her marriage, for such is the law of England whatever the intentions of the parties may be, but if her domicile was French her will would not be revoked by the English law, and still less by the French law. Both laws are alike in regarding her domicile as that of her husband as soon as she married him." Now, in the exposition of the case which your Lordship has been good enough to give us, you showed how the Judges there had differed upon certain points, and especially they differed on the question of fact as to whether the domicile was in truth French or English, but I do not find that any of these learned Judges dissent from this general statement of the law which is given by Lord Lindley, and in accordance with that statement I say that the question here is simply whether the domicile of the husband at the time of the marriage was Scottish or English. If it were Scottish, then the question of the subsistence or revocation of the will, will depend upon the law of Scotland, and according to that law this will is a perfectly good will. If it had been English, the will would no doubt have been revoked by English law. I am therefore of opinion that we cannot sustain the judgment of the Sheriff-Depute, but that we should revert to that of the Sheriff-Substitute.

The Court recalled the Sheriff's interlocutor, found in terms of the interlocutor of the Sheriff-Substitute, affirmed the said interlocutor, and decerned.

Counsel for the Appellants—A. R. Brown. Agents—Horne & Lyell, W.S.

Counsel for the Respondents—Hon. W. Watson. Agents—Dalgleish & Dobbie, W.S.

Friday, October 27.

FIRST DIVISION.

[Lord Dundas, Ordinary.

M'COSH *v.* MOORE.

(See *ante* June 9, 1903, 40 S.L.R. 691, and 5 F. 946.)

Arbitration—Lease—Clause of Reference—Application to Claims Advanced after Termination of Lease.

A mineral lease contained a clause of reference of disputes between the parties as to, *inter alia*, "the rights or obligations of either party, or in any way in relation to the premises." It also stipulated that the tenant should be bound "before the expiry or sooner termination hereof to fill up, if desired, all pits and excavations already made or to be made, and to remove all engine buildings or other erections in so far as the same may be their own property, and to clear away or trench in all tramways, railways, and heaps of rubbish so as to restore the land occupied by them and their said predecessors, . . . and to render the same arable, and as suitable and fit for the purposes of agriculture or any other purpose in every respect as before being originally interfered with."

A claim having been made by the landlord, after the termination of the lease and removal of the tenant, for the fulfilment of this stipulation, and the tenant having denied liability, *held* that the decision of the dispute fell within the reference clause.

Andrew Kirkwood M'Cosh, ironmaster, residing at Cairnhill, Airdrie, was the proprietor of the lands of Garrockhill and Bankhead, in the county of Ayr, including the minerals, conform to a disposition in his favour, dated 14th, and recorded 30th June 1900. By the disposition there were assigned to him all arrears of rents and royalties due by the tenants prior to his term of entry, and all claims against them under their leases and relative agreements for restoration of land, &c. By lease, dated in 1884, his predecessors had let, with a small exception, the whole coal seams in and under the lands, and to this lease Alexander George Moore, coalmaster, St Vincent Street, Glasgow, had acquired right by assignation, dated 15th September 1893, and under it Moore had taken possession of the subjects and had worked the mineral field. On 12th November 1897 the tenant gave notice that he would terminate the lease at Whitsunday 1898, which notice was accepted by the landlords, but owing to there being negotiations for a renewal of the lease the tenant did not remove till some time subsequent to that term. Thereafter the landlords called upon Moore to fulfil certain prestations under the lease, and M'Cosh, after acquiring the property, insisted in these demands, and on Moore denying liability, he invoked the aid of the arbiter named in the lease, James M'Creath, civil engineer, Glasgow. The nature of the demands is disclosed in the decree-arbitral, *infra*.

On 14th February 1905 M'Cosh raised the present action against Moore to have it found and declared that he was bound to implement the decree-arbitral, dated 2nd November 1904, pronounced by the said arbiter. The summons also contained conclusions that the defender should be ordained (1) to make payment of a sum in name of damages caused by a sit, and to drains and watercourses, (2), (3), and (4) to execute certain work required of him by the decree-arbitral, and (5) to make payment of certain sums of expenses.

The lease provided, *inter alia*, as follows —"And further, the second parties (the lessees) shall be bound, and they hereby bind themselves and their foresaids, all jointly and severally as aforesaid, before the expiry or sooner termination hereof, to fill up, if desired, all pits and excavations already made or to be made, and to remove all engine buildings or other erections, in so far as the same may be their own property, and to clear away or trench in all tramways, railways, and heaps of rubbish, so as to restore the land occupied by them and their said predecessors, or in any way

used or taken up in connection with the colliery, and to render the same arable and as suitable and fit for the purposes of agriculture or any other purpose in every respect as before being originally interfered with; and the lessees shall also be bound to restore all fences, drains, and watercourses which may be or may have been broken down, altered, or removed in the course of their said predecessors' operations; declaring, however, that the lessees shall not be entitled to fill up any pits which may be abandoned by them during this lease without the express permission in writing of the first parties (the proprietors) or their foresaids, but shall be bound to leave the same open and securely and properly fenced by a stone and lime wall of at least 6 feet in height. . . . Further, it is hereby agreed that in the event of misunderstandings or disputes arising between the parties as to the true intent and meaning of these presents, or any of the terms or provisions hereof, or in regard to the conduct by the second party of their coal workings or of their surface operations under the lease, or in regard to the condition of the engines, machinery, plant, and others, or the value thereof when handed over by the second party to the first party, or the rights or obligations of either party, or in any way in relation to the premises, all such shall be and are hereby referred to the amicable decision and final sentence of Alexander Simpson, civil and mining engineer in Glasgow, whom failing, of James M'Creath, civil and mining engineer in Glasgow, as sole arbiter in the premises, whose decision both parties bind themselves to implement and abide by."

On 2nd November 1904 the arbiter pronounced his decree-arbitral, finding and determining—"[(1), (2), and (3) dealt with a sit and damage to drains and watercourses in certain places marked on a map in process, finding Moore liable to pay damages therefor]. (*Fourth*) That the engine-seat at Garrockhill Pit, and the areas marked on the said plan A, B, C, D, to the respective extents following, namely, . . . have not been respectively removed and restored by the said Alexander George Moore. (*Fifth*) That the said Alexander George Moore is, upon a sound construction of the said lease . . . bound to remove the engine-seats and to restore the said areas marked A, B, C, and D on the said plan, so as to render the same arable and as suitable and fit for the purpose of agriculture or any other purpose in every respect as before being originally interfered with. (*Sixth*) That the pit shafts at the Garrockhill Pit and the old pit respectively have not been properly fenced. (*Seventh*) That the said Alexander George Moore is, upon a sound construction of the said lease . . . bound to fence the said pit shafts in a proper manner by stone and lime walls of at least six feet in height. (*Eighth*) That the area of ground extending to about ·310 (three hundred and ten one-thousandth parts) of an acre, formerly occupied by the hutch road between Garrockhill and Duchray, has not been restored by the said Alexander George Moore in terms of the obligations therein contained in the said lease . . . (*Ninth*) That the drains and watercourses in the said last-mentioned area have been injured by the construction and use of the said railway or hutch road. And (*Tenth*) That the said Alexander George Moore is, upon a sound construction of the said lease, and notwithstanding the termination of his occupancy of the minerals under the said area, bound to restore the said last-mentioned area, and to render the same arable and as suitable and fit for the purposes of agriculture or any other purpose in every respect as before the formation of the railway or tramway, and also to restore the field-drains and watercourses intersecting the said area." The arbiter also found Moore liable in expenses.

The defender pleaded—"(3) The pursuer not having timeously called upon the defender to restore the ground in question, and the relative obligations in the lease not being prestable against the defender after his removal from the subjects, the defender is entitled to be assoilzied from the conclusions of the summons thereanent. (7) In any event, the sum sued for in name of damages under the first conclusion of the summons is excessive."

On 17th June 1905 the Lord Ordinary (DUNDAS), having heard counsel in the Procedure Roll, pronounced the following interlocutor—"Finds that the arbiter has not acted *ultra vires* nor outwith the scope of the reference: Repels the defender's whole pleas-in-law except the seventh: Allows the pursuer a proof of his averments in support of the *First* operative conclusion of the summons, and to the defender a conjunct probation, said proof to proceed on a day to be afterwards fixed: Finds, declares, and decerns in terms of the declaratory conclusion of the summons: Further decerns and ordains the defender, in terms of conclusion *Second* of the summons, to remove the engine-seats and to restore the areas marked A, B, C, and D on the plan lodged in the reference referred to in the summons, so as to render the same arable and suitable for the purposes of agriculture or any purpose in every respect as before being originally interfered with, and that at the sight and to the satisfaction of James M'Creath mentioned in the summons, and within such time as he shall consider reasonable, with power to him to report to the Court at any time if so advised; and further, decerns and ordains the defender, in terms of conclusion *Third* of the summons, to fence the pit-shafts on the said subjects of the lease referred to in the summons in a proper manner by stone and lime walls of at least 6 feet in height, and that at the sight and to the satisfaction of the said James M'Creath, and within such time and with power as aforesaid: And further, decerns and ordains the defender, in terms of conclusion *Fourth* of the summons, to restore the field-drains and watercourses upon the area of ground mentioned in said conclusion, and also to restore the said area itself and to render the same arable and as suitable and fit for the purposes of agriculture as before the formation of the railway or

tramway, at the sight and to the satisfaction of the said James M'Creath, and within such time and with power as aforesaid: Decerns against the defender for payment to the pursuer in terms of the *Fifth* conclusion of the summons."

Opinion.—"The pursuer seeks to have the defender ordained to implement a decree arbitral pronounced by an arbiter named in a mineral lease dated in 1884, in which the pursuer and defender subsequently acquired the rights of landlord and tenant respectively. The defender gave notice to terminate the lease as at Whitsunday 1898, which was accepted by the then landlords, but in point of fact the tenant, by arrangement, continued to work the minerals, and did not remove his plant until a later period in that year. The then landlords subsequently called upon the defender to perform certain operations which they alleged to be incumbent upon him under the lease, and the pursuer, after he acquired the subjects, insisted in these demands, but the defender denied all liability in the matter. The pursuer accordingly invoked the aid of Mr James M'Creath, the arbiter named in the lease, and proceedings were instituted before him. The defender applied in the Bill Chamber to have Mr M'Creath interdicted from proceeding with the reference, upon the ground that the order prayed for would be *ultra vires* of the arbiter. The Second Division ultimately refused to grant interdict. The case is reported (*Moore* v. *M'Cosh*, June 9, 1903, 5 Fr. 946), but I do not think that either of the parties can now effectually pray it in aid, because the Court, so far as I can gather, decided no more than this, that they were not prepared to say that Mr M'Cosh might not under the clause of submission be able to make good some claim against Mr Moore, though the claim as then stated in the arbitration proceedings might not be successful. I understand that, in point of fact, the pleadings were afterwards largely recast, and the matter came before the arbiter for proof, the defender keeping his position open by renewing to Mr M'Creath the protest that what he was asked to do was *ultra vires*. Notwithstanding the protest, the arbiter thereafter issued a decree arbitral, the material portions of which are printed in Cond. 16, which contains findings of liability on the defender 'upon a sound construction of the said lease,' to perform the operations specified. The object of this action is, as I have explained, to obtain decree of specific performance of these operations. The principal defence is a renewal of the plea of *ultra vires*.

"The first point then seems to be to consider the terms of the clause of reference contained in the lease, in order to ascertain what truly were the limits of Mr M'Creath's jurisdiction. The clause is printed at length in Cond. 7, and is expressed in remarkably comprehensive terms. It was, *inter alia*, 'agreed that in the event of any misunderstandings or disputes arising between the parties as to the true intent and meaning of these presents, or any of the terms or provisions hereof . . . or the rights or obligations of either party, or in any way in relation to the premises, all such shall be' referred to the final decision of the arbiter. It was observed by Lord President Robertson (in the case of *Mackay & Son*, 20 R. 1093, at p. 1105), in regard to a clause of reference, that 'if on its fair reading, the parties have agreed to refer to the arbiter every dispute or difference about the meaning and effect of the contract, whensoever and wheresoever such dispute or difference may arise, then there is no rule or principle of law to defeat such agreement.' It is true that the Lord President dissented in that case, but the Judges who formed the majority did not deny, but on the contrary agreed with, the proposition thus generally expressed by his Lordship, though they thought it was not applicable to the clause there under consideration. Therefore, although it is not usual for parties to leave to the arbiter the absolute construction of the meaning of the contract in all its parts and under all circumstances, such a course would, in my judgment, be quite competent, and would not be either unintelligible or necessarily unwise. The parties might not unreasonably, I think, prefer, upon the construction of a mineral lease, to peril their case upon the decision of an experienced civil and mining engineer rather than upon that of a court of law. I have come to the conclusion that that is what the parties here intended to do, and have done, because I think that is the result of a 'fair reading' of the language used. I was referred to some of the numerous decisions as to the scope of clauses of reference—each of which, of course, turned upon the particular language of the clause—but I am not aware of any case where the words used were so comprehensive, or, as I think, so clearly intended to leave the arbiter a free hand in construing the contract, as that now under consideration. Nor, in my judgment, is the effect of the words which I have quoted lessened or restricted by the express enumeration of certain specific matters which intervenes between the sentences of my quotation. Holding these views, it is not necessary for me to express an opinion whether or not Mr M'Creath has, in regard to any of the points raised in discussion, wrongly construed the intent and meaning of the contract, for it is well-settled law that an arbiter, acting honestly and within the limits of the submission, is final upon matters of law, or of construction, as well as of fact. Among the most recent authorities to this effect are *Holmes Oil Company, Limited*, 18 R. (H. L.) 52, and *Caledonian Railway Company* v. *Turcan*, 25 R. (H. L.) 7. But it is fair to say that I am not satisfied that Mr M'Creath's construction of the lease is, upon any point, otherwise than correct. The principal matter of complaint by the defender's counsel was in regard to the clause (quoted in Cond. 6) by which the lessees are bound 'before the expiry or sooner termination hereof, to fill up, if desired, all pits and excavations already made or to be made,'

and to remove engine-buildings, &c., and to clear away or trench in all tramways and heaps of rubbish, so as to restore the land and render it arable, and to restore fences, drains, water-courses, &c. Mr Murray strenuously argued that the whole of these obligations were intended to emerge only in the event of the defender being 'desired' by the landlord to perform them 'before the expiry or termination' of the lease, and that as no such 'desire' was expressed by the landlord before that period the obligations had not become, and could not thereafter become, prestable. Mr Murray argued that the true intent of the clause was that if, after a six months' notice to terminate had been given by the tenant, the landlord should, before the six months had elapsed, 'desire' him to perform these operations, he would be bound to do so, the landlord having, *ex hypothesi*, decided to cease letting or working the minerals, and to resume agricultural possession of the surface; but that if the landlord, having secured a new mineral tenant, should refrain accordingly from expressing such desire, the obligations necessarily flew off at the termination of the lease, being obviously unadapted, and indeed destructive, to the continued working of the colliery. I confess, however, that I think that the words 'if desired' are intended to qualify only the first of the series of obligations referred to, viz., the filling up of pits, &c., and that there is nothing to indicate that the other obligations with which this case is concerned might not be enforced after the termination of the lease, and apart from any previous expression of 'desire' by the landlord. The case seems to me to be different from that of *Sinclair*, 25 R. 703, which Mr Murray relied upon, where a landlord was held not entitled, after the conclusion of a lease, to demand performance of operations in the quarry which the tenant was bound to execute from time to time during its currency. But it is unnecessary that I should elaborate the matter further, because, in my opinion, Mr M'Creath was entitled to construe the lease, as he has evidently and admittedly done, in a sense adverse to the defender's argument, and his decision is, in my judgment, final.

"But Mr Murray argued, as an alternative, that the Court ought, in no view, to grant decree of specific performance of the obligations, or at all events of certain of these. This argument was especially pressed in regard to the conclusion for restoration of the ground to an arable condition. The principal averments on the point are contained in answer 13. It appears that there are upon part of the ground huge bings which the defender says it would be impossible to clear away or trench in. He argued that these were not 'heaps of rubbish' within the meaning of the lease, but that, I think, was clearly a matter for the arbiter alone to consider and decide. This alleged impossibility is apparently based upon (*a*) the enormous cost which, it is said, would be involved in the removal of the bings, especially since the defender has removed his tramways and plant, and (*b*) his want of any legal title to enter upon the pursuer's lands. The latter difficulty could, I apprehend, be obviated by the pursuer granting his permission to the defender to enter upon the lands for the purpose of removal. With the former I have much sympathy; but the defender undertook by the lease to remove 'heaps of rubbish,' which the arbiter has decided to include these bings, and I do not know of any decision in our books which would warrant me in refusing to the pursuer a decree for specific performance of the obligation under such circumstances as are here disclosed. The only Scots cases to which I was referred upon this point were *Stewart* v. *Kennedy*, 17 R. (H. L.) 1; *Middleton*, 19 R. 801; and *Moore, &c.* v. *Paterson*, 9 R. 337.

"Various other points of minor importance were urged by Mr Murray. He objected to the conclusion for removal of the engine-seat, upon the grounds, as I understood, that it did not fall within the words of obligation (Cond. 6) to remove 'all engine buildings or other erections, in so far as the same may be their own property.' But it appears to me that it was for the arbiter alone to decide whether or not the engine-seat falls under the category named, and whether or not it was the defender's property and was included in the inventory of machinery, &c., appended to the lease. As to the 'impossibility' of removing it (Answer 13), I refer to what I have said in regard to the bings.

"Lastly, a matter about fencing pit-shafts, referred to in Cond. and Answer 13, seems to me to have been also finally decided by the arbiter.

"It was admitted that inquiry would be necessary in order to assess, failing agreement of parties, the damages claimed in the first conclusion of the summons. For the rest I shall pronounce an interlocutor in terms of the declaratory conclusion of the summons, and substantially, though not identically, in terms of the operative conclusions other than the first."

The defender reclaimed, and argued—The submission, though expressed in general terms, was ancillary to the contract. It applied to the parties' obligations as landlord and tenant, but had no relevance to their position after the expiry of the lease. Therefore the arbiter's findings were *ultra vires*. These findings being *ultra vires* it followed that they could not now be enforced. The landlord's only remedy was an action of damages—*Greenock Parochial Board* v. *Coghill & Son*, March 6, 1878, 5 R. 732; *Kirkwood* v. *Morrison*, November 6, 1877, 5 R. 79, 15 S.L.R. 51; *Mackay* v. *Parochial Board of Barry*, June 22, 1883, 10 R. 1046, 20 S.L.R. 697; *Beattie* v. *Macgregor*, July 5, 1883, 10 R. 1094, 20 S.L.R. 729; *Mackay & Son* v. *Leven Police Commissioners*, July 20, 1893, 20 R. 1093, 30 S.L.R. 919; *Sinclair* v. *Caithness Flagstone Company, Limited*, March 4, 1898, 25 R. 703, 35 S.L.R. 541; *Savile Street Foundry Company, Limited* v. *Rothesay Tramways*

Company, Limited, March 20, 1883, 10 R. 821, 20 S.L.R. 562.

Argued for the pursuer—Reference clauses are of two kinds, (1) executorial or limited, and (2) of a wider nature involving a consideration of the intention of parties as to the scope and extent of the matters which might be referred to arbitration in the event of disputes arising on a particular contract. The reference clause here fell under the second category, and the arbiter had correctly interpreted the scope of the reference—*Levy & Company* v. *Thomsons*, July 10, 1883, 10 R. 1134, 20 S.L.R. 753; *Moore* v. *M'Cosh*, June 9, 1903, 5 F. 946, 40 S.L.R. 691.

At advising—

LORD PRESIDENT — This is an action raised by a Mr M'Cosh, ironmaster, against Alexander George Moore, coalmaster, and it has various conclusions in which the Court is asked to make operative by decree the findings pronounced by Mr M'Creath, civil engineer, in a certain arbitration which had taken place between the parties. The relationship between the parties is that Mr M'Cosh is proprietor of a certain estate upon which the defender is the quondam tenant. The Lord Ordinary has given decree in terms of the conclusions of the summons, with a slight exception as regards one conclusion, so that there is still a small matter to be cleared up by proof. The defender has reclaimed against that judgment, his contention being that the arbiter was not empowered to pronounce the findings he has done, and that upon a true construction of the clauses of the lease in respect of which these findings proceed, the defender ought to be assoilzied from the conclusions of the summons. I am of opinion that the Lord Ordinary has taken a just view of the questions in dispute, and I have really very little to add to his Lordship's very careful note in this case.

It is quite clear that your Lordships cannot approach the question of what is the proper construction of the various stipulations in the lease unless you come to the conclusion that the arbiter had no power to determine what he has done by interpretation of these various stipulations, and I therefore apprehend that the initial point —the point which if decided in one way ends the case—is, what is the true construction of the arbitration clause? The arbitration clause is printed on page 13 of the appendix, and is in these terms. [*His Lordship quoted the clause given above and continued*]—Now, this matter of the construction of an arbitration clause has often been before the Court on previous occasions, and there are two cases which, I think, may be held to have completely settled the principles on which these questions are to be determined. The first case is the case of *Mackay* v. *Parochial Board of Barry*, 10 R. 1046, and the passage that really lays down the general principles in the leading judgment, which was given by Lord Rutherfurd Clark, is on page 1050, and is this — "The contracting parties may create a tribunal for settling differences which may occur in the course of executing the works, and which has no other function. But of course they may do more, and extend it to the decision of any claim which may arise out of the contract. In this sense the reference is not less executorial of the contract than when it is confined to the settlement of questions which may arise during the execution of the works." That expression of opinion of Lord Rutherfurd Clark was very soon after its delivery entirely approved of and concurred in by Lord President Inglis in the case of *Beattie* v. *Macgregor*, reported in the same volume of Rettie, page 1094, and his Lordship there, on page 1096, comments with approval upon the judgment of Lord Rutherfurd Clark, and quotes that portion of his judgment which I have just read, and he himself came to apply the same views in a subsequent case in the same volume — the case of *Levy & Company* v. *Thomsons*, page 1134. His Lordship goes on to say in *Beattie* v. *Macgregor* — "If parties would only keep in view that there are two kinds of reference, one of which includes only disputes arising in the execution of the contract, while the effect of the other is to refer to arbitration every claim and obligation that at any time arises out of the contract—if parties would only keep this in view, there would be an end to cases of this class."

Therefore the only point is, which class of these cases does this clause in the arbitration fall under? It is not immaterial to notice that the Lord President went on to say in *Beattie* v. *Macgregor* that he had no doubt at all that Lord Rutherfurd Clark's opinion of the application of the general principle to the particular in the case of *Mackay* v. *The Parochial Board of Barry* was a sound one. Now, the clause of reference in *Mackay* v. *Barry* was this— "Should any dispute arise as to the true nature, sufficiency, times, or extent of the work intended to be performed under the specification and drawings, or as to the works having been duly and properly completed, or as to the construction of these presents, or as to any matter, claim, or obligation whatever arising out of or in connection with the works, the same shall be submitted and referred." Your Lordships may notice the strong family resemblance, if I may say so, between the words of that clause and the words of the clause with which we are dealing, but taking the clause alone, without any question of authority upon it, it seems to me that the clause is very plain, and it seems to me really practically to go in what I may call chronological order through the whole period during which the lease operates, and it echoes all stipulations in the lease on the one hand or the other which could possibly form matters of dispute. These all apply to the event of misunderstanding and disputes arising, first, as to the true intent and meaning of these presents. That is a question of the construction of the lease, which of course might arise the moment the lease was entered into. Then there is "as to the conduct by the second party of

their coal workings;" that is something during the currency of the lease. Then, as to the "condition of the engines, machinery, plant, and others, when handed over by the second party to the first party," that is, at the termination of the lease; and then we come to the general words, "the rights or obligations of either party, or in any way in relation to the premises." That seems to me to cover every possible question which can arise in respect of the stipulations of the lease.

Now, the defender argued very strenuously that all that did not apply here, because the expression on which the determination of most of these matters arose was an expression which in time is limited to the duration of the lease. The clause in the lease on which these matters depend is the clause which is printed, and it is an obligation upon the mineral tenants "before the expiry or sooner termination hereof to fill up, if desired, all pits and excavations already made or to be made, and to remove all engine buildings or other erections in so far as the same may be their own property," and to clear away the obstructions and restore the ground to arable condition. The defenders argued that inasmuch as admittedly the lease has now expired, the true meaning of this clause is that the prestations in it were to be performed during the currency of the lease, that the lease being now over they could not be so performed, and that accordingly it must be *ultra vires* of the arbiter to ordain them to do anything after the lease was over. It seemed to me that argument involved a certain amount of confusion of thought. It is, of course, true that an arbiter cannot be the ultimate judge as to the scope of the reference. He is liable to be corrected by this Court if he is wrong. None the less he is bound to determine the scope of the reference in order to see whether or not he will proceed. But if the scope of the reference is absolutely general—and I have already given your Lordships my opinion on that point—then all we have got to do is to see whether the disputed question is a question which falls within that general scope or not. Now, if it had been possible to say that it was a legal impossibility in a lease to bind either party by any stipulations which should only take effect after the lease was over, then I should have understood the argument that although the reference clause was absolutely general as to anything which could happen under the lease, yet that if something happened after the expiry of the lease it could not fall within that reference clause. But of course any such contention that it is a legal impossibility to have a stipulation in a lease which shall only be prestable after the expiry of the lease is impossible. It is a matter of everyday practice that there should be stipulations inserted in leases which shall only be put into effect after the lease is over. Accordingly, if that is so, then the question as to whether this particular clause in this lease is really only prestable before the expiry, or prestable after the expiry, is simply a question of the construction of the particular clause of the lease, and being a question of the construction of the particular clause of the lease it falls within the clause of reference, if the true meaning of the clause of reference is what I have said.

I should only like to say that I am far from saying that this is one of those cases where the Court is reluctantly bound to affirm what it sees is an obviously wrong decision. Upon the question of whether the words "before the expiry" apply to the first branch only or to the whole branches of that sentence I am bound to say that I think the arbiter came to a right conclusion. I do not know that I am quite so certain upon the question of the engine-seats. There may be more in this question of property—because that is upon what it depends—than I know, and at any rate I do not take any further concern with that, because, for the reasons I have stated, it is really immaterial whether the arbiter has decided it rightly or wrongly.

The effect of my opinion is that we should affirm the judgment of the Lord Ordinary. Upon the form of the judgment, as the parties have told us that the small matter which was left over is not worth having a proof upon, I shall be glad to put the judgment in a form which will suit the parties if they would sooner have it in that form rather than in the form of a simple affirmation of the Lord Ordinary's interlocutor. But failing agreement I propose that we should affirm the Lord Ordinary's judgment.

LORD ADAM—I concur.

LORD M'LAREN—I am quite of the same mind. The only question raised before us was the question of the scope of the reference, which, of course, is always a question for the Court, because we could not allow an arbiter to determine finally the limits of his own jurisdiction. He may provisionally do so, but his opinion upon the limits of his own jurisdiction is not final. With regard to the scope of the reference and what questions are included in it, I adhere very firmly to the decision in the case of *Barry Parochial Board*, in which I concurred at the time. I think that the point decided there, or the principle affirmed, was only this, that there is no presumption with respect to reference clauses in leases and contracts that they are executorial, in the restricted sense in which that word has come to be used, but that each lease or contract must be considered by itself, and effect given to the intention of the parties as to the scope and extent of the matters which might be submitted to arbitration. Now, in leases these matters very often include pecuniary questions which may arise either during the lease or at its termination. They include always, I think, questions as to working in terms of the agreement. There must be some one to see whether the tenant is working fairly, and in very many cases questions arise as to restoration and value of the plant at the termination of the lease. It seems to me that the parties here have very clearly expressed their intention that the

reference to Mr M'Creath was to embrace matters arising at the termination of the lease, as well as those disputes which might take place during its currency. Perhaps it was even more necessary to provide for the settlement of disputes at the termination of the lease than of disputes of the other class, because if landlord and tenant are on good terms, and are desiring to work the contract fairly, there may be no questions during the currency of the lease, but there must always be questions to settle at its termination. We are asked, however, to interfere on the ground that the arbiter in deciding this question has had to construe the lease, and it is said that his construction is so clearly wrong that the foundation of his award is taken away by his having proceeded upon a false basis. I can conceive a case where an award may be cut down or set aside on such a ground, but I think that it would be almost necessary to say that the decision was so manifestly and demonstrably unsound that no honest arbiter, properly conducting his case, could have come to that conclusion. Now, it is not suggested that the objection to this award is of the character which I have stated. So far from that being the case as regards the more important question, the opinion of the Lord Ordinary (with which I understand your Lordships are in agreement) is that with nothing but the lease before him he would come to the same conclusion as the arbiter. With regard to the engine seat, which certainly raises a troublesome legal question, I am not prepared, any more than the Lord-Ordinary, to say that the award is wrong, because I think it is quite possible that there may have been evidence before the arbiter that the tenant had taken over this engine seat, and that it had thereby become his property in the sense of the contract. If he took the view that, according to the true meaning of the contract the tenant was to be treated as the proprietor of fixtures which he had paid for, then I cannot say that I should pronounce that decision to be wrong. On the whole matter I agree with your Lordship that, subject to the slight alteration that may be necessary upon the first finding, we should adhere to the Lord-Ordinary's interlocutor.

LORD KINNEAR—I concur.

The Court adhered.

Counsel for the Pursuer and Respondent—The Dean of Faculty (Campbell, K.C.)—Cooper, K.C.—Hunter. Agents—Webster, Will & Co., S.S.C.

Counsel for the Defender and Reclaimer—The Solicitor-General (Clyde, K.C.)—C. D. Murray. Agents—Drummond & Reid, W.S.

Thursday, November 23.

SECOND DIVISION.

[Lord Low, Ordinary.

ROBERTSON AND OTHERS *v.* DUKE OF ATHOLL AND OTHERS.

Process—Proof or Jury Trial—Right-of-way.

In an action raised by members of the public against proprietors, for declarator that a right-of-way existed (1) from A to B *via* certain places, (2) also from A to B for the first part *via* the same places but for the latter part *via* certain other places, a portion of this latter part being claimed by alternative routes forming a bifurcation, the defenders argued for a proof in lieu of jury trial on the ground of (1) the complexity of rights-of-way sought to be established, (2) the danger of the jury being misled by the evidence, since part of the right-of-way claimed was an admitted right-of-way, another part was a tolerated route, and traffic from either end to and from a certain well near the right-of-way claimed was likely to be mistaken for through traffic.

Held that there was nothing to take the case out of the settled rule of practice that right-of-way cases should be tried by a jury.

This was an action of declarator of right-of-way, brought by Robert Robertson, boot and shoemaker, Dunkeld, but to which, by interlocutor of 20th June 1905, the Reverend John White Hamilton, United Free Church Minister, Dunkeld, and John Murray, joiner, Dunkeld, were sisted as pursuers (see *ante*, May 5, 1905, 42 S.L.R. 601), against the Duke of Atholl and others. The pursuers sought to have it found and declared that there existed a public road or right-of-way for passage on foot and horseback, and also for driving cattle and sheep, (1) between Dunkeld and Kirkmichael *via* Santa Crux Well and certain named places, the route claimed being further identified by reference to certain points marked on a map produced with the summons, (2) between Dunkeld and Kirkmichael, also *via* Santa Crux Well as in (1), but thence *via* certain other named places also under reference to points marked in the said map. A portion of (2) was claimed by alternative routes. There was also an alternative conclusion for declarator that a public right-of-way existed between Dunkeld and Santa Crux Well which was not contended for in the Inner House, the pursuers there assenting to the defenders being assoilzied from it.

Defences were lodged for the Duke of Atholl, Charles Edward Stuart Chambers of Cardney, Frank Balfour of Kindrogan, and the trustees of the late Charles Trotter of Woodhill.

On 20th June 1905 the Lord Ordinary (Low) appointed the pursuers to lodge the issue or issues which they proposed for the trial of the cause.