the defenders’ contention, that does not prevent them submitting to the arbiter any claims which properly fall within the contract. The same view was put in another form by the defenders’ counsel. They said—‘The House of Lords has decided that the contract is applicable, and we now desire to apply it’; and they state that in this, as in all large contracts of the kind, there are many questions which fall to be adjusted by the arbiter which have never been submitted to him. At first I confess that I was disposed to agree with that view, but on further consideration I have come to be of opinion that it is unsound.

“It is true that the question whether the contract was binding on parties was the one which, almost exclusively, engaged the attention of the Court, but I do not think it is true to say that it was the only question decided. What the Court really decided was, I think, this, viz.—That the contractors were not entitled to recover from the Railway Company certain specified charges—estimated on the assumption that the schedule rates did not apply—and amounting in all to the sum of £88,830, 13s. 11d. If I am right in thinking that this was the real decision, I do not see how the arbiter can now be asked to consider the same specified charges, based on the same assumption and amounting to the same sum.

“The defenders argued that although the interlocutor appeared to restrict their right to submit all claims falling within the contract to the arbiter, that was not the true meaning. The real intention, they say, was to enlarge the powers of the arbiter so that he might be able to assess damages. I cannot accept that view. The defenders submitted their whole claims against the pursuers for the decision of the Court, and I do not think that the Court has decided that they may now submit the same claim to an arbiter with increased powers. I think it is clear from the report of the discussion which took place in the House of Lords on the claims reserved in the interlocutor that the Court, and I think both parties, assumed that all questions except those specially reserved were finally decided, and in my opinion the interlocutor was carefully framed to give effect to this view. It assoilzies the defenders from the conclusions of the summons, and the summons concluded for payment of all

sums alleged to be due in respect of work executed. That, I think, would exclude all claims from the arbiter. But there were two matters which the Court had not disposed of, viz.—Claims relating to (a) the construction of bridge 12a, and (b) delay in furnishing plans. Both parties agreed that the claims relating to these matters should be referred to the arbiter, and the interlocutor accordingly declares that the decree of absolvitor is without prejudice to such claims ‘provided they are condescended on in pursuers’ condescendence in the present action.’ If the intention had been, as the defenders say, merely to increase the arbiter’s power on these two questions and to leave them free to submit all claims, I think the interlocutor would have been framed in a different way. The intention was, I think, to exclude all claims except those specially reserved.

“I am accordingly of opinion that the pursuers are entitled to decree.”

The comparing defenders, Messrs Boyd & Forrest, reclaimed.

On December 3, 1917, the Second Division recalled the Lord Ordinary’s interlocutor, sustained pleas 2 and 5 of the defenders, and assoilzied them.

LORD JUSTICE-CLERK—In 1907 Messrs Boyd & Forrest, the present defenders, raised an action against the Glasgow and South-Western Railway Company, the present pursuers. The summons in that action, for some inscrutable reason, was in the form of an ordinary petitory action, asking decree for a sum of money, while all that the condescendence averred was that Messrs Boyd & Forrest, as contractors, had been employed by the Railway Company to do certain work for them which they had done, that they had been paid so much to account of the amount due in respect of the said work having been done, and that there was still a balance due, being the amount sued for, the pursuers’ only plea being—“The defenders being justly due and resting-owing to the pursuers in the sum sued for, the pursuers are entitled to decree as concluded for.” In their defence to said action the Railway Company explained that Messrs Boyd & Forrest had by a formal and detailed contract, specification, and plans agreed to construct a railway for the company for a slump sum, that the railway had been constructed, and that the contractors had been paid all that they were entitled to under the contract, and more.

In consequence of this defence Messrs Boyd & Forrest substituted for the original condescendence and pleas a long and detailed condescendence, the main feature of which was that the original contract was no longer binding on Messrs Boyd & Forrest, that it had been departed from and entirely superseded, and that they were entitled to be paid fair and reasonable prices for the work which they had done. In other words, they now disclosed that their claim was for a *quantum meruit*. The new condescendence was focussed in two new pleas, being pleas 2 and 3 of the closed record:—“2. The pursuers having,

on the defenders' employment, executed the work contained in the account sued for, and the prices charged therefor being fair and reasonable, the pursuers are entitled to decree as concluded for. 3. The contract founded upon by the defenders is inapplicable as the basis of charge for the work executed by the pursuers, and is no longer binding upon the pursuers, in respect (a) that the said contract was induced by the fraud of the defenders, (b) that said contract was entered into by the pursuers under essential error induced by the misrepresentations of the defenders, (c) that the work as executed by the pursuers proved to be entirely different from that contemplated by the contract, (d) that said contract was by agreement of parties departed from as a basis of charge, and (e) that the defenders are by their actings barred from founding on said contract as the basis of charge."

Incidentally, and as alternative to their *quantum meruit* case, Messrs Boyd & Forrest averred—"Alternatively, in the event of the contract hereinafter mentioned being held to be binding in whole or in part on the pursuers in respect of the work executed, the pursuers have suffered loss and damage to the extent of the sum sued in respect of the fraud, the negligence, and breach of contract of the defenders, all as aforementioned." Nothing more was averred or "after mentioned" by the pursuers as to damages, but they added a further new plea, viz.—"4. Alternatively, the pursuers having suffered loss and damage, to the extent of the sum sued for, owing to the fraud, negligence, or breach of contract of the defenders as condescended on, the pursuers are entitled to decree as concluded for."

After hearing parties in the procedure roll the Lord Ordinary (Salvesen) pronounced the following interlocutor on 14th July 1908:—"The Lord Ordinary having considered the cause, before answer allows to the pursuers a proof of their averments so far as bearing on their third plea-in-law, and to the defenders a conjunct probation, to proceed on a day to be afterwards fixed, and reserves all questions of expenses;" and on 13th November 1908 the Second Division adhered to said interlocutor. The proof so allowed was taken by Lord Johnston, who on 20th January 1910 sustained branches (a), (b), and (e) of said third plea, and found that the pursuers (Messrs Boyd & Forrest) were "entitled to reasonable recompense" for the work they had done, "allowing payments to account either in name of *quantum meruit* or, which in the present case is substantially the same thing, of damages as may be ascertained." On 10th November 1910 the Second Division sustained branches (a) and (e), omitting branch (b) of said third plea. After sundry further procedure the Railway Company obtained leave to appeal to the House of Lords, and that House, on 3rd April 1913, reversed, *inter alia*, the said interlocutors of 20th January 1910 and 10th November 1910, found that Messrs Boyd & Forrest had failed to prove that they had been induced to enter into the said contract by fraud, and remitted the cause to the

Court of Session, "with directions (1) to repel branch (a)" of said third plea; (2) to repel branches (b) and (e) of the said plea in so far as founded on allegations of fraud, and to hear and dispose of the whole pleas and contentions except in so far as repelled, in terms of the said directions. This order of the House of Lords was duly applied by the Court of Session on 5th June 1913. After further procedure the Second Division on 7th February 1914 sustained branches (b) and (e) of said third plea, and repelled branches (c) and (d), and found that the contractors were entitled to be paid for the work by them on a basis of *quantum meruit*. On 1st March 1915 the House of Lords reversed said last-mentioned interlocutor so far as it sustained branches (b) and (e) of said third plea, and so far as it found Messrs Boyd & Forrest entitled to be paid on a basis of *quantum meruit*, and remitted the cause to the Second Division to assolvie the defenders (the Railway Company) in the action from the conclusions of the summons, but providing "that this order and such decree of absolvitor be without prejudice to the right of the respondents in the original appeal, and it is hereby declared that the respondents in the original appeal are to have the right, if so advised, to refer to the arbiter named in the contract all claims, whether for damages or otherwise, under the contract, or in respect of breach thereof, provided that such claims are condescended upon in the pursuers' condescendence in this action, and provided that they relate to (a) the construction of bridge 12a and the diversion of the Paisley water-pipe, or (b) any delay on the part of the appellants in the original appeal in furnishing plans for dealing with water-courses encountered in the cuttings." This judgment was duly applied on 13th May 1915 by interlocutor of that date.

Thereafter the arbiter under the contract (Mr John Strain, C.E.) having been appealed to accepted that office on 1st March 1916, and ordered Messrs Boyd & Forrest to lodge their claim and the Railway Company to answer the same, and this having been done a record in the arbitration was made up and closed.

In their claim in said arbitration the claimants Messrs Boyd & Forrest averred that they had done certain work for the Railway Company, all in terms of the said contract and schedule thereto, "and in addition did numerous other work not set forth in the schedule, and for which no prices have been provided." The work so averred to have been done was practically altogether, or at least in great part, the same work as that averred to have been done in the original action. But whereas in the action it was averred that this work had not been done under the contract, but on the footing that it should be paid for on the basis of *quantum meruit*, in the arbitration the work was averred to have been done under the contract on the footing that it should be paid for at schedule rates where there were schedule rates, and where there were no such schedule rates at such rates as the arbiter might fix. The claimants in

this respect claimed that they were entitled to be paid by the Railway Company the sum of £88,830, 13s. 11d., and they further claimed that they were entitled to £9750 as damages in respect of the two items (a) and (b) referred to in the House of Lords' said order of 1st March 1915. The Railway Company in their answers to said claim for £88,830, 13s. 11d. maintained that it was excluded by the order for absolvitor of 1st March 1915, and they joined issue as to the said claim for damages amounting to £9750.

The arbiter having heard parties on the said claim and answers, on 24th July 1916 issued an order in which he found that the entire claim was within his jurisdiction and that he proposed to proceed accordingly, reserving *in hoc statu* all questions of relevancy, and in order to enable this order to be brought under review of a court of law he sisted further procedure in the arbitration.

The Railway Company thereupon, on 21st August 1916, raised the action in which the present reclaiming note has been taken. In that action the Railway Company sought declarator to the effect that the arbiter had no jurisdiction to entertain or determine the said claim for £88,830, 13s. 11d., and that the claimants should be interdicted from proceeding with said claim, and that the arbiter should be interdicted from proceeding to deal therewith.

The plea on which the Railway Company relied was *res judicata* in respect of the decree of absolvitor pronounced in favour of the Railway Company under the said order of the House of Lords, dated 1st March 1915.

The Lord Ordinary, by the interlocutor reclaimed against, decerned against the defenders in terms of the conclusions of the summons.

In my opinion the plea of *res judicata* does not apply in the circumstances of the case. I agree that, if not altogether, at least to a large extent, the work claimed for by Messrs Boyd & Forrest in the arbitration and referred to in this action is the same as was claimed for in the action finally disposed of by the House of Lords, and that even the separate items in the accounts in the two processes were the same. But the grounds of action, the *media concludendi* in the two processes, except it may be as to the damages under said heads (a) and (b) in the said order of 1st March 1915, and the interlocutor of 13th May 1915, were entirely different.

The *medium concludendi* in the first action was that the contract and relative schedule had been displaced and no longer applied, for the reasons set forth *seriatim* in the pursuers' (Messrs Boyd & Forrest's) third plea, and that these pursuers were entitled to be paid on the basis of *quantum meruit*.

The only proof allowed in said action was a proof "of the pursuers' averments so far as bearing on their third plea-in-law."

On the other hand, the claim in the arbitration is founded on the contract, and the claimants' rights, it is pleaded, are to be determined according to said contract and the relative schedule where the latter is

applicable, and where it is not according to the arbitrament of the arbiter in terms of the contract, said contract being thus the *medium concludendi*.

Not only was no such view presented in the original action, but the bases of the two proceedings (said action and the arbitration) are contradictory and mutually exclusive. The ground of claim put forward by Messrs Boyd & Forrest in the arbitration was never submitted for decision to the Court of Session or the House of Lords, and in my opinion could not be and was not decided or disposed of in any way in said action.

It seems to me that a simple and unqualified decree of absolvitor in the action could not have affected Messrs Boyd & Forrest's right to go to arbitration, as they now seek to do. But then it was argued to my by the Railway Company that even if this might have been true they had been put in a better position than they would have been in had they had only such a decree, in virtue of the clause in the order as to the claim for damages under heads (a) and (b). It seems odd that a pursuer should be put in a worse position by having a qualified decree of absolvitor pronounced against him than he would have been by an unqualified decree of absolvitor. In my opinion such a contention is unsound.

It is said that the action was a petitory one for a sum of money made up of certain items, and that the claim in the arbitration is to a large extent for the same sum of money made up to a large extent of the same items. But that is not the question. The question is, are the grounds of claim, the grounds on which the demands are made, the same in the two proceedings? In my opinion they are not the same but are radically different.

The addition to the order or decree of absolvitor is introduced by the words "But it is provided that." I would not readily hold that a clause so beginning could extend the scope or effect of the order or decree of absolvitor to the prejudice of the pursuers as regards rights which they would have had under a plain order or decree of absolvitor. But the clause I am now considering only provides that the order and decree of absolvitor is to be without prejudice to a specified right which it proceeds to say the respondents are to have, viz., the right "to refer to the arbiter named in the contract all claims whether for damages or otherwise under the contract, or in respect of breach thereof, provided such claims" have been condoned on in the pursuers' condensation in said action, and provided they relate to the items (a) and (b) therein set forth. This it was argued shows that the parties and the House of Lords had in contemplation the reference clause in the contract, and that there might still be a reference under and in virtue of that clause.

In the record in the present action it occurs to me that on this point parties have confined themselves to treating the dispute on this point as one of legal construction—what is the true construction of the order of the House of Lords, or rather of the decree which followed thereon—and

(it is not disputed) faithfully followed the order. There is no averment on record *dehors* the terms of the order and the interlocutor applying the same—neither party asked a proof, and as at present advised I think there is no ground for allowing proof. Each party asked at once for decree in their favour on the record. We were referred at the debate before us by both sides to notes of discussions in the House of Lords on two occasions—one at the close of the argument on the appeal and the other after the opinions of the noble Lords had been delivered and before the questions were put. But there is no averment of agreement or bargain or of any fact which could either in law or in fact affect the construction of the clause in question or give an independent ground of judgment. The counsel who took part in said discussion differed in argument before us *toto caelo* as to the import of said discussions.

I confess I have felt it a question of delicacy and difficulty how far we are entitled to consider these reports or as to what is the correct import of them. The clause in its present form does not appear in either of these reports, and in the end counsel were asked to draw up the form of the order for submission to the House.

Our duty it appears to me is to construe the decree or interlocutor of 13th May 1915, and I do not see that we in any event, and particularly having regard to the pleading and proceedings in this action, are entitled to proceed in any way on these reports.

The clause was represented to us as a "concession" to Messrs Boyd & Forrest by which they would be entitled to get the arbiter to assess damages (contrary to the law of Scotland) in respect of the two items (a) and (b). But the Railway Company say that the decree of absolvitor in itself would have excluded any further arbitration, and that the clause in question must be read as if it had contained the words "and the pursuers shall not have the right to refer any other claims to the arbiter" or words of similar import. As to the first point, in my opinion the decree of absolvitor would not have any such effect, such a right not being in dispute in the action. As to the second point the words are not there, and we ought not in my opinion to construe the decree or order as if they were.

The Lord Ordinary says that the decisions in the original action proceeded on the assumption that "the schedule rates did not apply," and he goes on to say that he does "not see how the arbiter can now be asked to consider the same specified charges based on the same assumption. In my opinion it is a mistake to say that the charges in the arbitration are not based on the schedule rates. It was distinctly explained to us that where there are schedule rates these rates must be applied by the arbiter, and that it is only as to items for which there are no schedule rates that the arbiter's arbitrament can be appealed to.

I do not think there was any relevant statement sufficient to support a claim of damages in the original action. There was only the sentence, to which I have already

referred, in condescence 3 and the corresponding plea, plea 4. But in the arbitration no claims of damages have been referred except those which arise out of the two items (a) and (b) specified in the order, and I understand no objection is taken to the arbiter proceeding to deal with these.

I am of opinion that we should recal the Lord Ordinary's interlocutor, repel the 1st plea for the defenders, sustain the 2nd and 5th pleas-in-law for the defenders, and assoilzie them.

On the plea of *res judicata* we were referred by Messrs Boyd & Forrest, *inter alia*, to the following authorities:—

1. Stair's Institutions (vol. ii.), iv. 40, 16—
"But the exception *rei judicatae* must not only be that the decret had the same conclusion but also that it proceeded upon the same *media concludendi* if the decret was an absolvitor; for though absolvitor was pronounced against a pursuer it could not hinder him to insist for the same conclusion upon a different *medium*, in which case competent and omitted takes no place but only in decreets condemnatory *in foro contradictorio*. So he who pursues a reduction of any decret or other right may raise as many actions as there are relevant reasons."

2. *Macdonald and Others v. Macdonald*, 1 Bell's Appeals 819, at page 829, where Lord Campbell says—"With regard to pursuers, on the other hand, in proceedings of this nature there may be as many actions of reduction as there are *media concludendi*. A pursuer cannot a second time set up a ground of reduction on which there has been judgment against him. But this is no bar to his bringing a fresh action on a totally different ground of reduction although both might have been included in the first action."

3. *Phosphate Sewage Company v. Mollison*, 1879, 6 R. (H.L.) 113, at page 121 (16 S.L.R. 822, at 827), where Lord Blackburn says—"Secondly, there is a ground where there is a fresh *medium concludendi*; the plaintiff in the action is not obliged to join all his *media concludendi* in one suit; if he has one *medium concludendi*, and fails in proving that, he may start another, and that whether or not he knew of it at the former time, provided it be a separate *medium concludendi*."

4. *Edinburgh and District Water Trustees v. Clippens Oil Company, Limited*, 1899, 1 F. 899, at page 909, 36 S.L.R. 710, at 718, where Lord Kinnear states—"The validity of a plea of *res judicata* must necessarily depend upon the pleadings and decision in the previous action, and not upon any rights or equities which may have arisen antecedent to the pleadings or from any extrajudicial communications between the parties. The question always is, what was litigated and what was decided. I think the defenders have in this case stated perfectly distinctly and quite accurately the reason why the judgment in the previous case cannot be pleaded as *res judicata* in this. For they say in their sixth statement of facts—'The pursuers did not either aver or plead in said action that they had any right of support for

either of their lines of pipes, such as is now put forward relative to the Crawley pipe.' That means that they neither averred facts nor pleaded law which would have enabled the Court to decide the question raised in this action."

5. Mackay's Manual of Practice, page 312—"Decree of absolutor is a decree by which the merits of the action are finally determined in favour of the defender. It consequently forms *res judicata* and excludes a new action on the same grounds. A new action on different grounds may always be raised notwithstanding decree of absolutor."

LORD DUNDAS—I have found this case difficult and perplexing, because the question turns mainly upon the true meaning and import of an order by the House of Lords, dated 1st March 1915, which this Division as a matter of form applied in terms of interlocutor dated 13th May 1915. It is not easy to affirm what issues were truly raised by the pursuers' pleadings in the former action—a matter to which I took occasion to advert at an early stage of the litigation (1911 S.C. 81, 82), and which has, I think, been the cause of a good deal of subsequent trouble. I do not feel at all certain what *media concludendi* the House of Lords may have considered to be embraced by the petitory summons; whether or not they held it—in view of the account then produced, the items of which are now substantially repeated in the claim before the arbiter—to include everything that the pursuers could claim as against the defenders, whether by arbitration under the contract or otherwise, as falling under the sum sued for; and whether or not the House intended to (and did) treat all such claims as negatived by their order, with the exception of the matters thereby specifically referred to arbitration; or whether their Lordships intended (as is now argued for the Railway Company) to give effect to an agreement (which the contractors now dispute) to the above effect come to between the parties at the bar of the House; or whether (as the contractors maintain) the effect of the order was to assolisie the company as regards all that the contractors had competently claimed in the action, but leaving open to the latter any rights they originally had under the arbitration clause in the contract; and to include in the reference by agreement of parties and to avoid a fresh action of damages the matters specifically mentioned in the proviso. A decision on these various views was not facilitated by the total divergence between learned counsel at our bar as to the scope of the original action, and as to their respective understanding of what had been effected by the order of 1st March 1915. It seems to me that the question at issue can be satisfactorily solved only by another appeal to the House of Lords, which it may be hoped will be heard before the same noble and learned Lords who were present on the last occasion. I agree with your Lordship in thinking that we cannot properly, or indeed competently, refer to notes of what is said to have taken

place at the bar of the House of Lords before their order was pronounced; but I may add that, even if we could do so, my impression, from listening to what was read to us, was that little aid would have been obtainable from that source. Upon the pleadings and arguments before us I have come to the conclusion, differing from the Lord Advocate, that we ought to allow the claim (which I cannot help thinking must be a greatly exaggerated one) to be submitted to the arbiter's adjudication. *Prima facie*, it seems to me improbable that the House of Lords should have treated the contractors' original rights under the arbitration clause of the contract—as to which no evidence was led, or, as far as I see, could competently have been led, as being included in the subject-matter of the action, especially looking to the limited terms of the Lord Ordinary's allowance of proof; and that their Lordships intended to embrace them in their decree of absolutor; nor do I see sufficient grounds for holding that the contractors agreed to any such course being adopted of consent—a view which, though it was presented to us in argument by Mr Macmillan, does not seem to be pleaded upon the record. I am therefore for recalling the Lord Ordinary's interlocutor. The defenders' first plea was not insisted in, and should be repelled. I think their second and fifth pleas should be sustained, and decree of absolutor pronounced.

LORD SALVESEN—The pursuers in this action seek to interdict the arbiter appointed under a contract entered into between them and the defenders, for the construction of certain railway work, from entertaining claims at the instance of the defenders relating to the execution of the contract with the exception of two claims with regard to which there is no question. The arbiter held that these claims fell within the reference to him, but the Lord Ordinary, differing from the arbiter, has decerned in terms of the conclusions of the action.

In order to ascertain the nature of the claims it is best to turn to the record in the arbitration. The claimants there set forth that they duly executed the work referred to in the schedule according to the terms of the contract, and in addition numerous other works not set forth in the schedule and for which no prices had been previously fixed. They further say that parties failed to agree on the rates and prices to be allowed for certain parts of the work, and that they fell to be adjusted by the arbiter under the contract. They produce a detailed account of the work done, priced, so far as the schedule provides prices, in terms of the schedule, and so far as it does not at rates which they deemed to be fair. They give credit for the amount paid under the contract and claim the balance.

The claim, they state, may thus be said to be a claim for extra work beyond what the contract provided for, and so far as it relates to work falling within the contract for the difference between the rates which they claim and the rates allowed by the Railway

Company applied to a detailed measurement of the work. I understood it to be conceded that if the arbiter should find that this work falls to be priced according to schedule rates, then this part of their claim could not be maintained. Their ground for claiming special rates is that the work done was different from any to which the schedule rates apply.

Apart from the proceedings to which I shall afterwards refer I can see no reason why the arbiter appointed by the parties should not deal with these claims. They may be extravagant in amount and some of them may be irrelevant, but this is for the arbiter to decide. Meanwhile all he has decided is that the entire claim falls within his jurisdiction as arbiter under the contract or under the specific remit to him by the Court.

The ground on which the pursuers maintain that all claims except those contained in the specific remit referred to are excluded from arbitration is that they obtained absolvitor in an action in which substantially the same sum was sued for in the Court of Session as is now put forward in the arbitration, and further, that the reservation contained in the order by the House of Lords, and which was the result of an agreement between the parties, inferred an abandonment of all other claims except those especially referred to. The parties, however, are at complete variance as regards the nature and effect of this agreement. The defenders maintain that its effect was to enlarge their rights under the contract so as to enable them to submit to the arbiter certain claims of damage which he could not competently have assessed; while the pursuers say that its effect was to extinguish any claim for extras which the defenders might otherwise competently have preferred other than the two specific claims which were reserved to them. It is unfortunate that we have to construe an order of the House of Lords, but we cannot help doing so to the best of our ability, as on its construction and effect the rights of parties necessarily depend.

The effect of a decree of absolvitor in an action is without doubt to prevent the parties against whom it is pronounced bringing forward any new action or any claim in respect of any of the matters which have been the subject-matter of the action decided against them. If, therefore, the contractors' claims for extras were within the conclusions of the action which was terminated by the decree of absolvitor, they cannot now be made the subject of a fresh litigation. There may, however, be identity of the sum sued for, but if the grounds of action are different the same sum may be sued for in a different action proceeding on different *media concludendi*. These *media concludendi* in the case of a petitory action can only be ascertained by reference to the condescendence.

On referring to the condescendence in the previous action I find that the pecuniary claim is based on two alternative grounds. The first alternative was for a *quantum meruit* for work done on the employment

of the Railway Company but on the footing that there was no contract which could be appealed to as the basis of charge. The other alternative was that the pursuers had suffered loss and damage to the extent of the sum sued for in respect of the fraud, negligence, and breach of contract of the Railway Company. Both these claims have been decided adversely to the contractors by the Court except in so far as the reserved claims of damages fell to be inquired into by the arbiter. I nowhere find that any claim was put forward by the pursuers of that action on the basis of the contract being a valid contract. Such a claim would have been entirely inconsistent with their whole pleadings, and, what is more material still, was not included in the matters remitted to probation. In the only interlocutor allowing a proof, which was that of the 14th July 1908, which limited the proof to the averments so far as bearing on the 3rd plea-in-law, that plea-in-law relates entirely to a challenge of the contract on the ground that it had been induced by fraud or fell to be disregarded on similar grounds. It is true that when the House of Lords finally repelled all the various heads of that plea the claim for the *quantum meruit* necessarily fell; and if the alternative claim of damages had been regarded as irrelevant, as Lord Shaw seems to have thought, it too would have gone by the board, although it might competently have been made the subject of a new action at common law, there having been no inquiry into the facts on which it was based. I take it, however, that to the limited extent expressed in the reservation of the order it was thought better to leave the arbiter under the contract to decide the merits of this claim than to open a new discussion on such evidence of negligence or breach of contract as had been admitted into the limited proof allowed.

Mr Macmillan was constrained to admit that if there had been a simple decree of absolvitor a claim for extra work under the contract could have been competently proposed before the arbiter nominated in the contract. If so I am unable to understand how a reservation which qualified the decree of absolvitor, and instead of making it absolute left open two specific claims, could bar claims which would have been competent notwithstanding an absolute and unqualified absolvitor. No court can deal with claims that are not submitted to their decision, and I apprehend that the House of Lords cannot be assumed to have adjudicated on matters of pure fact with regard to which there was no inquiry. The two claims specially reserved had been made the subject of averment in the action, but the other claims now put forward in the arbitration were never mentioned for they had no bearing upon any of the heads of plea 3, nor were they founded on as having caused the pursuers loss owing to negligence or breach of contract on the part of the defenders. They are, I apprehend, such claims as always emerge at the end of a large contract, and whatever their nature and extent are generally disposed of with

comparative ease by an arbiter who has acted as the engineer of the Railway Company under the contract. The pursuers in the arbitration have, perhaps, prejudiced their claim by making it substantially identical in amount with the claim which they put forward on the footing that the contract was not binding upon them as the basis of charge. But the claims are now based on the terms of the contract, and on the footing that the arbiter must settle them in accordance with its terms. They are not made on the footing that a court of law is free to decide on what terms the work done ought fairly to be remunerated. In my opinion, therefore, the arbiter has correctly held that these claims are within the reference, and have not been made the subject of final determination in a court of law so as to exclude his jurisdiction.

LORD GUTHRIE—I read the decree of absolvitor pronounced by the House of Lords and applied in this Division as applicable only—first, to all claims by the defenders against the pursuers in connection with the contract in question based on the ground of *quantum meruit*, and, second, to all claims of damage, with the exceptions mentioned in the decree itself. The defenders, founding on the contract, now claim to go to arbitration under the contract. They are therefore, in my view, not excluded by the decree of absolvitor pronounced by the House of Lords and applied in this Division from suing the present action, which is based on grounds not expressly or by implication founded on in the previous action.

The pursuers, the Glasgow and South-Western Railway Company, appealed to the House of Lords.

At delivering judgment—

LORD CHANCELLOR—An action was brought on the 15th November 1907 by Messrs Boyd & Forrest, contractors, against the Glasgow and South-Western Railway Company, in which they claimed payment of money alleged to be due in respect of the construction of a line of railway by the contractors. That case was by an order of your Lordships' House, dated 1st March 1915, remitted to the Court of Session with the direction to assoilzie the defenders from the conclusions of the summons with certain reservations. The present action has been instituted by the appellants, the Glasgow and South-Western Railway, by summons dated 26th August 1916, against the respondents Messrs Boyd & Forrest, asking for a declarator as to the effect of your Lordships' order of the 1st March 1915 in the former action, and for an interdict accordingly.

The claim in the former action was for £378,254, 2s. 2d., which sum it was alleged was due and resting owing to the pursuers. The defenders (the Railway Company) pleaded in their statement of facts that the work was done under a lump sum contract by which the work was to be executed for £243,000 plus the price of extras, and that with extras and certain allowances the total amount due was

£272,030, which had been paid. The pursuers (the contractors) lodged pleas-in-law, the third of which was as follows:—"The contract founded upon by the defenders is inapplicable as the basis of charge for the work executed by the pursuers, in respect (a) that said contract was induced by the fraud of defenders, (b) that said contract was entered into by the pursuers, and is no longer binding upon the pursuers, under essential error induced by the misrepresentations of the defenders, (c) that the work as executed by the pursuers proved to be entirely different from that contemplated by the contract, (d) that said contract was by agreement of parties departed from as the basis of charge, and (e) that the defenders are by their actings barred from founding on said contract as the basis of charge."

A proof was ordered and the Lord Ordinary (Lord Johnston) found in favour of the pursuers on the plea of fraud. His finding was affirmed by the Inner House, but on appeal your Lordships' House, by order of the 3rd April 1913, found that the pursuers had failed to establish that the contract was induced by fraud, and ordered—"That the said cause be, and the same is hereby, remitted back to the Court of Session in Scotland, with directions (1) to repel branch (a) of the respondents' said third plea-in-law; (2) to repel branches (b) and (e) of the said plea-in-law in so far as the same are founded or maintained on allegations of fraud against the appellants; and (3) to hear and dispose of the whole pleas and contentions of the parties except in so far as repelled in terms of the foregoing directions, and to do in the cause as shall be just and consistent with these declarations, findings, and directions and this judgment."

The Court of Session after a further hearing pronounced an interlocutor of 7th February 1914, the material part of which is as follows:—"Find that the pursuers entered into the contract libelled under essential error induced by misrepresentation and concealment on the part of the defenders; find further that the defenders were in breach of obligations under the said contract, and that the breaches committed went to the root and consideration of the contract; therefore sustain branches (b) and (e) of the third plea-in-law for the pursuers; repel branches (c) and (d); find further that the pursuers are entitled to be paid for the work done by them for the defenders on a basis of *quantum meruit*."

An appeal was brought to your Lordships' House by the Glasgow and South-Western Railway Company, and there was a cross appeal by Messrs Boyd & Forrest against that part of the interlocutor of the 7th February 1914 which repelled branch (c) of the pursuers' plea-in-law above set out.

Your Lordships' House on the 1st March 1915 made the order the construction of which is in question on the present appeal. The order allowed the appeal and disallowed the cross appeal, and proceeded as follows:—"And it is further ordered that the same cause be, and the same is hereby, remitted

back to the Second Division of the Court of Session in Scotland, to do therein as shall be just and consistent with this judgment, and to assolzie the defenders in the action from the conclusions of the summons, finding the pursuers liable in expenses accordingly: But it is provided that this order and such decree of absolvitor be without prejudice to the right of the respondents in the original appeal, and it is hereby declared that the respondents in the original appeal are to have the right, if so advised, to refer to the arbiter named in the contract all claims, whether for damages or otherwise, under the contract, or in respect of breach thereof, provided such claims are condescended upon in the pursuers' condescendence in this action, and provided that they relate to (a) the construction of bridge 12a and the diversion of the Paisley water-pipe, or (b) any delay on the part of the appellants in the original appeal in furnishing plans for dealing with water-courses encountered in the cuttings."

The Court of Session accordingly granted absolvitor, and the result of these proceedings was this. The contractors had claimed that the Railway Company were indebted to them in a large sum. The Railway Company set up the contract under which the work had been done and payment of the amount due under the contract. The contractors attempted to get rid of the contract, first on the ground of fraud, and then on the ground of essential error. They failed on both these points and absolvitor was pronounced. They now claim to be entitled to a large amount on the basis of the contract, alleging that under it they can go to arbitration and have an award on the question of liability. It is admitted that all the amounts now claimed were included in the claim in the action in which absolvitor was pronounced. The ground on which this claim is put forward is this—they contend that what was decided in the former action was that the contract could not be got rid of, and that it is now open to them to say that on the basis of the contract they are entitled to go to arbitration. In my opinion this contention must fail. The moneys now claimed were claimed in the action in which absolvitor was granted, and as that judgment stands the claim is barred. It is, of course, true that if the action had been one to reduce the contract on the ground of fraud or essential error its failure would have been no bar to another action on the footing of the contract. The *media concludendi* in the two cases would have been different. In the first it would have been invalidity of the contract by reason of fraud or essential error; in the second that the money was due under the contract itself. But here the *medium concludendi* is the same. The action was a petitory one to recover so much money on the footing that it was due and owing from the defenders to the pursuers. The decree of absolvitor put an end to any such claim. It was quite open to the pursuers, if they had pleased, to have set up in reply to the defence of the contract that even if the contract stood the money claimed or some part of it would be

due on its true construction, and if this contention had been established they would have recovered in the petitory action any money due on this basis. The pursuers set up no such case, but confined themselves to an endeavour to get rid of the contract on the ground of fraud or essential error. It appears to me to be impossible to contend that such a case can be sustained while the decree of absolvitor stands.

The facts which led to the action in which the present appeal has been brought were as follows:—Two heads of claim had been specially reserved by the order of the House of Lords to be dealt with by arbitration. The parties appeared before the arbiter (Mr Strain), and Messrs Boyd & Forrest, the present respondents, lodged a claim comprising not merely the two items which had been reserved by the House of Lords but also the whole of the items of claim which they had put forward in the action. The arbiter held that he had jurisdiction to decide on the entire claim, upon the ground that what had been sought by the pursuers in the former action was "to obtain a *quantum meruit* by setting aside the contract altogether," and that the claim before him was different from that and therefore not barred. At the same time he sisted further procedure to enable the Railway Company to appeal to the Court.

The Glasgow and South-Western Railway Company accordingly instituted the present action against Messrs Boyd & Forrest (the arbiter Mr Strain being also made a defender) by a summons dated 21st August 1916. The summons claimed declarator that the pursuers (the Railway Company) had been assolizied from all claims by the contractors in respect of the construction of the railway, except those reserved in the Order of the House of Lords, and that the defenders (the contractors) were not entitled to submit to the arbiter any claim other than those so reserved, and asked for an interdict accordingly. Condescendences, answers, and pleas-in-law were lodged by both parties.

The case came before Lord Dewar as Lord Ordinary, and he decided in favour of the pursuers (the Railway Company), holding that the claim of the contractors was not competent except as to the two matters reserved. There is one paragraph in his judgment which seems to me to put the whole case on the right basis. He says—"It is true that the question whether the contract was binding on parties was the one which, almost exclusively, engaged the attention of the Court, but I do not think it is true to say that it was the only question decided. What the Court really decided was, I think, this, viz.—That the contractors were not entitled to recover from the Railway Company certain specified charges—estimated on the assumption that the schedule rates did not apply—and amounting in all to the sum of £88,830, 13s. 11d. If I am right in thinking that this was the real decision, I do not see how the arbiter can now be asked to consider the same specified charges, based on the same assumption and amounting to the same sum."

He accordingly, by interlocutor of 22nd December 1916, decerned against the defenders in terms of the conclusion of the summons.

Lord Dewar's decision was reversed by the Second Division. The Lord Justice-Clerk rested his decision on the ground that the *medium concludendi* in the action was that the contract had been displaced and no longer applied for the reasons set forth in the pursuers' third plea, and that the pursuers were entitled to be paid on the basis of *quantum meruit*, while in the arbitration the claim was based on the contract, and the contract was the *medium concludendi*. This view is in direct conflict with what Lord Dewar said in the passage which I have above quoted from his judgment, and it appears to me to be erroneous. The action was not an action for reduction. It was a petitory action asking for money said to be due and owing. It might have been supported either on the ground that the contract alleged by way of defence was not applicable on the ground of fraud or essential error, or that the contract on its true construction entitled the pursuers to succeed. The pursuers cannot bring forward the very same claim merely on the allegation that they did not set up this case in answer to the contract, which it was perfectly open to them to do in support of their petitory action. The absolutor under these circumstances is a bar to any subsequent claim for what was comprised in the petitory action in which the absolutor was pronounced, either by subsequent action or by proceedings in arbitration.

I come to this conclusion apart altogether from the proviso with reference to the two specified items reserved in the order of this House. I should have read the order in the same way if the proviso had not been there, but I may add that the existence of that proviso fortifies the conclusion at which I should arrive independently of it.

I have only to add one observation. In the judgments in the Second Division the contractors' claim is often referred to as one for extras. In substance it was not a claim for extras, but for additional payments in respect of the fact that the work contracted for turned out to be more difficult than had been anticipated, and it was for that reason that the attempt was made to get rid of the contract.

In my opinion the decree of Lord Dewar should be restored, and the appeal should be allowed with costs here and below.

LORD DUNEDIN—I regret that I cannot take the same view of this case as was taken by the learned Judges of the Second Division. I do not question the authorities cited by the Lord Justice-Clerk as to what are the criteria of a *res judicata*. But the question here is what was the import of your Lordships' judgment in the second appeal.

I approach the question without any previous knowledge, for I was not a party to the former judgments. Now I find that the action was a petitory action for a certain sum of money, on the ground of work per-

formed by the respondents upon the order of the appellants. The first plea-in-law is that the appellants are resting-owing the sum of money sued for. The defence set forth that the work was done under a contract, and that the work being priced according to that contract the respondents had been already paid. To this the respondents replied that the contract, which they admitted had been entered into, had been procured by fraud. That reply was negated by the first judgment of this House. The respondents then alleged that the contract was not binding in respect that it had been entered into under essential error induced by the misrepresentations of the appellants. This also was negated by the second judgment of this House.

The question then arose, what was to be done with the action, and the respondents' counsel consented to absolutor. Under these circumstances I am clearly of opinion that absolutor was absolutor from the conclusions as rested on the plea of resting-owing. There was a reservation in the judgment which applied to two specific claims. As to these there is no question. But the respondents successfully insisted before the arbiter that they were entitled to have their whole pecuniary claims adjudicated upon, provided only that they were taken upon the footing that the contract held good, and not as they originally contended on the footing of a *quantum meruit*. They say that this is a new action based on a different *media concludendi* from the original action.

I do not think that this is a new action. The sums which they seek to secure from the arbiter were all included in the sum sued for in the original action, in which action the respondents consented to absolutor. If the respondents had raised a simple action of reduction of the contract on the ground of fraud or essential error, no doubt they could, in spite of absolutor, have proceeded to make what claims they could under the contract. But they did not do this. They sued for a sum of money, and pled resting-owing. They were met by a defence of payment made, such payment being calculated according to prices under a contract. In replication they attacked the contract on two separate grounds, both of which failed. But the plea of resting-owing still remained and had to be disposed of. They consented to absolutor, and by that they admitted that nothing was resting-owing. Had they still wished to fight upon the contract they were bound to have asked the House to pronounce a mere finding as to the validity of the contract, and to have kept the case alive in order that decree might be got thereunder after the arbiter had fixed the sum due, if any. This would have been in strict accordance with the case of *Levy v. Thomson* (10 R. 1134, Lord President Inglis at page 1137, 20 S.L.R. 753), which is authoritative in such matters.

I may say, as I see I have Scotch counsel before me, that that case is absolutely inadequately rubricated in both the Digest and the Sessions Cases. It has been always a great authority upon that point which I

have just cited during all my time at the bar, and I consider it is absolutely binding. It is rubricked on another point which really has no great application to other cases.

This would have been my opinion if the decree which your Lordships directed the Court of Session to pronounce had been one of absolvitor only. But the reservation makes it only more clear. It is impossible, in my opinion, to read that reservation without seeing that the respondents' counsel were content that all claims should be held as disposed of except the two claims specially reserved. That they did so because they knew that once the contract was affirmed their clients had been fully paid I have not a doubt. I look upon the present position taken up by the respondents as a clear afterthought, and I am of opinion that the appellants were right in stopping the arbiter from proceeding to adjudicate on any claims except the two specially reserved. I think the judgment of the Lord Ordinary was right, and should be restored.

My noble and learned friend Lord Parmoor has authorised me to say that he concurs in my judgment.

LORD ATKINSON—I concur, for the reasons given by my noble and learned friend who has preceded me.

LORD SHAW—[Read by Lord Dunedin]—In the multitude of arguments used in this case it seemed sometimes to be forgotten what the action really was. It was a simple petitory action for a sum of money. Lord Dundas spoke very clearly and forcibly on this subject in his judgment of 29th January 1910. "It is," says he, "a simple petitory summons for a large sum of money. There are no declaratory or reductive conclusions. The whole of this complex and difficult litigation is raised by the simple demand for a pecuniary payment. Mr Clyde told us that this course had been deliberately adopted, because, as he frankly explained, the pursuers were anxious that their summons should be unfettered by a multiplicity of conclusions, so that it might square with any of the possible views favourable to the pursuers which the Court might come to entertain in fact or in law after the evidence was led." Differing, I fear, in this somewhat from Lord Dundas, I think that this course was perfectly defensible, and indeed I think it was an entirely sensible proceeding. Their Lordships so treated it on a former occasion, and they acquiesced in the spirit of that proceeding so far as to think that an absolvitor from an action deliberately laid with such simplicity and breadth would be an end of the contractors' entire claims, subject to an exception, asked for and arranged by the parties themselves, of two specially named items. The very articulateness of the exception gives, in my humble opinion, force to the completeness and comprehensiveness of the absolvitor in every other respect.

The judgment of this House has not, however, been so viewed by the learned Judges of the Second Division of the Court

of Session. In expressing concurrence with my noble and learned friend on the Wool-sack, I may be allowed, on behalf of myself and those of your Lordships who sat on all the three appeals, to express also my satisfaction that he and my noble friend Lord Dunedin have construed the former judgment of this House ordering an absolvitor to signify accurately and precisely just what we meant it to convey.

The judgment appealed from deserves careful consideration, not only on account of the respect due to those who delivered it, but also because of its principal, and as I think, its sole ground. That ground is this—While the parties are the same, while the demand for the amount claimed in the arbitration is identical with the demand in the account sued for in the action, and while the very document and its items are there and they balance out at the same figure, yet the demand was formerly said to be due not under the contract of employment, whereas it is now said—the same account for the same work—to be due under and by means of the contract. This is said to constitute a new *medium concludendi*. I cannot so view it. Of course were it a new medium—not in any formal or abstract but in the real and substantive sense to which I shall presently advert—then absolvitor would not displace the fresh proceeding, and the plea of *res judicata* would be unavailing. I humbly think that the learned Judges in the Court below have fallen into some misconception as to the true meaning of the term *medium concludendi* as used in this branch of the law, and as to the true meaning and effect of a decree of absolvitor.

What is a *medium concludendi*? There is nothing sacrosanct in the term and nothing difficult in the idea. For the purpose of this case it may be quite sufficient to say, negatively, that it is certainly not the mere equivalent of a plea in law, and, positively, that it signifies the reality and substance of the thing disputed between the parties. And I would venture to add that it is only when it is so viewed that it becomes in jurisprudence a safeguard against an abuse which it is recognised to be in the interest of the State to suppress. You cannot settle any argument as to a *medium concludendi* without getting at the actual and substantial thing itself—the medium—just as you cannot judge of a plea of *res judicata* without first determining what was the actual *res*.

Realising as I do that the difficulties in the minds of the learned Judges of the Second Division have been probably caused by certain dicta in the institutional writers, I have examined these with some care. It is true that Stair (iv, 40, 16) says—"The exception *res judicata* must not only be that the decret had the same conclusion, but also that it proceeded upon the same *media concludendi*, if the decret was an absolvitor; for though absolvitor was pronounced against a pursuer it could not hinder him to insist for the same conclusion upon a different medium, in which case competent and omitted takes no place, but only in decreets condemnatory *in foro contra-*

dictorio." This is the passage from the institutional writers which is usually cited in these cases, and which of course is mentioned in the present.

Not a little light may be derived from an exception of great apparent breadth which is made to this rule in the case of reductions. Stair in the title quoted fully recognised the mischief which such an exception might open the way to, and he expresses himself thus—"So he who pursues a reduction of any decret or other right may raise as many actions as there are relevant reasons, but he cannot multiply suspensions upon different reasons which were competent the time of the decret." Then he adds this reflection—"This might be a reasonable ground for a statute to exclude pursuers from multiplying processes upon mediums competent and known the time of the first process; and to appoint that all the mediums might be libelled in the first process, and insisted in together, as well as many defences or reasons of suspensions must be insisted in together, or else what was competent and omitted should be lost. But now there is no other remedy but that if there be such multiplication of actions upon different *media* the pursuer succumbing should be condemned in large expenses." I feel free to say that it is this passage which runs through the reference in most of the cases since Stair's time which is founded upon as institutional authority for the exception relating to reductions. It is therefore important to see what Stair means when he says that "he who pursues a reduction of any decret or other right may raise as many actions as there are reasons," and fortunately Stair in another passage, not so far as I know referred to or founded on in the decisions on the subject, has explained his meaning thus—he is dealing with the case of suspensions, and he observes of suspensions (iv, 52, 3)—"The last hath the like effect as a reduction, but with this difference, that decreets on suspensions cannot be again suspended or reduced upon grounds proponed and repelled, or competent and omitted, when the first decret on the suspension was obtained, which does not so hold in reductions of other rights; for though a reduction upon one ground be not effectual, so that the defender is assoilzied, yet a new reduction may be raised upon other grounds on different facts, but not upon other grounds *in jure*; which hath a great inconvenience to multiply and protract pleas; and it were worthy of a statute that whosoever raises reduction of any right should not be heard upon any reasons that were then competent and omitted; for otherwise the litigious and rich might weary out the innocent and those who are less powerful to maintain pleas."

I incline to the opinion that Stair in this matter is his own interpreter, and when in iv, 40, 16, he says that the pursuer of a reduction "may raise as many actions as there are reasons" he means nothing more than what he says in iv, 52, 3, that a new reduction may be raised upon other grounds on different facts. In both cases he laments the multiplication of pleas and the possi-

bility of unequal justice owing to the opportunity for even this facility of raising a new action of reduction on different facts. So read the doctrine of Stair is perfectly intelligible. It produces more equality between litigants, and while the door is left open for fresh reduction, and while even in this form it seems to be deplored by Stair, the fresh reduction which he means is the reduction grounded "on different facts." Whether he would thus apply to reductions the same principles as apply to actions *in petitorio*, of which the present case is an example, it is not necessary here to determine, but I have thought it to be my duty to call attention to the real doubt that must exist on this subject with reference to reductive proceedings.

I may add that I cannot think that there is anything startling in the view just presented. It, indeed, appears to be the view not only of Erskine (iv, 3, 3), but of Erskine as according with and interpreting institutional authority. He expresses himself thus—"In the opinion of Stair (b. iv, tit. l., sec. 44) and of Mackenzie (sec. 1, h. t.) the Session may also reduce their own decrees upon the emerging of any new fact or voucher in writing, not pleaded formerly by the party, if it shall appear that it was not known to him before decree, or that he did omit it wilfully, with a view to protract the cause."

Accordingly I think it will be the duty of courts in future cases, if a second reduction should be attempted in reference to the same document and grounded upon the same facts, seriously to consider whether such a proceeding can be justified simply because the pursuer chooses to array those facts under a different legal category from that in which in his first reduction he had placed them. I am not prepared as at present advised to assent to the proposition, for instance, that an action of reduction grounded on fraud and failing can be competently succeeded by another action of reduction with reference to the same document and founded on the same facts, but the ground of action being not fraud but, say, force and fear, or error arising from innocent misrepresentation. The proposition which appeared in argument in this appeal, and was founded upon expressions used in some of the decided cases, to the effect that you may bring over and over again as many actions of reduction as there are pleas-in-law, is unsound as well as loose and unsatisfactory. It would not be very creditable to any system of jurisprudence, and I am not prepared to admit that it is the law of Scotland.

As I have said, the point just mentioned does not arise here for express determination, but I have thought the learned counsel for the respondents had not a little ground to justify them when they alleged that the reasons applicable in the case of reductions seem to be in principle an importation which was legitimately made into cases like the present. If, in short, a reduction may be as many times repeated as there are different reasons for reduction, why should it not be so in regard to such petitory actions as this? The hypothesis, as I have shown, is an extremely doubtful one even with regard

to reductions, unless the different reasons be reasons not of law but a different set of facts to be brought before the Court. But fortunately I can hardly think that with regard to non-reduction actions and to simple petitory suits, of which this is one, the law is in any doubt. I think the law on the subject to be that when such an action is brought, and absolvitor is given from the demand which it makes, that absolvitor is as comprehensive in its ambit as was the action itself. It follows from this that if, as is admitted in this case, the demand made in the fresh action or arbitration is one which would have been covered if the first action had succeeded and would have been embraced in a decree under it, then the absolvitor from that first action must be construed as an absolvitor from everything that the decree in the first action could so have covered or contained. To permit any other result would be to produce an inequality as between litigants which is repugnant to legal principles, for it would involve that a pursuer obtaining a decree as against a defender could hold down a defender for all time to the position that he was bound by that decree even although there were other defences which were perfectly relevant and which were not incompetent, but which were not put before the Court; whereas when a defender gets an absolvitor from such action he would not have a like permanent settlement as against the pursuer, for according to the argument, while the defender would be so bound and silenced, it would be open to the pursuer to bring action after action on the same facts, the principle being only limited by the number of arguments at law in a large and various category. I do not think that this is any part of our law.

What is left open, in my judgment, in the case of petitory suits (I leave over, as I have said, the case of reductions which may some day, unless the Legislature interferes, come to be settled upon the same sound principles) is that a pursuer shall not be debarred by the plea of *res judicata* from again presenting a case before the courts founded upon new facts which have come to his knowledge and which he is able to prove, through no fault of his, he was previously ignorant of. I go further and suggest that even a second view might justify a second suit, namely, that the result on the former had been reached by a total failure of all parties to realise that the rights adjudicated on had been settled in a contrary sense by an Act of Parliament of which no stock had been taken. Such a case is conceivable, and I do not wish to exclude it. But the main and broad case is the former one which I have stated, and with regard to that I venture humbly to adopt the expression of opinion by Earl Cairns in the *Phosphate Sewage Company v. Molleson*, 6 R. (H.L.) 117, 16 S.L.R. 825—"As I understand," said the noble Earl, "the law with regard to *res judicata*, it is not the case, and it would be intolerable if it were the case, that a party who has been unsuccessful in a litigation can be allowed to reopen that litigation merely by saying that since the former liti-

gation there is another fact going exactly in the same direction with the facts stated before—leading up to the same relief which I asked for before—but it being in addition to the facts which I have mentioned, it ought now to be allowed to be a foundation of a new litigation, and I should be allowed to commence a new litigation merely upon the allegation of this additional fact. The only way in which that could possibly be admitted would be if the litigant were prepared to say—I will show you that this is a fact which entirely changes the aspect of the case, and I will show further that it was not and could not, by reasonable diligence, have been ascertained by me before."

I revert accordingly, in the light of the authorities and principles which I have ventured to set forth, to the crucial question what was the *medium concludendi* in this action? It was a simple petitory action for a sum of money, and in the forefront of its pleas a plea of "due and resting-owing." Why this action and plea? What were they about? The answer to that question gives us the *medium concludendi*. And in his usual luminous and helpful manner the Lord Ordinary, Lord Dewar, supplied the answer—"The summons concluded for all sums alleged to be due in respect of work executed." That was, to use the language of Lord Kinnear in the *Clippens* case, 1 F. 900, 36 S.L.R. 718, "The question always is, what was litigated and what was decided."

To that question the appellants obtained their definite, final, and complete answer by absolvitor. For when absolvitor is pronounced, it concludes the pursuer as to every claim within the summons from which the defender is absolved. If he puts forward simply a claim that in respect of work and service rendered the defender owes him £106,686, 13s. 11d. sterling, then absolvitor means that the defender owes him none of it.

It is too late in the day to attempt to place a decree of absolvitor on the same plane as a decree of dismissal. Sometimes a decree uses the word "absolvitor" with such conditions attached as show that what was truly meant was a dismissal—such as the case of *Gillespie v. Russell*, in which the former suit was on the ground of insufficient or irrelevant averments truly dismissed, but in which the judgment was expressed as absolvitor from the action "as laid." It is easily possible also to figure a good plea of *res judicata* in the case of a fresh action containing what is in substance a mere repetition of the averments in the action disposed of by dismissal. But in the plain and ordinary case, such as the present is, the rule of law prevents the duplication or multiplication of legal proceedings. That rule was thus expressed in the language of Lord Deas in *Stewart v. Greenock Harbour Trustees* (6 Macph. at 958, 5 S.L.R. at 617) when he said—"We have had this matter again and again before us, and if there be a distinction established in our practice, it is that the word 'dismiss' is used when it is open to the party to bring another action, and the word 'assoilzie' when it is not open."

Their Lordships allowed the appeal and restored the judgment of the Lord Ordinary, with expenses.

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COURT OF SESSION.

Friday, November 23.

SECOND DIVISION.

DIXON'S TRUSTEES v. DUNEHER.

Succession — Vesting — Conditio si sine liberis—Marriage Contract.

The trustees under an antenuptial marriage contract held funds in liferent for the wife, in liferent for the husband should he survive her, in fee for any child or children of the marriage, but not to vest till the wife's death. The wife was divorced but survived her husband and her only son, whose children claimed the funds under the *conditio si sine liberis decesserit*.

Held that no right could vest in the children at a date sooner than that at which it would have vested in their father, the institute, and as no right could have vested in him during the life of his mother no right had yet vested in them.

A Special Case was presented, *inter alios*, by G. A. D. Kirkland, writer, the sole trustee acting under the antenuptial marriage contract, dated in 1878, between George Dixon, stockbroker in Glasgow, and Alice Margaret Alexandrina Shirer, *first party*; the said Alice Margaret Alexandrina Shirer or Dixon, now Mrs H. G. Duneher, with her husband's consent, *third party*; Camille Clifford Dixon, daughter of George Clifford Dixon, who was the only child of the marriage between George Dixon and Miss Shirer, with her tutors, *fifth parties*; and William Gair Chrystal, C.A., factor *loco tutoris* to George Ian Paring Dixon, son of the said George Clifford Dixon, *sixth party*, dealing with the rights of parties under the said antenuptial marriage contract.

The *marriage contract*, with regard to certain funds conveyed by Miss Shirer to the trustees, directed, *inter alia*—“*In the second place*, they shall hold the estate conveyed by her for behoof of the said Alice Margaret Alexandrina Shirer in liferent for her liferent use alienarily, exclusive of the *jus mariti*, right of administration, and curatorial powers of the said George Dixon, all of which the said George Dixon hereby renounces and discharges; Declaring that the receipts by the said Alice Margaret Alexandrina Shirer herself

shall form sufficient discharges to the said trustees and their foresaids in the premises. *In the third place*, should the said George Dixon survive the said Alice Margaret Alexandrina Shirer, the said trustees shall hold the said means and estate hereby conveyed by the said Alice Margaret Alexandrina Shirer for behoof of the said George Dixon in liferent for his liferent use alienarily. *In the fourth place*, subject to the said rights of liferent, the said trustees shall hold the fee of the trust estate hereby conveyed by the said Alice Margaret Alexandrina Shirer for behoof of all the children or any child of the said intended marriage who being sons or a son shall attain the age of twenty-one years, or being daughters or a daughter shall attain that age or be married, and that equally among them if more than one, and the fee of the said trust estate shall not vest in the child or children until the death of the said Alice Margaret Alexandrina Shirer, but on or after her death the same shall vest in the case of a son or sons on attaining majority, and in the case of a daughter or daughters on attaining majority or being married.”

George Dixon, who on 2nd August 1883 had obtained a decree of divorce against his wife, died on 30th October 1913. From the date of the decree of divorce until his death he had received the whole revenue from the marriage-contract funds contributed by both the parties, out of which, however, he had made a voluntary allowance of £200 per annum to his former wife, who had since married H. G. Duneher, and who was still in life at the date of this case. The only child of the marriage, George Clifford Dixon, died on 20th September 1914, survived by his widow, a daughter (fifth party), and a son (sixth party).

The following *question of law* was, *inter alia*, submitted—“1 (a) Is the third party entitled to immediate payment of the capital of the funds contributed by her under the antenuptial contract of marriage between her and the said George Dixon; or (b) is the fee of said funds now vested in the fifth and sixth parties subject to the third party's liferent; or (c) is the first party bound to retain the said capital to await the event either of one or both of the fifth and sixth parties surviving the third party and attaining majority, or, in the case of the fifth party, surviving the third party and marrying or attaining majority; or (d) is the first party bound in any event to retain the said capital until the death of the third party or the complete failure of all issue of the said George Clifford Dixon?”

Argued for the third party—The fund could not vest in the grandchildren until Mrs Duneher's death. The radical right to it belonged to her, and in the event of the whole *stirps* predeceasing her she could justly claim payment of it to herself. Her son by her marriage to Mr Dixon could only have taken if he had survived her, and his children could not claim under the *conditio si sine liberis* any higher right than their father would have enjoyed. He only had a *spes successionis* to the funds, and there was no gift to the grandchildren. Counsel