

sum consisting of shares in a mercantile firm with the dividends accruing thereon. As the curator had in his hands the price of the shares which he had sold, it was thought right that interest should be allowed on that price from the date of the sale to the date of settlement, considering that this is a prosperous business and that it had been paying dividends considerably exceeding five per cent. it was thought only fair that in settling accounts between the parties interest should be allowed on the price at the highest rate allowed by the Court, viz., five per cent. The result of giving one party the dividends and allowing the other party interest at five per cent. is that the former receives a lesser sum; he receives the dividends minus five per cent. which was considered a fair equivalent of the use of the money.

I cannot see that there exists here the state of facts contemplated by the clause of the Revenue Act to which our attention was called. I think the hypothesis of the Act is that there is an investment yielding interest and having a certain permanence about it; and as we are not to enlarge the effect of taxing statutes by putting a forced and artificial construction upon them, I should not hold under the clause quoted that whenever a decree was given for payment of money with interest, income-tax was due on the interest so paid. Of course I do not desire to prejudge in any way any question that may be hereafter raised by the Inland Revenue Department in the public interest. The Inland Revenue is not here represented, and it is not said by the pursuer that she had paid or intends to pay income-tax upon this sum of interest in account. I confess that the determining consideration in my mind is that I am unable to see how in cases of this kind the sum which is deducted in name of income-tax is ever to reach the Exchequer. If the Exchequer authorities find that they have an interest in it, they will, no doubt, be able to raise the question in another form, but my opinion is that payment under the deduction proposed is not a sufficient payment in terms of our decree.

LORD ADAM, LORD KINNEAR, and the LORD PRESIDENT concurred.

The Court refused the prayer of the note.

Counsel for the Pursuer — Sol-Gen. Dickson, Q.C. — Cullen. Agents — Ronald & Ritchie, S.S.C.

Counsel for the Defenders — Balfour, Q.C. — W. Campbell. Agent — Lindsay Mackersy, W.S.

Friday, March 4.

FIRST DIVISION.

[Lord Pearson, Ordinary.]

WILSON & MACFARLANE v.
STEWART & COMPANY.

Arbitration—Clause of Reference—Sist of Action till Questions Falling under Reference Clause Disposed of by Arbitrator—Form of Plea.

In an action for the price of work done in terms of a contract, which contained an alternative claim for the same sum by way of damages for breach of contract, the defender, founding on an arbitration clause, pleaded that the "action is excluded by the reference clause." The Lord Ordinary, holding that all the questions raised between the parties were not excluded by the reference clause, allowed a proof before answer.

The defender reclaimed and craved the Court to sist the cause pending the decision by the arbitrator of the question as to the quantity and quality of the work executed by the pursuers, which clearly did fall within the reference clause.

It was suggested by the Court that the defenders' plea was not the correct one to warrant the adoption of this course.

The defenders, in deference to the views of the Court, added a plea—"In respect that the question raised in condescendence 9 and answer 9, relative to the quantity and quality of the work done by the pursuers, falls to be determined by the arbitrator, the action ought to be sisted pending his decision."

The Court *remitted* to the Lord Ordinary to sustain this plea.

In 1896 Messrs Wilson & Macfarlane, plasterers, Glasgow, contracted to do the plaster-work of certain tenements which were being erected by Messrs Stewart & Co., builders, Glasgow. These were to be charged for at schedule rates, and to be paid for by instalments. The contract contained a reference clause by which it was provided—"Should any disputes or differences of opinion arise on any matter connected with the contract or the execution of the work, the same shall be and hereby are referred to the decision of Mr John Sim, clerk of works, whose award shall be final and binding on all parties without appeal. An action was raised by Messrs Wilson & Macfarlane against Messrs Stewart & Co., in which they claimed payment of a sum of £460 for work done under the contract at schedule rates. They amended their record by stating the claim alternatively as a claim of damages through the defenders' breach of contract.

The pursuers averred that in April 1897 they withdrew their men and brought the contract to an end owing to the defenders' failure to observe their part, and in

particular to pay the stipulated instalments. The defenders averred that the work had not been done in terms of the contract.

They pleaded—"(4) The present action is excluded by the reference clause in the contract."

The Lord Ordinary (PEARSON) on 3rd February 1898 allowed parties a proof before answer.

Opinion.—"In 1896 the pursuers contracted to do the plaster-work of certain tenements in Glasgow which were being erected by the defenders. The work was to be charged for at schedule rates, and to be paid for by instalments.

"The pursuers allege that in April 1897 they withdrew their men, and brought the contract to an end, owing to the defenders' failure to observe their part of the contract, and in particular to pay the stipulated instalments.

"The pursuers claim as due to them a sum of £460. As originally stated, the claim was for work done by the pursuers under the contracts at schedule rates, including materials on the ground, the work being, however, subject to measurement in terms of the contract. The claim was for £700, less £240 paid to account as under the contract, leaving £460 due.

"The pursuers have now been allowed to amend the record by stating their claim alternatively as a claim of damages through the defenders' breach of contract.

"The defenders, on the other hand, justify their refusal to make further payments, alleging that the pursuers were themselves in breach of their contract, and have involved the defenders in damages far exceeding the sum sued for.

"The defenders plead that the action is excluded by a reference clause in the contract, which provided that should any disputes or differences of opinion arise on any matter connected with the contract or the execution of the work, they should be referred to Mr John Sim, clerk of works. I do not think that all the questions now raised between the parties fall under this reference clause. It was urged that at all events some of them might do so, but if it should so turn out, this may be worked out by allowing the parties an opportunity of obtaining the arbiter's judgment upon them when the time comes.

"In these circumstances I think the case must go to proof, and the defenders' position both on that plea and on the other parts of the case will be sufficiently safeguarded if the proof is before answer.

"The defenders criticised the pursuers' new alternative case on damages as being not a real alternative but only another way of putting his case for work done under the contract.

"The figure remains the same; and the pursuers do not disclose their case as to the proper measure of damages. I have sometimes thought it would be an improvement if our rules of pleading were made more strict in that particular. But if the circumstances infer loss and damage, I think that according to our practice it is sufficient to

make a general averment as to the amount of it."

The defender reclaimed, and argued that the pursuer not having any relevant claim of damages, the only real question was whether there was anything due to them for work done. Accordingly the case should be sisted till the arbiter's decision on this point, which clearly fell under the arbitration clause, had been obtained, and even if the pursuers had any claim in respect of damages, it would in no way be affected.

It was suggested by the Court in the course of the argument that the defenders' fourth plea was not an appropriate one on which to found this contention. The defenders submitted that it was the practice of the Court to use such a plea for the purpose of limiting the action in the manner proposed, but in deference to the views of the Court added the following plea—" (5) In respect that the question raised in condescendence 9 and answer 9, relative to the quantity and quality of the work done by the pursuers, falls to be determined by John Sim, the arbiter named in the contracts founded on, the action ought to be sisted pending the decision of that question."

LORD PRESIDENT—Although the pursuers thought fit in the Outer House to amend their record, so as to state their claim alternatively as a claim of damages, this does not alter its ground. The essential averment on which they rely is that they executed the work in terms of the contracts. This averment the defenders deny. There is thus a dispute as to the execution of the work under the contracts, and the contracts provide that such disputes stand referred to the decision of Mr John Sim. I therefore see no answer to the contention of the defenders, which is embodied in their new plea—[quotes]. Until the pursuers get Mr Sim's decision they cannot move an inch; when they do get it the time will have come to see what further procedure is required. The defenders' new plea rightly claims a sist; but as the case when sisted ought to be in the Outer House, the correct procedure for us would seem to be to recal the Lord Ordinary's interlocutor and remit to his Lordship to proceed with the cause, and *imprimis* to sustain the defenders' fifth plea-in-law.

LORD ADAM, LORD M'LAREN, and LORD KINNEAR concurred.

The Court recalled the interlocutor of the Lord Ordinary, and remitted to him to proceed with the cause, and *imprimis* to sustain the defenders' 5th plea-in-law.

Counsel for Pursuers—Sol.-Gen. Dickson, Q.C.—Guy. Agents—Martin & M'Glashan, S.S.C.

Counsel for Defenders—Ure, Q.C.—Cullen. Agents—Webster, Will, & Co., S.S.C.