LORD TRAYNER—I also doubt the relevancy of this action, but assuming it to be relevant, I concur in the view that it is excluded by the terms of the statute.

The case of *Sutherland* is not analogous. In that case the ground upon which the Court went was that the proceedings out of which the action arose were not within but contrary to the statute on which the defenders relied as protecting them from the consequences of irregular proceedings.

LORD MONCREIFF—I am of the same opinion. I proceed upon the protection afforded to the defenders by the Act of 1893. If the action had been brought in time there might have been a case for inquiry.

The Court dismissed the appeal and affirmed the interlocutor appealed against.

Counsel for the Pursuer and Appellant —Gunn. Agents—Mackay & Young, W.S.

Counsel for the Defenders and Respondents—Lees, K.C.—M. P. Fraser. Agents—Campbell & Smith, S.S.C.

Saturday, January 31.

FIRST DIVISION.

[Lord Stormonth Darling, Ordinary.

BENNET *v.* BENNET.

Arbitration — Claim Partly Relating to Matters Outside Reference — Reference Clause in Partnership Contract — Interdict of Arbiter before Decision.

By a clause in a contract of copartnery it was provided that should any difference arise between the partners "as to the meaning or the implement of these presents, or in the prosecution of the business of the firm or in the winding up of said business, or in any way touching the premises," the same should be referred to arbitration, and that parties should be "debarred from resorting to any court of law on any pretext whatever." Disputes having arisen between the partners, one of them called for the intervention of the arbiter and submitted a claim by which, *inter alia*, he asked the arbiter to declare that it was necessary that the business should be wound up. Answers were lodged to this claim by the other partners, in which they maintained, *inter alia*, that some of the questions raised were not covered by the arbitration clause. The arbiter repelled certain of these pleas so far as preliminary, and allowed a proof. The respondent partners then brought a note of suspension and interdict to restrain the arbiter from dealing with the items of the claim to which they objected. They did not aver that the arbiter had not jurisdiction to deal with some of the questions submitted to him. *Held* that even on the assumption that some of the items of the claim related to matters which fell outside the arbitration clause, no grounds had been shown for the interference of the Court before the arbiter had pronounced any final decision on the matter.

In 1898 four brothers—Charles, Robert, George, and James Bennet—entered into a contract of copartnery for the purpose of carrying on a business known as the Bennet Furnishing Company. The contract contained the following clause:— "*Lastly*, Should any difference arise between the parties or between the surviving and solvent partners and the representatives of a deceasing or creditors of a bankrupt or insolvent partner as to the meaning or the implement of these presents, or in the prosecution of the business of the firm, or in the winding up of said business, or in any way touching the premises, such differences shall be and the same are hereby submitted and referred to the decision of William Lucas, writer, Glasgow, whom failing from any cause David Murray, LL.D., writer, Glasgow, as sole arbiters, in their order foresaid, whose decisions in their order foresaid by decree or decrees-arbitral, interim or final, partial or total, shall be final and binding on all parties, who are hereby debarred from resorting to any court of law on any pretext whatever."

Disputes having arisen between James Bennet and the other three partners, the former requested Mr Lucas to act as arbiter under the clause quoted above, and lodged a claim in which, after a narrative of various grounds of complaint against his copartners, including a complaint that certain charges and expenses had been improperly charged against the firm, he claimed as follows:—"(*First*) That Charles Bennet, Robert Bennet, and George Bennet have wilfully caused serious loss and injury to the firm, and have been guilty of such conduct towards the claimant and the firm as is wholly inconsistent with the duty of partners to each other and to the firm, and that such conduct makes it impossible to carry on the partnership any longer. *Second*, That if the arbiter holds that the partnership must be continued, it is necessary that he should pronounce an order for the proper and regular conduct of the business, and for defining the respective positions and duties of the partners. *Third*, That the improper charges and expenditure complained of, incurred not in the interest of the firm but from improper motives, should be disallowed as charges against the firm, and should be debited to the individual partners who caused such charges and expenditure to be incurred. *Fourth*, Failing the said Charles Bennet, Robert Bennet, and George Bennet appearing before the arbiter in the reference and submitting to his judgment in the matter in dispute and differences which have arisen among the partners, the arbiter should find that the partnership cannot be carried on by the parties, and that it is necessary to have the partnership dissolved and the business placed

under judicial management and wound up in terms of the contract of copartnery at the earliest possible date. *Fifth*, That the said Charles Bennet, Robert Bennet, and George Bennet be found liable, jointly and severally, for the expenses of the claimant and of the arbitration."

Answers were lodged containing the following pleas:—"(1) The claimant has stated no relevant cause for the intervention of an arbiter. (2) The claimant's statements, so far as they relate to matters which occurred before the date of the current contract of copartnery, cannot competently be dealt with by an arbiter appointed therein. (3) The arbitration clause in the contract was not intended to embrace and does not cover questions such as those raised by the claimant. (4) The arbiter cannot entertain any question as to the expediency of dissolving the partnership."

On 17th February 1902 the arbiter pronounced an interlocutor whereby he repelled the first, second, and third pleas-in-law for the defenders so far as preliminary, and allowed a proof to both parties.

The arbitration having reached this stage, Charles, Robert, and George Bennet presented a note of suspension and interdict, in which they prayed the Court to interdict James Bennet from insisting in or prosecuting the first, second, and fourth items of his claim as quoted above, and also to interdict Mr Lucas as arbiter from further entertaining or dealing with the said items of claim.

After narrating the facts relating to the disputes and the arbitration proceedings the suspenders pleaded—"(1) The respondent Bennet's claim being incompetent and irrelevant the complainers are entitled to suspension and interdict as craved. (2) The arbiter having no power under the contract of copartnery to entertain the first and fourth items of the respondent's claim, interdict should be granted as craved. (3) The findings craved in the first and fourth items of the claim being neither provided for in the contract nor recognised by the Partnership Act as grounds of dissolution, the claim is incompetent *quoad* the said items. (4) It being *ultra vires* of the arbiter to give a finding in terms of the second item of the claim, and *separatim*, there being no averment of facts to warrant such a finding, suspension and interdict should be granted as craved. (5) The questions raised in the said claim are not covered by the reference clause, and it is *ultra vires* of the arbiter to entertain them."

Interim interdict was granted, but on 9th December 1902 the Lord Ordinary (STORMONTH DARLING) recalled the interim interdict, and refused the note of suspension.

The complainers reclaimed, and argued—Admitting that some of the questions submitted to the arbiter fell within the reference clause, it was clear that under that clause the arbiter had no power to make some of the findings asked for in the respondent's claim. To carry those out would imply that he had power to dissolve the partnership. No such power was committed to him—*Lauder* v. *Wingate*, March 9, 1852, 14 D. 633. On that assumption the interdict should be granted. It was perfectly competent for this Court to interdict an arbiter from proceeding to entertain questions which were *ultra vires—Glasgow and South-Western Railway Co.* v. *Caledonian Railway Co.*, November 3, 1871, 44 Scot. Jur. 29. Lord Neaves there pointed out that the conditions for interdict in such a case were that it should be plain that the matters in question fell outside the clause of reference, and that the proceedings of the arbiter threatened to involve the parties in unnecessary litigation and expense. The present case fulfilled both these conditions.

Argued for the respondent—The arbiter should be allowed to proceed. It was not disputed that there were matters submitted to him which fell within the jurisdiction conferred upon him, and which necessitated a proof. All he had done was to allow a proof. Even admitting that the arbiter had no power to dissolve the contract, there was nothing to show that he had any intention of pronouncing any such finding. The argument on the other side really amounted to a criticism of the respondent's pleadings. The Court would not readily interfere with an arbitration when it was not suggested either that the arbiter had already exceeded his powers or that there was nothing in the case which he could competently decide — *Dumbarton Water Commissioners* v. *Lord Blantyre*, November 12, 1884, 12 R. 115, 22 S.L.R. 80.

LORD PRESIDENT—In November 1898 a contract of copartnery for carrying on cabinet-making businesses in different places was entered into by four brothers, Charles, James, Robert, and George Bennett, residing in London, Canada, and Glasgow. It is a carefully framed deed, containing a number of provisions, of which the two most material for the purposes of the present question are the tenth and the one described as "lastly." By the tenth article provision is made as to what is to happen on the dissolution of the copartnership; and in particular it is declared that in the event of the parties differing as to the winding up, it shall be done at the sight of the arbiter after-mentioned, who shall have power to appoint a third party or third parties to perform the duty. And lastly, there is a very wide clause of arbitration, which provides that in the event of any difference arising between the parties, or between the surviving and solvent partners and the representatives of a deceasing partner or the creditors of a bankrupt or insolvent partner as to the meaning or the implement of these presents, or in the prosecution of the business of the firm, or in the winding up of said business, or in any way touching the premises, such differences shall be, and the same are hereby submitted and referred to the decision of William Lucas, writer, Glasgow, whom failing, to another named, as sole

arbiters in their order, whose decision "by decree or decrees arbitral, interim or final, partial or total, shall be final and binding on all parties, who are hereby debarred from resorting to any court of law on any pretext whatever." This is as wide a clause of reference as could well be imagined. The arbiter is to ascertain the meaning of the contract, determine the rights of the partners, "or the implement of the contract either during the prosecution of the business of the firm"—that would seem to mean how the business is to be carried on—"or in the winding up of said business." It is plain that the four brothers desired that any differences which might arise between them should be settled by proceedings other than before courts of law, and by an unusually wide clause have provided against such differences being brought into Court.

Differences have arisen. It is not necessary to say what these are, but unhappily there is no doubt they have arisen, and one of the partners, Mr James Dick Bennet, has called in the arbiter, the arbitration has been duly set on foot, and condescendences and claims were ordered and have been lodged in the ordinary way. Complaint has been made—I think by Mr Salvesen—that the condescendence and claim of James Dick Bennet is too large—and it is certainly large, for it contains thirty-eight articles—but Mr Salvesen cannot say he is without ample notice of what is required; and if the condescendence is somewhat long it certainly develops the grounds of complaint of parties and their contentions with great clearness. Only a few of the claims, however, are important for the purpose of the questions now before us. By the first, James Dick Bennet claims that the arbiter shall find "that Charles Bennet, Robert Bennet, and George Bennet have wilfully caused serious loss and injury to the firm, and have been guilty of such conduct towards the claimant and the firm as is wholly inconsistent with the duty of partners to each other and to the firm, and that such conduct makes it impossible to carry on the partnership any longer," and next, "that if the arbiter holds that the partnership must be continued, it is necessary that he should pronounce an order for the proper and regular conduct of the business, and for defining the respective positions and duties of the partners." The third claim is for rectification of the charges and accounts; and the fourth is that in the event of the other parties, Charles, Robert, and George Bennet, failing to appear before the arbiter and submitting to his judgment, the arbiter shall find that the copartnership cannot be carried on by the parties, and that dissolution is necessary.

The question which we have now to consider and decide is whether this arbitration should be stopped. Apparently an interim interdict had been granted, but on hearing the matter fully argued the Lord Ordinary recalled that interdict and refused the note. It is against this judgment that the present reclaiming-note is presented, and we are asked, instead of adhering to the recal of the interdict, to grant an interdict against the arbitration going on, or, in other words, to stop it. This contention could never be maintained on the ground that the arbiter was about to do something beyond his powers, unless he had made some finding or pronounced some order that was *ultra vires*, or intimated an intention to do so. We have heard a number of the questions or differences which the arbiter is to be asked to decide, and I do not think it necessary to go through all these, or indeed to enter into any of them in detail, because the only point now to be decided is whether the arbitration or reference proceedings are to be stopped. It is plain that, unless no part of the questions could competently be entertained by the arbiter he should be allowed to go on, at all events as to any of the questions which may fall within the reference. Unless it was made clear to us at this stage, without inquiry, that the arbiter was threatening to do something that was beyond his powers, it would not be proper to pronounce any decision stopping the arbitration in whole or in part. A great many questions have been raised or suggested during the argument which it is said that the arbiter would not have power to decide, but for the purposes of the present question it is sufficient to say that there are questions raised in the pleadings which it is within the power of the arbiter to decide, and that we are bound to assume that he will confine himself to these, not dealing with any other parts of the reference, which can be shown to be beyond his powers. We are not entitled at this stage to assume that he will deal with these. The proposal is to stop him altogether, and I think he should not be stopped altogether. But if he is not to be stopped altogether I agree with the Lord Ordinary in thinking that it would be inexpedient at this stage to separate the questions and to say that he may entertain some but that he is not to entertain others. We are bound to assume that he will keep within his powers. The alternative is that this very careful provision for arbitration and for keeping out of the law courts, which all the four brothers desired, should be cast to the winds, and that the whole questions should be set at large to be decided by a court of law. For these reasons I think that the judgment of the Lord Ordinary is right, and that it should be adhered to.

LORD ADAM—I concur. Your Lordship said that the parties were very anxious to keep out of the law courts by having framed such a wide clause of reference, but that does not depend on inference, for I see that it is stated in the last clause that the parties "are hereby debarred from resorting to any court of law on any pretext whatever." Now, I do not, founding on that clause, propose to say that this proceeding is incompetent, but I quite agree with your Lordship on the grounds on which you propose to deal with it. I do not think the law is doubtful. If the

claim made related to a matter clearly *ultra vires* of the arbiter, and there was nothing in it which could be decided under the reference, that would be a proper case for refusing arbitration at that particular stage of the case. Or if it were a case of high expediency on the one side that it should not go to arbitration upon, it may be some extensive claims which might or might not turn out to fall within the reference—it might be that in such a case as that also the Court would discriminate before sending the case to arbitration; but in this case I agree with your Lordship that although the claim is very widely stated, and might, if sustained in its integrity, be *ultra vires* of the arbiter, yet within the claim there are matters which are entirely within the power of the arbiter, and I think, in the first place, it should go to the arbiter, who will decide it, and will have an opportunity of deciding those matters which will be properly laid before him, and which he has power to decide. I think that the proper way to deal with the case, and accordingly concur with your Lordship.

LORD M'LAREN—As the case is going to the arbiter I should desire to say nothing that would look like instructing the arbiter in his duties; but I think it is very likely that when he comes to consider this clause of reference he will see that its main object is to provide the means for executing a contract, and that under it the arbiter may issue such orders as will prevent friction between the partners and will enable the business to be carried on as a money-making concern for the benefit of all concerned. I should not as at present advised think that the parties intended by this clause of reference to refer to arbitration the question whether the contract is to be dissolved because I see that the arbiter has certain defined and limited powers. In the case of a dissolution he is to determine disputes, but then that is a case of dissolution either arising from the effluxion of time or arising from the wishes and acts of the parties themselves. Now, there are some expressions in the first head of the claim that seem to point to preparing the way for a dissolution, and if the prayer for interdict had been directed against such proceedings a different question would have arisen. It is not necessary to say what my opinion would be in such a case, but then I understand that Mr Salvesen disclaimed any intention to limit the scope of this interdict, and we were asked to interdict the arbiter from proceeding under any of the heads except head 3 of the claim, which it is conceded by both parties is a very immaterial part of the matters in dispute. I concur with your Lordship that we cannot so limit the arbiter in the discharge of his duties. Indeed, it would be very unfortunate if arbiters were liable to be interfered with by a court of law in the performance of their duties in relation to a partnership, because by the constitution and methods of procedure of courts of law it would be extremely difficult to make effective orders for the conduct of a going business, and on the other hand that is just the kind of work which an arbiter may very advantageously perform. I concur in the opinion that the interlocutor should be adhered to.

LORD KINNEAR—I am of the same opinion. I think that the condescendence and claim disclose differences between the parties which beyond all doubt fall within the clause of reference; and therefore it cannot be said that the subject-matter of the claim which the arbiter is asked to consider is beyond the jurisdiction which is conferred on him by the contract. The objections simply resolve into a criticism of the pleadings before the arbiter, and especially of the condescendence and claim, for the purpose of showing that it included irrelevant matter and also that it contained demands which might in the view taken by the reclaimer have carried the arbiter beyond the clause of reference. Now, I think all this criticism raises questions for the arbiter. It is admitted that there was a difference that the parties were entitled to submit for his decision; and that, his jurisdiction being invoked, it was argued before him on the grounds now maintained in this Court, that this condescendence and claim ought not to be entertained. The question being raised before the arbiter, he decided it, and he repelled the objection to the condescendence and claim in so far as preliminary, and allowed a proof to the parties to proceed on the quesion in dispute, and therefore the application for interdict really resolves into an appeal to this Court against the decision of the arbiter. If in that decision he had gone beyond the limits of his jurisdiction there might have been ground for complaint. But he has decided nothing but a question of procedure. He has held in effect that it is better that the facts should be ascertained before he decides disputed questions on the merits or on the limits of his own jurisdiction. I think that was a question for the arbiter which was within the jurisdiction of the arbiter to decide, and I do not think this Court has jurisdiction to review his judgment on it, and to say that he decided it wrongly. Since the pleadings have been examined so carefully as they have been, I may venture to say that I think the condescendence and claims are not very artistically framed, and that they do suggest questions of some difficulty, but these I think are questions for the arbiter, and I do not think we are entitled to assume that he will dispose of them wrongly. I quite agree with your Lordship that there is no ground for stopping the arbitration proceedings in the meantime. If the arbiter should act *ultra vires* or do anything outside the contract of reference a different question would arise, but we cannot assume in the meantime that he is likely to do anything of the kind.

The Court adhered.

Counsel for the Complainers and Reclaimers—Salvesen, K.C.—A. S. D. Thomson. Agents—Dove, Lockhart, & Smart, S.S.C.

Counsel for the Respondent—Clyde, K.C. —Graham Stewart. Agents—Gill & Pringle, S.S.C.

Tuesday, February 3.

FIRST DIVISION.

TRUSTEES OF GATESIDE SCHOOL, PETITIONERS.

Educational Trust—Endowed School—Gratuitous Transfer of School Buildings to School Board—School—School Board—Education (Scotland) Act 1872 (35 *and* 36 *Vict. c.* 62), *sec.* 38.

The trustees and committee of management of an endowed school, on the narrative that the funds at their disposal were insufficient to pay a schoolmaster and carry out the purposes of the trust, petitioned the Court to settle a scheme for the administration of the endowment. It was an essential part of the suggested scheme that the Court should authorise the petitioners to convey the school and teacher's house gratuitously to the school board of the parish in which the school was situated. The Court *refused* to sanction the gratuitous conveyance by the trustees of the heritable subjects held by them to the school board.

Observed (*per* Lord M'Laren and Lord Kinnear) that section 38 of the Education Act 1872 did not entitle trustees holding a school under an educational endowment trust to convey the school buildings to the school board of the parish gratuitously.

The Education Act 1872 (35 and 36 Vict. c. 62), sec. 38, enacts—"With respect to schools now existing . . . in any parish, . . . erected or acquired and maintained or partly maintained with funds derived from contributions or donations (whether by the members of a particular church or religious body or not) for the purpose . . . of promoting education: be it enacted that it shall be lawful for the person or persons vested with the title to any such school, with the consent of the person or persons having the administration of the trust upon which the same is held, to transfer such school, together with the site thereof and any land or teacher's house held and used in connection therewith to the school board of the parish . . . in which it is situated, to the end and effect that such school shall thereafter be under the management of such board as a public school in the same manner as any public school under this Act." Section 37 enacts:—"In performing their duties under this Act, it shall be lawful for any school board . . . to acquire by purchase . . . any existing schools and teachers houses, together with any land used or suitable to be used in connection therewith, not being schools, houses, and land of the description to which the provisions of this Act in the two immediately succeeding sections regarding the transference of existing schools are applicable." . . .

The Rev. J. G. Sutherland, minister of the parish of Beith, and others, the trustees and committee of management of Gateside School, near Beith, acting under the trust-disposition of the late William Patrick of Roughwood, petitioned the Court to settle a scheme for the administration of an endowment bequeathed by the truster for educational purposes, and "to authorise such of the petitioners as are vested in the said school, school-house, and buildings, to convey the said subjects to the School Board of the parish of Beith in terms of a draft disposition to be approved" by the Court.

By trust-disposition and endowment dated 8th August 1855, and registered 17th April 1871, the late William Patrick of Roughwood, on the narrative that he desired to afford additional facilities for the education of children at Gateside, and had some time before built a schoolroom and offices there, and desired to permanently settle and endow the school and provide a dwelling-house for the schoolmaster, gave to the minister of Beith and his successors in office certain ground at Gateside upon which the school-house and play-ground as well as a dwelling-house and garden for the schoolmaster were situated. By the same deed he granted an annual rent of £25 out of his estate of Roughwood, and obliged his successors in the said estate to be at the whole expense of keeping the school-house, dwelling-house, and buildings in sufficient repair in all time coming, the obligation being made a real burden on the lands. The management of the school and ground-annual was entrusted to a committee of management.

The school, which continued to exist entirely apart from the School Board, was attended by about 131 children. The schoolmaster's salary was made up, in addition to the annual payment to him from the trust, from school fees and Government grants earned.

Owing to the abolition of school fees and an intimation by the Education Department that unless the accommodation of the school was largely increased so as to bring it up more nearly to modern requirements they would not continue to pay the Government grants, the petitioners averred that they found themselves without sufficient funds to carry on the trust, with the result that the school would be closed. In these circumstances the petitioners put themselves into communication with the School Board of the parish of Beith. The School Board intimated their willingness to take over the school, schoolmaster's house, and other premises, and to provide buildings to meet the requirements of the Education Department so that the school might be carried on. In respect that there was no other mode of effectually carrying out the purposes of the trust, the petitioners submitted to the Court a request for authority to hand over the premises to the School Board of the parish of Beith.

Under the scheme proposed by the peti-