tion if the complaint had only averred that Nellie Mitchell was defrauded. But the complaint was amended by allowing the prosecutor to insert the name of Messrs Kennedy, the employers, and I think he was entitled to this latitude, because the fraud charged is one and the same whether the loss falls on the employer or the employee. My opinion is that the suspension should be refused.

LORD PEARSON—I agree that this bill of suspension must be refused. The first objection stated to the complaint is that it merely bears that the accused pretended to the shop assistant that her employers paid yearly for an advertisement, without any qualifying words to the effect that the pretence was false and fraudulent. I think this objection is completely met by a reference to the group of sections in the Criminal Procedure Act 1887, and particularly section 8, which have for their object the simplifying and shortening of indictments and criminal complaints; and the experience of the working of the Act for upwards of twenty years has, I think, shown that the extended application of those sections which was approved in the case of *Swan* (2 White 137) leads to no difficulty or risk of miscarriage.

There seems at first sight to be more substance in the second objection. It is founded on the examination by the complainer of several witnesses to prove (as I understand it) attempts by the accused, made on or about the date of the offence charged, to induce the employees of other tradesmen to pay money on similar pretences. I think, however, this is one of a class of cases in which guilty knowledge may be proved by such evidence, so as to exclude the defence that the act complained of was a mere mistake.

Then it is said that the conviction is ambiguous, because it affirms that the accused defrauded both the shop assistant and her master of the sum libelled. I think this is too narrow a construction of the words used. In fact it may in one sense be quite accurately said that both were defrauded. But the words are, in my view, not of the essence of the charge at all; and the accused has not been in any way prejudiced or embarrassed by their presence.

LORD M'LAREN stated that the LORD JUSTICE-GENERAL, who was absent at the advising, concurred in his opinion.

The Court refused the bill of suspension.

Counsel for the Complainer — Crabb Watt, K.C. — Kemp. Agent — James D. Turnbull, S.S.C.

Counsel for the Respondent — Hunter, K.C.—J. Jamieson. Agents—Fife, Ireland, & Company, S.S.C.

COURT OF SESSION.

Friday, March 19.

FIRST DIVISION.

[Lord Mackenzie, Ordinary.

JOHANNESBURG MUNICIPAL COUNCIL *v.* D. STEWART & COMPANY (1902), LIMITED, AND OTHERS.

Contract — Jurisdiction — Foreign — Arbitration—Process—Contract to be Implemented in South Africa containing Clauses Declaring (1) *that it should be Deemed an English Contract, and* (2) *that the Arbitrations therein Provided for should be Conducted in Accordance with the Arbitration England Act* 1889 *and the Transvaal Arbitration Ordinance of* 1904 *respectively—Law Governing—Mode of Ascertainment.*

A contract between a municipal council in South Africa and a firm of contractors in Scotland, to be implemented by the latter in South Africa, contained this clause — "This contract shall be deemed for all purposes an English contract enforceable in and subject to the jurisdiction of the English Courts." The contract also contained an arbitration clause in these terms—"In case any dispute or difference shall arise between the purchasers and the contractors . . . it shall . . . be referred to the arbitration of a single arbiter . . . to be mutually agreed upon between the parties, or failing agreement, to be nominated by the President for the time being of the Institute of Civil Engineers of London, or in the case of disputes arising with local contractors in Johannesburg, to be nominated by the Lieutenant-Governor of the Transvaal. The decision of such arbiter or umpire . . . shall be final . . . and the arbitration shall be an arbitration within the meaning of the Arbitration Act of 1889 (England), and shall be conducted in all respects as therein provided, and this clause shall stand for the submission as agreed between the parties thereto in the event of such arbitration becoming necessary." A supplementary contract contained an arbitration clause providing for the appointment of an arbiter, and declaring that the arbitration should be deemed an arbitration within the meaning of the Transvaal Arbitration Ordinance of 1904, and should be conducted in all respects as therein provided.

Held (1), *following Hamlyn & Company* v. *Talisker Distillery*, May 10, 1894, 21 R. (H.L.) 21, 31 S.L.R. 143, that while effect could be given to the contract in the Scottish Courts, the construction, validity, and scope of the arbitration clauses fell to be determined by the law of England; and (2) that inasmuch as parties had avowed the intention of appealing to the House

of Lords as to the validity and scope of these clauses, the more convenient mode for ascertaining the law of England thereon was by a stated case for the opinion of the Court there.

Contract—Rescission before Completion—Repudiation and Acceptance—Breach—Damages—Applicability of Arbitration Clause to Claims of Parties.

A contracted to supply plant to B, but being unable to complete the contract, wrote intimating the fact to B, and stating that the letter was not to be taken as an admission of breach. B replied that he would hold the contract at an end and claim damages. B having brought an action of damages and being met by the arbitration clause in the contract, maintained that the contract had been terminated by A's letter which he (B) had agreed to, that his action was not an action for breach of the contract but for reparation or for breach of the conditions on which the contract had been terminated, and that the contract being no longer in existence the defender was not entitled to found on the arbitration clause.

Held that B's action was an action of damages for breach of the contract, and that the contract still subsisted as the measure of such damages.

Process—Contract—Cautioner—Beneficium ordinis — Action of Damages against Principal and Cautioner for Breach of Contract — Competency — Arrestments — Recal.

A firm of contractors agreed to supply certain plant to M. A and B guaranteed the firm's fulfilment of the contract, and signed a bond to that effect in English form.

In an action of declarator and damages by M against the contractors and guarantors on averments that the contract had not been fulfilled, *held* that as A and B were not bound as principals but as sureties, they could not be sued until the principal debtor had been first discussed; that the action so far as against them was accordingly premature and must be dismissed, together with the arrestments which had been used upon it.

On 15th September 1908 the Municipal Council of Johannesburg brought an action against D. Stewart & Company (1902), Limited, London Road Iron Works, Glasgow; William Beardmore, steel manufacturer, Flichity, Inverness-shire; and Mrs Beardmore, Moreton Lodge, Eye, Herts, widow of the late Joseph Beardmore, shipbuilder, Moreton Lodge, aforesaid, as his executrix.

The following *narrative* is taken from the opinion of the Lord President—"This is an action by the Municipal Council of Johannesburg against a firm of Scottish contractors, and also against another gentleman and the representatives of a deceased gentleman who were guarantors under a contract shortly to be mentioned. The Municipal Council of Johannesburg wished to instal a system of electric power and electric lighting, and in order to do so they issued proposals for a contract for the necessary machinery for supplying the power. There were alternative proposals as to the method in which the power was to be supplied, one method being that it should be supplied with a gas generating plant, and the other that it should be supplied with a steam generating plant. Along with each of these there were also gas engines in the one case and steam engines in the other; and then appropriate for either there was the electric generating machinery that was necessary. The end of it was that a contract was entered into between the pursuers and the defenders Messrs Stewart & Company, Limited, Glasgow. The terms generally of the contract I need not advert to. The contract had detailed specifications of great length and particularity, and described with great detail the various classes of machinery to be supplied, and also with great detail and precision the precise tests which the various portions of the machinery were to undergo and pass before they were accepted.

"The contract was partially implemented. The machinery was set up and was put in operation, but the tests which were demanded of the machinery were admittedly never passed. At the end of what I may call the first unsatisfactory period the parties came together and, realising that something had to be done, they entered into another contract which has been called 'The Running Contract.' This contract was not destructive but was supplementary of the original contract. The original contract, of course, had in view that the machinery, when made, and having passed its test, should be handed over to the Municipal Council, and that thereafter the Municipal Council should run the works. The Running Contract contemplated that inasmuch as the machinery had not passed its test and that therefore the Municipal Council were not in a position to accept it, the contractors should for a certain period run the works. It did not only do that, but it also provided for the supply of certain additional machinery which had been shown to be necessary. Of almost even date to it there was concluded another contract which is known by the name of 'The Supplementary Contract,' and which dealt principally, if not entirely, with the subject of the tests, and altered the conditions which had originally been laid down about them and provided new ones. Into the details of that it is not necessary I should go.

"What happened was that after a certain time of running under the Running Contract the defenders found that they could not or would not—I do not say which—go on. There was a meeting between the parties, and then upon 15th May 1907 the defenders, by the hand of their director Mr Bell, wrote this letter to the pursuers—'Sir, I regret to confirm that my company cannot continue the tram and lighting service

under the main, running, and supplementary contracts, and that the works will be stopped at six p.m. to-day. This letter must not be taken as an admission of a breach of contract on the part of my company, which reserves any rights it may possess.' That letter was acknowledged on the same day by the Town Clerk as follows:—'With reference to your letter of to-day's date stating that your company cannot continue the tram and lighting service under the main, running, and supplementary contracts, and that the works will be stopped at six p.m. to-day, I beg to inform you that I, on behalf of the Council, accept this intimation as a confirmation of the statements and admissions made by you at the meeting between certain councillors and yourself and Messrs Ross & Grimmer, in my office at ten a.m. to-day, to the effect that your company does not intend to go on with any work under the main contract, running contract, or supplementary contract after six p.m. to-day, *i.e.*, that the contractors throw up the main contract, the running contract, and the supplementary contract, and that they will not continue the work of placing the machinery into order for the tests.'

"Shortly after that, upon 21st May, a further letter was written by a firm of lawyers on behalf of the Council, as follows:—'We are instructed by the Municipal Council of Johannesburg to give you notice, as we hereby do, that in consequence of your principals having committed a material breach of the contract between them and our clients, dated 19th November 1906, and known as the "Running Contract," in having entirely stopped working thereunder' (which of course, I need scarcely say, had happened) 'our clients, in terms of clause 28 (a) of that contract, terminate the same, and claim damages from your principals in respect of the said breach on their part.' And then they go on to say that they cannot state the figure of damages, but that it will be afterwards made up. They supplement that afterwards by a letter in July in which, referring to that letter, they do assess the damages claimed under that head at £62,500. Then in a letter of the same date they wrote to the contractors and said—'We hereby give you notice that all the plant supplied by your company to the Council under the main contract of 25th May 1905 has in every respect proved unsatisfactory, and that the Council, in exercise of its rights under the said contract, as modified by the running contract . . . and the supplementary contract . . . hereby rejects all the said plant, and calls upon your company forthwith to repay the part of the purchase money already paid, amounting to £143,095, 9s. 7d., and to remove the said plant. The Council hereby tenders the said plant, which is now at the Council's generating station, for removal, against payment of the abovementioned sum. By reason of the failure of your company to fulfil the main contract, modified as aforesaid, the Council has further suffered damage amounting to £155,000,' payment of which is demanded.

"Accordingly, the present action is raised by the Municipal Council against the contractors (I shall deal with the position of the guarantors afterwards), and concludes for three separate sums—first, £143,000 odds, which is simply repayment of the instalments which had been paid; second, £206,000, which is for damages under the main contract; and third, £69,000, which is for damages under the supplementary contract."

The Main Contract, *inter alia*, contained this provision—"11. This contract shall be deemed for all purposes an English contract, enforceable in and subject to the jurisdiction of the English Courts."

General Condition 23 of the Main Contract was—"In case any dispute or difference shall arise between the purchasers and the contractors, the same shall in the first instance be referred to the engineers, but if either the purchasers or the manufacturers refuse to accept the engineers' decision of the matter in dispute, it shall, after the complete delivery of the material, be referred to the arbitration of a single arbiter or umpire to be mutually agreed upon between the parties, or, failing agreement, to be nominated by the President for the time being of the Institution of Civil Engineers of London, or in the case of disputes arising with local contractors in Johannesburg, to be nominated by the Lieutenant-Governor of the Transvaal. The decision of such arbiter or umpire on the matter referred, including the cost of the reference, shall be final and binding on both parties, and the arbitration shall be an arbitration within the meaning of the Arbitration Act of 1889 (England), and shall be conducted in all respects as therein provided, and this clause shall stand for the submission as agreed between the parties thereto in the event of such arbitration becoming necessary."

The Running Contract provided—Art. 38—"In the event of any dispute between the contractors and the Council under this contract, the matter shall in the first case be referred to the engineers; but if either party refuses to accept the engineers' decision, the matter in dispute shall be referred to a single arbiter or umpire to be mutually agreed upon, or, failing agreement, to be nominated by the Lieutenant-Governor of the Transvaal, and to hold the said arbitration in Johannesburg. The decision of such umpire on the matter referred to him, including the cost of such reference, shall be final and binding on both parties, and the arbitration shall be deemed to be an arbitration within the meaning of the Transvaal Arbitration Ordinance of 1904 (One thousand nine hundred and four), and shall be conducted in all respects as therein provided."

The defenders, *inter alia*, pleaded—"1. The action should be dismissed in respect that the Scottish Courts have no jurisdiction to entertain the same, because (1) the whole parties have agreed that the contract founded on should be deemed an English contract, enforceable in and subject to the

jurisdiction of the English Courts; (2) according to English law, the questions in dispute between the parties as to the execution of the contract fall to be determined by arbitration, conform to English law and procedure, in terms of the said contract; and (3) the liabilities of the individual defenders upon the bond are ancillary to the contract and fall to be ascertained under English law. 2. *Forum non conveniens*. . . . 4. *Esto* that the present action is to proceed, the matters in dispute between the pursuers and the defending company fall to be determined by arbitration in terms of the contract founded on, and the action should be sisted to await the arbiter's decision."

On 30th January 1909 the Lord Ordinary (MACKENZIE), pronounced this interlocutor —"Repels the first and second pleas-in-law for the defenders: Finds that the arbitration clause founded on by the defenders falls to be construed by the law of England, and before further answer sists procedure *hoc statu* in order that the parties may carry through arbitration proceedings in England if on a true construction of said clause it is valid and covers the dispute in question: Sists the action in so far as directed against the defender William Beardmore."

Opinion.—". . . [*After narrating nature and origin of action*]. . . . The pursuers meet the defenders' first plea with the argument that their case is not one of damages for breach of contract, but one for reparation. Their claim, they say, is founded upon a renunciation by D. Stewart & Company of the whole contract, adopted by the pursuers with the effect that the contract is at an end except for the purpose of bringing an action for the damage consequent upon the renunciation. Therefore clause 11, quoted above, they maintain, cannot be founded on by the defenders, who are liable to be sued in the courts of their domicile. The arbitration clause, clause 23, of the general conditions, which provides for an arbitration under the English Arbitration Act of 1889, goes also, according to the pursuers' contention. The argument was supported by a reference to such cases as *Mersey Steel and Iron Company* v. *Naylor*, 9 Q.B.D., 648, 9 A.C. 434, and *Llanelly Railway and Dock Company* v. *London and North Western Railway*, L.R. 8 Ch. App. 942, James, L.J., at p. 948.

. . . .

"In both the case of the main and the running contract I consider the pursuers' case is one of damages for breach of contract. The provisions of the contract must therefore be looked at to see what the rights of the parties are.

"The defenders are therefore entitled to found on clause 11 of the main contract, quoted above. After giving all due attention to the argument submitted by the defenders, I am unable to hold that the jurisdiction of the courts in Scotland is excluded by its terms. The fact that the contract is to be deemed for all purposes an English contract is not sufficient, as the Court here can always ascertain, if and when necessary, any specialty which emerges in the construction of the contract, which depends on English law. Nor do the words 'enforceable in and subject to the jurisdiction of the English courts,' have the effect contended for. It is not said that the contract shall be enforced in the English courts; the word 'enforceable' means 'may be enforced.' Nor is it said that it is the English courts only that are to have jurisdiction, in which case a question would have arisen as to what effect should be given to such a stipulation. Upon a construction of the clause I hold there is nothing to prevent the pursuers suing the contractors, and also the surety William Beardmore, in the Scotch courts, the courts of their domicile. I do not overlook the specialty which was urged in the case of the surety, that his designation in the bond is given as of 36 Victoria Street, London, but that does not make a difference.

"The first plea-in-law for the defenders will accordingly be repelled.

"The defenders next maintained their second plea—*forum non conveniens*. In order that this plea may be sustained the Court must be satisfied that there is some other tribunal, having competent jurisdiction, in which the case may be tried more suitably for the interests of all parties and for the ends of justice—*Clements* v. *Macaulay*, 4 Macph. 593; *Sim* v. *Robinson*, 19 R. 665. The argument was to the effect that there was here a clause of arbitration covering the disputes between the parties; that the arbitration was plainly to be in accordance with English law; and that the Scotch Court would have nothing to do but to give effect to the award in an English arbitration after it had been pronounced. Assume, in the meantime, that the defenders are right in regard to the arbitration clause. I know of no case in which the plea of *forum non conveniens* has been successfully advanced by a defender who was sued in the court of his own domicile. The case of *Williamson* v. *North-Eastern Railway*, 11 R. 596, was quite different from the present. The same remark applies to *Atkinson & Wood* v. *Mackintosh*, 7 F. 598. If the argument were sound it might equally well have been advanced in the cases of *Hamlyn & Company* v. *Talisker Distillery Company*, 21 R. (H.L.) 21, and *Robertson* v. *Brandes, Schonwald & Company*, 8 F. 815. It was pointed out by counsel for the defenders here that the plea was not taken in those cases. I think, however, that the reasoning in the opinions in these cases indicate that the plea would have been repelled had it been taken. As Lord Watson pointed out in the case of *Hamlyn & Company*, the jurisdiction of the Court is not wholly ousted by a contract to submit the matter in dispute to arbitration. It deprives the Court of jurisdiction to inquire into and decide the merits of the case, while it leaves the Court free to entertain the suit and to pronounce a decree in conformity with the award of

the arbiter. In the event of any lapse of the reference it would be for the Court of Session to dispose of the merits of the case.

"I am of opinion that the plea of *forum non conveniens* should be repelled.

"The next question is whether the case should be sisted in order that parties may have their disputes settled by arbitration in the manner provided by the contract.

"Upon this I consider the cases of *Hamlyn & Company* and *Robertson* to be direct authorities. In *Hamlyn's* case it was held that the arbitration clause there was to be construed and governed by the law of England, as its terms showed that that was the intention of the parties; that by the law of England it was valid; and that there was no principle of public policy to prevent the Courts of Scotland from giving it effect. The case of *Robertson* followed that of *Hamlyn*. There the interlocutor pronounced was in these terms—'Find that the arbitration clause falls to be construed by the law of England, and before further answer, sist procedure *hoc statu* in order that the parties may carry through arbitration proceedings in England if on a true construction of said clause it is valid and covers the dispute in question.'

"The only question, therefore, I have to determine at present is whether the clause of reference contained in clause 23 of the general conditions of the main contract means that the questions which it governs are to be determined in an arbitration, the seat of which is to be in England, according to the usual methods in which arbitrations are there conducted. If so, then the parties should go to the High Court at once, when the question may be determined authoritatively. It was argued that I should now decide, in accordance with the Scotch decision, whether the arbitration clause covered the matters in dispute, or whether it is merely executional. In this connection clause 26 of the running contract was founded on. The only question for determination in England, according to the pursuers' argument, is whether the arbitration is valid according to the law of England. They maintain that the Court here must first decide whether the dispute falls within the arbitration clause or not. The interlocutor, however, in *Robertson's* case expressly bears that the parties are to carry through arbitration proceedings in England if on a true construction of the clause it is valid, and also if it 'covers the dispute in question.' On the authority of this case I am of opinion that this point must be settled in the arbitration proceedings. It is as evident in the present case as it was in *Hamlyn* that it was the intention of parties that the arbitration should be English.

"The difficulty I have upon this branch of the case arises from the fact that there is no reference in the pleadings to the arbitration clause (clause 38) in the running contract. [*The defenders met this objection by amendment in the Inner House to the effect of pleading the arbitration clause contained in the running contract.*] This seems to point to an arbitration in the Transvaal as regards the disputes under the running contract. The Dean of Faculty contended that this applied only to disputes with local contractors of the nature expressly provided for by clause 23 of the main contract. I should have great doubt as regards this if I were called on to decide the point, but the contractors are entitled to maintain their argument when proceedings are taken to start an arbitration in England.

"The interlocutor, therefore, should, in my opinion, be in the same terms as the one pronounced in *Robertson's* case.

"As regards the conclusion against William Beardmore, I am of opinion that his liability, being that of a surety, will only emerge after it has been ascertained that there has been a failure on the part of the contractors to fulfil their contracts. This conclusion cannot be dealt with at present. A complaint was made that the sole purpose of bringing these proceedings in Scotland was to get the benefit of arrestment and inhibition against William Beardmore's estate. I do not think, however, the action, so far as directed against him, can be dismissed. It will be sisted."

The pursuers reclaimed.

The summons in the action contained warrant to arrest, and on 16th September 1908 the pursuers used arrestments against the defender William Beardmore in the hands of the National Bank of Scotland and others. A petition for their recal was presented on 3rd March 1909. The petition was heard and disposed of at the same time as the reclaiming note.

Argued for reclaimers—The respondents could not found on the arbitration clauses in the contracts, for the contract as a whole had been rescinded, including the arbitration clauses—*Turnbull* v. *M'Lean & Company*, March 5, 1874, 1 R. 730, 11 S.L.R. 319; *Freeth* v. *Burr*, (1874) L.R., 9 C.P. 208; *Mersey Steel and Iron Company* v. *Naylor, Benzon, & Company*, (1884) L.R., 9 A.C. 434; *Lodder* v. *Slewey*, [1904] A.C. 442; *Bottoms* v. *Mayor of York*, (1892) reported in Hudson on Building Contracts, ii, p. 220; *Hochster* v. *De La Tour*, (1853) 2 E. & B. 678; *Pickering* v. *Cape Town Railway Company*, (1865) L.R., 1 Eq. 84; Leake on Contracts (5th ed.) 39; *Llanelly Railway and Dock Company* v. *London and North-Western Railway Company*, (1873) L.R., 8 Ch. App. 942. Neither the case of *Hamlyn & Company* v. *Talisker Distillery*, May 10, 1894, 21 R. (H.L.) 21, 31 S.L.R. 143, nor that of *Robertson* v. *Brandes, Schönwald, & Company*, May 23, 1906, 8 F. 815, 43 S.L.R. 635, was in point, for in neither of these cases was the contract at an end. The respondents were not entitled to found on an arbitration clause which by their own actings they had rendered non-existent. There was no arbitration clause applicable to all three contracts, for while the clause in the main contract said that disputes were to be settled by English law, that in the remaining contract said disputes under it were to be settled by the law of the Trans

vaal, and in the supplementary contract there was no arbitration clause at all. Accordingly, *ex necessitate rei*, the matters in dispute fell to be disposed of here. In any event, the arbitration clauses were merely executorial and did not cover the questions in dispute—*Electric Construction Company* v. *Hurry & Young*, January 14, 1897, 24 R. 312, 34 S.L.R. 295; *Savile Street Foundry Company* v. *Rothesay Tramways Company*, March 20, 1883, 10 R. 821, 20 S.L.R. 562; *Tough* v. *Dumbarton Waterworks Commissioners*, December 20, 1872, 11 Macph. 236, 10 S.L.R. 160. It was for the Court to determine the scope of the clauses—*Griffith's Judicial Factor* v. *Griffith's Executors*, January 31, 1905, 7 F. 470, 42 S.L.R. 361. The pursuers were entitled to proceed against the respondents Beardmore as sureties. The bond was an English bond, and by English law a surety, after default by the principal, could be proceeded against without first discussing the principal—De Colyar on Guarantees, 3rd ed. 211; *Ex parte Young*, (1881) L.R., 17 Ch.Div. 668.

Argued for respondents—The Lord Ordinary was right. This was an ordinary claim of damages for breach of contract. It was not a claim for reparation as distinct from a claim of damages, for the action was laid on the contract itself. The contract therefore was not at an end, but subsisted for the ascertainment of damages—Leake on Contracts, 618-19; *Johnstone* v. *Milling*, (1886) L.R., 16 Q.B.D. 460. The arbitration clauses covered the whole dispute, and the action should therefore be sisted to await arbitration, in the one case in England, and in the other in the Transvaal—*Hamlyn* (*cit. supra*); *Robertson* (*cit. supra*). That was the natural inference from the language of the clauses, for they expressly provided for that course being followed. The scope of the clauses was for the arbiters to decide—*M'Cosh* v. *Moore*, October 27, 1905, 8 F. 31, 43 S.L.R. 167; *Muir* v. *Muir*, January 9, 1906, 8 F. 365, 43 S.L.R. 240; *Levy & Company* v. *Thomsons*, July 10, 1883, 10 R. 1134, 20 S.L.R. 753. The respondents Beardmore were only liable as sureties, *i.e.*, they could only be sued if the contract had been broken, if damages were due, and if the principal debtor failed to pay, so that there was a long interval between this application and their liability. They were entitled, therefore, to have the action against them dismissed—Bell's Prins. secs. 252-3; Ersk. Inst. iii, 3, 61. The case of cautioners *ad facta præstanda* was not affected by sec. 8 of the Mercantile Law Amendment Act 1856 (19 and 20 Vict. cap. 60), which was limited to the case of cautioners for debt—Ersk. Inst. iii. 3, 62 (note). Further, the respondent Mrs Beardmore was not executrix at the time the arrestments to found jurisdiction were used. That fact was admitted, and therefore the action, so far as against her, fell to be dismissed. The respondent W. Beardmore was entitled to have the arrestments used against him recalled, for the action was premature and he might never be called on to pay. In these circumstances the *nexus* placed on his funds ought to be removed.

At advising—

LORD PRESIDENT—[*After narrative quoted supra*]—Now, the main contract *ab initio* contained this clause:—Article 11—"This contract shall be deemed for all purposes an English contract, enforceable in and subject to the jurisdiction of the English Courts." The first, and in its order the most prejudicial plea which the defenders table here, is that plea in which they state that the action is excluded upon the ground that by the contract the jurisdiction of the Scottish Courts is excluded. The Lord Ordinary repelled that plea, and he also repelled the plea of *forum non conveniens*. Before your Lordships his Lordship's judgment upon that matter was not attacked by the defenders, and accordingly I take it that we must hold these two pleas as rightly repelled. I have no doubt that they were rightly repelled, but at any rate I say this emphatically, in case the case goes further, that no argument was addressed to us against the Lord Ordinary's repelling of these pleas.

But then the defenders further proceeded to argue that the effect of that clause, taken with the way in which certain arbitration clauses, which I now call your Lordships' attention to, were expressed, shows conclusively that the construction of the contract, and in particular the construction of the arbitration clauses in the contract, is by the contract to be determined according to the law of England.

The arbitration clauses to which I have to refer are these. The first is the 23rd of the general conditions in the main contract, and it says this ". . . (*reads supra*) . . ."

And in the running contract clause 38 says—". . . (*reads supra*) . . ."

Accordingly the defenders plead *in limine* that these arbitration clauses cover the whole matters in dispute, and although they do not now dispute the jurisdiction of this Court, they say that the action falls to be sisted in order that the matters in dispute may be determined by the tribunal which the two parties contracting have agreed shall be the tribunal to determine these matters—namely, arbitration, in the one case an English arbitration for damages under the main contract, and in the other an arbitration in the Transvaal. The first answer which is made on the pursuers' part is this. They say that inasmuch as one arbitration is in England and another is in the Transvaal, and inasmuch as in the third contract—namely, the supplementary contract—there is no arbitration clause at all, you cannot really work out the dispute in any one tribunal, and therefore the matters on which the dispute turns being inextricable, you must take it where you find it in a court of admitted jurisdiction. If the matters had been inextricably mixed up, I would have thought that view a very formidable one, and at first I was inclined to favour it; but when I came to look attentively at the summons and at the condescendence by

which the summons is supported, it seems to me that the pursuers have triumphantly destroyed their own plea, because they have been most minute in saying that they know perfectly what, according to them, their damage is and to what contract it is referable. Two sums are due in respect of the main contract—namely, repetition of the instalments paid for the material supplied, which is practically worthless, and which is offered back to those that gave it, and damages for loss under the main contract for breach of contract; the second sum of damages being equally referable to the running contract—and the running contract alone—and in respect of the supplementary contract, nothing at all. Therefore it seems to me that the pursuers themselves have kindly furnished me with most minute reasons for disposing adversely of their own plea.

The next point the pursuers take is this. They plead that these arbitration clauses are invalid and do not cover the dispute in the contract; and in ordinary cases I think it would be absolutely necessary that we should give judgment upon that plea. But before we can consider whether we should give judgment upon that we must consider whether we are a tribunal who, by the contract between the parties, are the proper persons to decide the matter. Now it seems to me that by the general clause which I read at the beginning—"that this contract shall be deemed for all purposes an English contract"—and by the scheme of clauses which comes afterwards it is quite evident that the pursuers contracted that this contract should be interpreted according to the law of England. In other words, I think we are precisely in the same case—only, really, this is rather clearer—as the case of *Hamlyn*, which was decided by the House of Lords, and is reported in 21 R. (H.L.) p. 21. The Lord Chancellor in that case (at p. 23) says—"In the present case it appears to me that the language of the arbitration clause indicates very clearly that the parties intended that the rights under the clause should be determined according to the law of England." I think the case here is still clearer, because, not only have you the language of the arbitration clause itself, but you have the language of this initial clause which precedes all the clauses of the contract, and, *inter alia*, the arbitration clause which I have already quoted. Therefore it seems to me we do not have here to do what we should have to do in the ordinary case—determine the scope of the arbitration clause—because by the contract between the parties it has been determined that the scope of the arbitration clause shall be determined according to the law of England.

I wish to say something more about this. I am not for a moment going back upon what has often been said in this Court, that where the whole question is one of the interpretation of the English language in an English contract, and no matter peculiar to the law of England enters into it, we are entitled to interpret that language, which we are supposed to know equally well with the English judges. I can quite conceive a contract with an initial clause of this sort where still it would be our duty to construe the clause. But here it seems to me the matter of English law does come in, because whether the clause covers the dispute or not does not altogether depend on the question of construction, it also depends upon what may be called the rules of the *forum*—although in using the word *forum* I am taking, not a *forum* in the strict sense of a Court, but the *forum* chosen by the parties—namely, an arbitration court. Your Lordships know enough of the law of England to know that in many respects there are great differences as to what can be done in an arbitration in England and what can be done here. In particular, it is said that in England an arbiter can assess damages under a clause conceived in general terms. Most indubitably in Scotland an arbiter cannot, unless he has been given the right to do so in so many words. You can expressly contract that an arbiter can do that just as you can contract about anything else; but under a general clause covering disputes an arbiter in Scotland cannot give damages. Now it is said that in England he can, and, of course, it is not for me to pronounce an opinion whether that is right or not. But the question of what is covered by a certain arbitration clause does not depend upon the mere construction of the English language; it also depends upon what, according to English law, an arbitration can or can not contain. It seems to me that we cannot proceed to determine the matter of what this arbitration clause covers or what it contains, because by the contract the parties have asked the intervention of the English Court.

That is the view the Lord Ordinary has taken, and I think in his view the Lord Ordinary is entirely right. The Lord Ordinary has taken a method of procedure which, although I think perfectly right, is not in the present case the most convenient. He followed the case of *Robertson*, 1906, 8 F. 815, which came after the case of *Hamlyn*. It was pointed out in *Robertson's* case that either of two courses was possible. The action might either be sisted in order to allow the parties to follow forth the arbitration in England, in which arbitration no doubt they could get the question of the validity and scope of the clause perfectly well determined by applying to the Court; or else we could first of all find out what the English law was in the ordinary way by a Stated Case to the Court. We have been told quite frankly that the parties wish to go further; and it seems to me that the latter course indicated would very much assist the procedure in the case if after we pronounce an interlocutor to that effect it is taken to the House of Lords. The Stated Case would consist of either an incorporation by way of reference of the pleadings in the case, or else a restatement in other words of the dispute between the parties, and then the English Court, there being a dispute, would be asked to say whether this dispute is or is not covered by the arbitration clause, and

whether the arbitration clause is a valid one. If that is done, and the case goes to the House of Lords, the House of Lords may or may not take up the question at once and settle whether the arbitration clause is valid or not. They did in *Hamlyn's* case, there having been no determination by a lower court whether the arbitration clause was valid by the law of England. But the House of Lords know the law of England, and they are entitled to say if they choose—"We say at once that this clause is valid and covers the dispute, or is invalid and does not," as the case may be. On the other hand they may, if they choose, say—"We are, after all, the supreme appeal tribunal, and if we think the question difficult of solution we are not going to determine it until we have got the judgment of the English Court of Appeal." That is entirely for the House of Lords. Therefore I think what I propose puts the case in a more convenient form for ultimate determination than if we sent the parties to arbitration, where the first thing the pursuers, who started the arbitration, would have to do would be to plead that it was not a valid arbitration. What I propose to your Lordships to do is to recal the Lord Ordinary's interlocutor, merely in form, and to find that there should be a case stated for the determination of the English Court to say whether the arbitration clause in question is valid and covers the question in dispute.

There was one other argument which, logically, I should have taken up sooner, but which I take up now. The pursuer had this argument. He said:—My case is really not under the contract at all, and therefore no arbitration clause in the contract can properly conclude it. Before the Lord Ordinary he seems to have phrased it, as I notice from the Lord Ordinary's opinion, as a claim not for damages for breach of contract but for reparation. I confess that seems to me a gross inaccuracy of term. In Scots law there is reparation for a delict—a form of wrong which, *ex hypothesi*, does not depend upon contract at all, but is a breach of some general duty which you have to everybody or to certain classes of people, and which has been contravened. You have only got to state that to see how peculiarly inappropriate the word was. But when the argument came up before your Lordships, the argument which Mr Morison stated was that here, by the letter that I have read, the contract had been terminated, and that the action therefore was not for breach of contract but was for breach of the terms on which the contract was terminated. I think that is ingenious, but extraordinarily fallacious. I think it is a fallacy which is based upon the word "termination," sometimes called rescission. When two parties are bound together under contract, of course each must perform to the other his mutual stipulations. If one of the parties is in breach of a stipulation of the contract, what is the position of the other? There has been a great deal of authority, and we had a case from Glasgow the other day which dealt with it—(*Wade* v. *Waldon, et e contra*, 46 S.L.R. 359). If the stipulation which is broken goes to the root and essence of the contract, the other party is entitled to say—Now you have so broken the contract that I am entitled to say that it is at an end through your fault; I shall not perform any more of my stipulations because you have precluded me, and I shall claim damages. On the other hand, if the stipulation which is broken does not go to the root and essence of the contract, then the other party cannot take that position, but he must go on with the contract and do what he is bound to do under it; he may claim damages for the breach of the portion which has been broken.

Here it is perfectly clear that the breach was of the first class. Nobody can say that the breach was not of the essence of the contract, for as a matter of fact according to the allegation, the defenders (Stewart & Company) did not supply proper plant at all, threw up the whole contract, and allowed the town to go into darkness and the tramways to stop. If that is the fact, the letter which was written by the Municipal Council was a perfectly proper one to say—We see you cannot go on; you have so utterly broken the contract that we hold it at an end, and we will claim damages for breach. That does not mean that the contract is gone for ever; on the contrary, the contract remains and is only the measure of liability for damages. Therefore I think it is absurd to say that this is an action for anything but breach of contract. I could understand a case of this sort—where two parties being bound under a contract, but not much having been done, one party goes to the other and says, Now, though I am bound, I am sorry; so little is done, let me off; and the other party says, I will let you off on such and such terms; and the contract is stopped and nothing more happens. Of course, if the person does not abide by the terms on which he was let off he would be sued, but he would not be sued for breach of the original contract, but for breach of the second bargain. I need scarcely say there is not a trace on this record of the defenders being sued for a breach of the second bargain, because no such bargain was made. The action is one for breach of contract and for that alone, and therefore that argument, I think, entirely fails.

As regards the cautioner Mr Beardmore I say this. The Beardmores were bound under a bond in English form, which binds them to see the contract carried out, and are liable in damages of a certain specified sum if the contract is not properly carried out. Their liabilities were altered by the second or running contract being entered into, but their liabilities were again undertaken and were modified as under the original bond. The scheme of their liabilities was the same as before. Now the pursuer raised his action and he concluded for the sums that I mentioned. He concluded against the company and the two guarantors, and then asked for a declarator as to their having been bound to supply

and deliver to the pursuers the gas producers, gas engines, and others set forth; and that on this being found and declared the defenders Stewart & Company ought to pay the sums mentioned, and the defenders the Beardmores should be decerned to make payment of the sum of £115,134, 6s. 8d., being the sum in the bond. The Lord Ordinary has sisted the action as against the Beardmores, and upon the dependence of the action the pursuers executed an arrestment. There is before your Lordships also a petition for the recal of the arrestments.

I am bound to say I think there is no warrant whatsoever for calling the Beardmores in the principal action along with the defenders Stewart & Company, and concluding *de plano* against them for that sum. They only become liable after the pursuers have failed to recover from the principals the full amount of damage occasioned to them by the non-implement of the contract. The pursuers have got first of all to prove that there has been a breach of contract, and even then, if they recover the full damages from Stewart & Company, they have no need to go against the Beardmores, who are only guarantors. I think the proper interlocutor here is not to sist the action so far as these parties are concerned, but to dismiss it. I think it follows they are entitled to the recal of the arrestments.

I think the defenders ought to get the expenses of the reclaiming-note. If we are wrong on the merits the House of Lords can put us right. But if, on the other hand, our view of the case is right, then of course the defenders have had a substantial success, because the attitude of the pursuers was that there ought to be a proof, which they have not got. As regards the Beardmores, I think they ought to get expenses of lodging their defences and a watching fee for one counsel.

LORD M'LAREN—I am of the same opinion. It is, of course, quite possible that a person who is really a surety may be willing to be bound as principal. We are familiar in banking transactions with such cases, because the banks make it a part of their general policy that both principals and sureties shall be bound to them in the character of principals. But it is perfectly clear on the face of these documents that Messrs Beardmore never undertook the obligations of a principal. They are only responsible in case of the failure of Stewart & Company to execute their contract. It follows, in my judgment, that until that failure is established by a competent process in a court of law or court of arbitration no claim arises against the surety; and the action being premature must, I think, be dismissed together with the arrestments which have been used upon it.

LORD KINNEAR—I concur.

LORD PEARSON—I also concur.

The Court pronounced this interlocutor—

"The Lords having considered the reclaiming note for the pursuers against the interlocutor of Lord Mackenzie, dated 30th January 1909, along with the closed record as amended and the petition for recal of arrestments, and having heard counsel for the parties, Recal said interlocutor: Of new sustain the third plea-in-law for the defenders and dismiss the action in so far as laid against Mrs Beardmore: Further, dismiss the action as against William Beardmore, and recal the arrestments used against him in terms of the prayer of said petition, and decern: Repel the first and second pleas-in-law for the defenders: Find that it is necessary for the proper disposal of the action that it be ascertained whether under the law of England the clauses of arbitration founded on by the defenders cover the dispute between the parties: Therefore direct the parties to prepare a case setting forth the facts relevant to the ascertainment of said question of law for submission to the superior Courts in England under and in terms of the British Law Ascertainment Act 1859, ... and grant leave to the pursuers to appeal to the House of Lords."

Counsel for Pursuers (Reclaimers)—Clyde, K.C.—Morison, K.C.—Mitchell. Agents—P. Morison & Son, S.S.C.

Counsel for Defenders—(Respondents)—Macmillan—Hon. W. Watson. Agents—Davidson & Syme, W.S.

Friday, March 19.

FIRST DIVISION.

[Lord Guthrie, Ordinary.
[Lord Mackenzie, Ordinary.

THE LOCHGELLY IRON AND COAL COMPANY, LIMITED *v.* SINCLAIR.
FINNIE & SON *v.* FULTON.

Master and Servant—Workmen's Compensation Act 1897 (60 *and* 61 *Vict. cap.* 37), *sec.* 1 (3), *First Schedule* (12), *and Second Schedule* (8) *and* (14) (*b*)—*Competency of a Suspension of a Charge in so far as Relating to* (a) *the Period Prior to the Date of the Granting of the Warrant to Record a Memorandum of Agreement;* (b) *the Period Subsequent thereto—Relevancy of Averment of Acquiescence in Discontinuance of Compensation.*

Apart from such special cases as that of a workman admitting actual payment of compensation or the receipt of full wages from the same employer, the Court will not suspend a charge, proceeding upon a recorded memorandum of agreement, so far as relating to the period subsequent to the date of the granting of the warrant to record the memorandum; while, so far as relating to the period prior to the granting of the warrant, it will not suspend *simpliciter*, but as regards that period will allow a