tion-over of the fee. This would appear to make any actuarial calculation impossible.

I think that the Inner House in *Russell's* case (*cit.*) made it clear that equitable compensation cannot be applied in any fixed manner but as may be most reasonable in the circumstances of each case. I suggested at the hearing of the case that the result desired might possibly be best attained by retaining the residue undivided, adding year by year one-half the income derived from the surrender of Hugh Rose to the fund and paying the two remaining quarters of the income to each of Ethel and Hugh Erskine Rose, or applying it for their behoof. Year by year as the principal is being restored the income would be improving, and the interests of the liferenter whose liferent is postponed, as well as of the fiars and of the liferenters in immediate possession, might prove to be as equitably regarded as circumstances admit. I think that where a bequest is surrendered in such circumstances as to involve equitable compensation it is surrendered not to or for the benefit of any individual beneficiary directly but to the uses of the settlement generally. Mathematical accuracy in its distribution or application is impossible. Without committing myself to more than a suggestion for the parties' consideration I am disposed to think that this method would be found to come more near to the implied will of the testator at any rate than any attempted actuarial calculation could in the circumstances of the will attain.

LORD PRESIDENT—I also agree with the views expressed by Lord Johnston in the opinion he has read as to how the case should be disposed of, but I do not feel that I am competent to offer any opinion upon the question of how equitable compensation is to be made.

We shall make a finding as suggested by his Lordship.

LORD MACKENZIE—I do not think there is any difference of opinion regarding the manner in which the question now raised in the case should be dealt with. We have not now before us the question how equitable compensation is to be made, but as at present advised I am unable to see how the interlocutor which we shall pronounce could be given effect to without calling in the assistance of an actuary.

LORD SKERRINGTON—I agree with your Lordships. In the circumstances of this particular will the surrendered benefit must go to give equitable compensation, but as to how that compensation is to be made I offer no opinion.

The Court found the liferent in succession to the second party of one-half of the whole estate of the testator liferented by him did not open to the third party immediately by reason of the second party's claim of legitim, but was dependent on his death and her survivance.

Counsel for the First and Second Parties—The Solicitor-General (Morison, K.C.)—Lippe. Agents—Macpherson & Mackay, S.S.C.

Counsel for the Third Party—A. O. M. Mackenzie, K.C.—Macquisten. Agents—Wallace & Begg, W.S.

Counsel for the Fourth Party—C. H. Brown. Agents—Fyfe, Ireland, & Co., W.S.

Counsel for the Fifth Parties—Wark. Agents—Laing & Motherwell, W.S.

Thursday, June 15.

SECOND DIVISION.

R. & J. SCOTT *v.* GERRARD.

Contract — Arbitration — Applicability of Arbitration Clause to Dispute when Contract has been Declared at an End — Clause.

A building contract which contained a clause "that all disputes and differences whatsoever that may arise between the parties from the date of the subscription of this contract by the parties until the whole work shall be fully completed, the last instalment paid to the contractors, and the work taken off their hands, shall be and are hereby referred to the decision of the said G. W.," *i.e.*, the architect "whose decision shall be final"—conditioned that on the work not being satisfactorily proceeded with "the architect shall be at liberty to declare the contract at an end, and the proprietors shall be at liberty thereupon to proceed with and finish the same at the expense of the contractors, or, at their expense, to contract with other persons to finish the same."

The architect having declared the contract at an end, the contractors having claimed for the work done, and the owners replying that they had been put to greater expense than the value of that work, *held* (1) (*diss.* Lord Salvesen) that the contract was not rescinded in its entirety, the arbitration clause remaining in force, and (2) that the arbitration clause was not merely executorial but covered the question between the parties, and action *sisted.*

Arbitration — Arbiter — Disqualification — Bias.

The contractors under a building contract which had been declared at an end by the architect, sued for the value of the work done, and pleaded that the architect had disqualified himself by his actings from being arbiter under the arbitration clause. They averred — "Throughout the contract the pursuers were constantly hampered by the architect failing to provide them with detailed drawings of the work, and this failure caused much delay to the pursuers. It is believed and averred that in consequence of the pursuers' repeated requests that detailed drawings should be provided more expeditiously, for

certificates for work done, and for permission to remove the scaffolding, the architect conceived an animus against the pursuers. Except in the early stages of the work he invariably acted in a manner hostile to the pursuers, and, in particular, about ten days before he cancelled the contract he called at the pursuers' workshop in connection with certain of the contract work which was being done by the pursuers, and when leaving stated in presence of the pursuers and others that he would 'make it hot' for the pursuers, meaning that he would use his position as architect of the church to their detriment. By all of said conduct and by his rescission of said contracts under the circumstances averred by the pursuers he has disqualified himself from acting as arbiter under said contract of 3rd and 13th August 1910. . . ."

Held that the averments were too vague to be submitted to probation.

Contract—Arbitration—Auxiliary or Independent Contract—Applicability of Arbitration Clause in Main Contract.

The architect for the erection of a church wrote to the firm of carpenters and joiners whose tender had been accepted for a tender for the seating of the church, which work had not been included in the carpenter's and joiner's specification, and accepted their tender. He had also written to other firms. In the correspondence no reference was made to the conditions and regulations of the original contract.

Held that the contract for the seating was an independent contract to which the arbitration clause of the original contract did not apply.

On 13th October 1914 R. & J. Scott, builders, Portobello, *pursuers*, brought against James Gerard and Others, the building committee of St James' Church, Portobello, *defenders*, an action to recover (1) £288, 7s. 9d., and interest, or otherwise £238, 19s. 1d., with interest, and (2) £60 with interest, the sums sued for being as averred due under building contract.

The pursuers *pleaded*—"2. . . . or otherwise, the defenders being *lucrati* by work done and materials supplied by the pursuers to the extent of said sum of £238, 19s. 1d. alternatively sued for, the pursuers are entitled to decree for that sum. . . . 4. The defenders having rescinded said contract, the reference to arbitration is not binding upon the pursuers. 5. In any event, the said architect, having been nominated sole arbiter, and having disqualified himself by his actings from undertaking the duties of arbiter, the reference clause falls and is no longer binding on the pursuers." And the defenders, by amendment in the Inner House—"In respect of the reference to arbitration the action should be sisted."

By the *contract*, dated 3rd and 13th August 1910, the pursuers undertook the carpenter and joiner work of a church the defenders were having erected. It contained this clause—"The whole of the works to be in every respect under the direction of Mr George Watson, architect (referred to in said general conditions and regulations as 'the architect'), and to be executed and completed to his entire satisfaction. It is further contracted and agreed that all disputes and differences whatsoever that may arise between the parties from the date of the subscription of this contract by the parties until the whole work shall be fully completed, the last instalment paid to the contractors, and the work taken off their hands, shall be and are hereby referred to the decision of the said George Watson, whose decision shall be final."

The *general regulations* and conditions of the contract provided—"Should the works from any cause not be proceeded with by the contractors to the satisfaction of the architect, as regards either speed, or mode of erection, or material used, the architect shall be at liberty to declare the contract at an end, and the proprietors shall be at liberty thereupon to proceed with and finish the same at the expense of the contractors, or, at their expense, to contract with other persons to finish the same. . . . The architect shall also have power to order what part of the works is to be proceeded with at each particular time, and in case the works shall from any cause not be duly proceeded with by the contractors the architect shall be at liberty to declare the contract at an end, and to proceed with and finish the same at the expense of the contractors. . . . In the event of any question whatever arising between the proprietors and the contractors in connection with the works, or as to the true intent or meaning or implement of the plans and specifications, or schedules, or of these conditions, or as to the measurements or the execution of the works, or adjustment of accounts, or as to extras or deductions, or otherwise, the same shall be determined and adjusted solely by the architect, as sole arbiter, with power to him to fix and assess damages and decern therefor, and to dispose of questions of expenses, and to issue decrees - arbitral, interim or final, partial or total; and both parties waive all objections competent to them respectively against his appointment as arbiter."

The following *letters* were sent by the architect to the pursuers:—On 15th September 1911 Mr Watson, the architect, wrote to the pursuers asking estimates for the execution of the seating of the area of the church, work not included in the specification of the contract of August, and on 29th November wrote accepting their estimate "to supply and fit up complete the church seating executed in yellow pine according to the details and carried out to my entire satisfaction. . . ." No reference was made to the original contract or its conditions, and it was admitted other contractors had been invited to tender. On 6th April 1912 Mr Watson wrote to the pursuers this letter:—"Messrs R. & J. Scott, Portobello. *New Church, Portobello.* Dear Sirs—I have received your letter of yesterday's date. Your delay with the work is so serious, and your reply to my letters of the 28th ult. and 3rd inst. so unsatisfactory, I am compelled in my

clients' interest to declare the contract at an end now. Another contractor shall be appointed by me to proceed with the work at once, and I shall have it completed at your expense. I regret being under the necessity of having to take this proceeding. Please return all the drawings in connection with the work, which you unwarrantably removed from the buildings. Yours faithfully—GEO. M. WATSON."

The pursuers *averred*—"(Cond. 9) In April 1913 the work executed by the pursuers was measured by the official surveyors Messrs Thos. I. S. Watson & Company, and the value thereof, in terms of the specifications, including extras, variations, and deductions made by the authority of the defenders and their architect, was fixed by them at £508, 19s. 1d., whereof £270 has already been received by the pursuers as above stated, leaving a balance of £238, 19s. 1d., representing actual work done and unpaid for. The remainder of the work to be done by the pursuers under the said contract of 3rd and 13th August 1910 amounted in value to £247, 3s. 7d., whereof the profit which would have accrued to the pursuers would have been at least £49, 8s. 8d. These two sums of £238, 19s. 1d. and £49, 8s. 8d. amount to £288, 7s. 9d., which is the sum first sued for, and represent the damage done to the pursuers by the defenders in consequence of their breach of the first of said contracts. The actual work done by the pursuers and unpaid for by the defenders at the date when the principal contract was wrongously declared at an end as aforesaid amounted in value to £238, 19s. 1d. This work was taken over by the defenders and they have had the benefit thereof. The defenders were therefore *lucrati* to the extent at least of the said sum of £238, 19s. 1d., which is the sum sued for alternatively to the sum first sued for in the summons. . . . (Cond. 10) The contract price for the supply of church seats as aforesaid was £236, and the loss to the pursuers by the refusal of the defenders to proceed with, and their breach of that contract, is at least £60. This is the sum second sued for." [*For bias v. rubric* 2.]

On 10th June 1915 the Lord Ordinary (HUNTER) sustained the first plea-in-law for the defenders and dismissed the action.

Opinion.—"In this action the pursuers, who are a firm of joiners and builders at Portobello, sue four gentlemen as the members of the building committee of St James's Church, Portobello, for payment (first) of the sum of £288, 7s. 9d. in respect of work done under, and loss of profits for wrongful termination of, a contract under which the pursuers were to carry out the carpenter and joiner work in connection with a church being built by the defenders, and (second) £60 as loss of profit arising from the wrongful termination of a separate contract in connection with the supply of seats for the church.

"The formal contract, dated 3rd and 13th August 1910, between the parties stipulated that the defenders were to pay the contract price of the work at such times and by such instalments as should be certified by the architect, according to the provisions of the general conditions and regulations. These regulations contained, *inter alia*, the following provisions—'The money shall be advanced as the works proceed after the rate of eighty per cent. upon the value of the work done and fixed in its place until a reserve fund for security shall have accumulated equal to ten per cent. of the whole amount of the contract; thereafter the instalments will be paid in full upon the value of work done and fixed in its place. Extra work, if any, will be paid for at the same rate or in full as may be thought best by the architect; and if the architect shall think it advisable an amount not exceeding fifty per cent. shall be paid upon the value of materials and workmanship delivered upon the ground for the purpose of carrying on the works; but in any case all materials delivered upon the premises, whether any instalment has been paid upon the same or not, are to be the property of the said first party, and are not to be removed again without the sanction of the architect. The power of withholding any certificate is reserved to the architect in case the contractors fail or decline to implement any of the conditions of the contract, or these general conditions or regulations.'

"The pursuers were bound to execute the carpenter and joiner work in terms of the drawings, specifications, schedules of quantities and general conditions and regulations, the whole of the work to be under the direction of the architect, and to be executed and completed to his entire satisfaction. By the contract it was agreed that 'all disputes . . . (*quotes arbitration clause, supra*) . . . final.'

"The general conditions and regulations contain, *inter alia*, the following provisions —'Should the works . . . (*quotes clause in regulations giving power to terminate, supra*) . . . the expense of the contractors.'

"The reference to arbitration in the general conditions is in the following terms . . . (*quotes arbitration clause in regulations, supra*) . . .

"Disputes are said by the pursuers to have arisen between the parties but to have been amicably adjusted about 12th February 1912. They allege that at that date they applied to the architect for a certificate entitling them to an instalment payment, but they complain that the architect wrongfully withheld the certificate. On 6th April 1912 the architect wrote to the pursuers that he was compelled to declare the contract at an end, and intimating that another contractor would be appointed to proceed with the work and complete it at the pursuers' expense. The pursuers say that the architect was not justified in so terminating the contract. On 30th October 1914 they accordingly raised the present action.

"The defenders maintain, in the first place, that the action should be dismissed in respect of the arbitration clauses to which I have referred. Looking to the wide and general terms of these clauses I think that this plea must be given effect to unless the pursuers have set forth facts and circumstances which if proved would make

the reference clauses inapplicable. Their principal contention was that the defenders could not found on the arbitration clauses because they were in breach of contract in two respects (*first*) in withholding a certificate, and (*second*) in rescinding the contract. From an examination of the pursuers' averments it appears to me that the question whether the architect was justified in taking either of these steps depended upon whether the pursuers were right in their contentions. The contract and the general conditions gave the architect the power to do what he did, and if the pursuers maintained that he was wrong they were under the contract bound to ask him to adjudicate as arbiter. This is just an illustration of the incongruous position in which an architect or engineer is frequently put under reference clauses like the present. The pursuers were content to take the contract upon terms which left the architect power of decision as arbiter in questions where the propriety of his own acting might come in question. They cannot be relieved of their contract because of such a circumstance. In the case of *Trowsdale & Son* v. *North British Railway Company*, 1864, 2 Macp. 1334, the Court held that the engineer of a railway company who had been appointed arbiter in a contract between the company and the contractors for the formation of a railway was not disqualified from acting as arbiter by reason of his being (as alleged by the contractors) personally interested in the questions in dispute.

"The pursuers have not proposed at any time to refer any of the disputed points to the arbiter, and in view of the arbitration clause I think that the action cannot be maintained unless they have made relevant averments pointing to the disqualification of the arbiter. The averments made by the pursuers bearing upon this question are contained in their answer to the seventh statement of fact by the defenders, where they say—'It is believed and averred that in consequence of the pursuers' repeated requests that detailed drawings should be provided more expeditiously, for certificates for work done, and for permission to remove the scaffolding, the architect conceived an animus against the pursuers. Except in the early stages of the work he invariably acted in a manner hostile to the pursuers, and, in particular, about ten days before he cancelled the contract he called at the pursuers' workshop in connection with certain of the contract work which was being done by the pursuers, and when leaving stated in presence of the pursuers and others that he would "make it hot" for the pursuers, meaning that he would use his position as architect of the church to their detriment. By all of said conduct, and by his rescission of said contracts under the circumstances averred by the pursuers, he has disqualified himself from acting as arbiter under said contract of 3rd and 13th August 1910, even if, as is not admitted, the present dispute falls under the arbitration clause.'

"It does not appear to me that these averments ought to be remitted to probation. They are wanting in precision. So far as they refer to any facts they would not, if established, show that the architect could not be expected to act in a judicial manner as arbiter.

"As regards the second claim for £60, the pursuers have averred this contract as though it were quite distinct and separate from the main contract. This might have necessitated a proof, as the defenders maintain they are only liable in so far as it was part of and affected by the conditions of the main contract. The pursuers' case, however, is that this contract was wrongfully terminated by the architect. The defenders set forth in detail the letter of the architect which brought the pursuers' work at the church to an end. It refers only to one contract, and was the only intimation given by the architect to the pursuers. They admit that they accepted it as an intimation applicable to the contract for the supply of seats as well as to the earlier contract. If their position was, as they now maintain, that the conditions of the main contract did not govern this part of the work, they ought to have claimed right to complete that contract. They did not do so, and I do not think that they are now entitled to have it separately dealt with. I propose to sustain the first plea for the defenders and to dismiss the action."

The pursuers reclaimed, and argued—The action should not have been dismissed. If the clause of arbitration could be invoked the action fell to be *sisted*—*Hamlyn & Company* v. *Talisker Distillery Company*, 1894, 21 R. (H.L.) 21, *per* Lord Watson at p. 25, 31 S.L.R. 642; *Wilson & M'Farlane* v, *Stewart & Company*, 1898, 25 R. 655, 35 S.L.R. 538. But that question did not arise here, as defenders had put an end to the contract through their architect, and so to the arbitration clause—*Kennedy, Limited* v. *Mayor, &c., of Barrow-in-Furness*, reported in Hudson on Building Contracts, vol. ii, p. 411; *General Bill Posting Company, Limited* v. *Atkinson* [1908], 1 Ch. 537; *Johannesburg Municipal Council* v. *D. Stewart & Company, Limited, and Others*, 1909 S.C. (H.L.) 53, 47 S.L.R. 20. Further, the arbitration clause, if still operative, was merely executorial, and had no application now that the work in fact was not being carried on, the powers given to the architect being appropriate to a running contract—*Aviemore Station Hotel Company, Limited* v. *James Scott & Son*, 1904, 12 S.L.T. 494; [by the Court, *Hegarty & Kelly* v. *Cosmopolitan Insurance Corporation, Limited*, 1913, S.C. 377, 50 S.L.R. 256; *Turnbull* v. *M'Lean & Company*, 1874, 1 R. 730, *per* L.J.-C. Moncrieff at 738, 11 S.L.R. 319]; *M'Cord* v. *Adams*, 1861, 24 D. 75; *Beattie* v. *M'Gregor*, 1883, 10 R, 1094, 20 S.L.R. 729; *Mackay* v. *Parochial Board of Barry*, 1883, 10 R. 1046, 20 S.L.R. 697; *Saville Street Foundry and Engineering Company, Limited* v. *Rothesay Tramways Company, Limited*, 1883, 10 R. 821, 20 S.L.R. 562. But even if the arbitration clause might have applied, the arbiter

here had disqualified himself by his actings—*Aviemore Station Hotel Company, Limited, supra; Bristol Corporation* v. *Aird & Company*, [1913] A.C. 241; *Hickman & Company* v. *Roberts*, [1913] A.C. 229; *Halliday* v. *Duke of Hamilton's Trustees*, 1903, 5 F. 800, 40 S.L.R. 628. In any event the seating of the church was a separate contract and that question must go to proof.

Argued for defenders—The Lord Ordinary was right to dismiss the action. The pursuers' averments disclosed ground for an action against the architect, but not against the defenders. The architect was not the servant of the defenders. The architect in declaring the contract at an end (as he was empowered to do under the contract) did not rescind it or put it to an end so far as the execution of the contract was concerned. The arbitration clause was not merely executorial, and still stood—*North British Railway Company, Limited*, v. *Newburgh and North Fife Railway Company*, 1911 S.C. 710, *per* Lord Dunedin at p. 719, 48 S.L.R. 450; *Smellie* v. *Caledonian Railway Company, Limited*, 1916, 53 S.L.R. 336. Though the architect had terminated the contract his jurisdiction did not fall therewith, and he was still entitled to settle disputes arising under the contract—*Scott* v. *Corporation of Liverpool*, 1858, 28 L.J. Ch., 230, 3 De G. & J. 334. There was here no relevant averment of bias such as to disqualify the arbiter—*Scott, supra; Cross* v. *Corporation of Leeds*, 1902, see Hudson on Building Contracts, vol. ii, p. 339; *Chapman* v. *Edinburgh Prison Board*, 1844, 6 D. 1288; *Buchan* v. *Melville*, 1902, 4 F. 620, 39 S.L.R. 398; *Trowsdale* v. *North British Railway Company, Limited*, 1864, 2 Macph. 1334, 1865, 4 Macph. 31, 1 S.L.R. 28; *Jackson* v. *Barry Railway Company*, [1893] 1 Ch. 238; *Wadsworth* v. *Smith*, 1871, L.R., 6 Q.B. 332; *Ranger* v. *Great Western Railway Company*, 1854, 5 H.L.C. 72; *Clarke* v. *Watson*, 1865, 34 L.J.C.P. 148. The seating of the church was merely ancillary to the main contract.

At advising—

LORD JUSTICE-CLERK—In this case the questions which now remain for determination appear to me to be different in material respects from those which the Lord Ordinary was called on to decide, and indeed from those which were originally presented for our consideration in the argument on the reclaiming note. As to the main point in controversy, Mr Macmillan conceded that the architect in his letter of 6th April did no more than he was entitled to do, and that that letter involved no breach of contract; and he rested his contentions entirely on the pursuers' averments that the defenders were *lucrati* and on the alternative branch of the pursuer's first claim. In so doing I think he acted most prudently. But he still raised a very shrewd legal point. He argued that the architect having in terms of the agreement and without any breach thereof declared the contract at an end, he thereby not only put an end to the contract but also put an end to the efficacy of the arbitration clauses. In my opinion this argument is unsound.

I accept unqualifiedly as good law what was said by Lord President Dunedin at the end of his opinion in *Hegarty* v. *Kelly's* case as to the differences between the laws of Scotland and England regarding the effect of arbitration clauses and the powers of the courts of law in the two systems with reference thereto.

The contract between the parties in the present case contemplated that disputes might arise, and that these disputes might eventuate in the work being taken out of the contractor's hands before it was completed, and that said work might be required to be finished at the expense of the contractors, either by the defenders themselves or by other contractors employed by them.

There are two arbitration clauses—one in the agreement of August 1910—the other in the general conditions. The former refers to George Watson "all disputes and differences whatsoever that may arise between the parties from the date of the subscription of this contract between the parties until the whole work shall be finally completed, the last instalment paid to the contractors, and the work taken off their hands." That seems to me the widest arbitration clause that has ever been submitted to judicial consideration. It refers "all disputes and differences whatsoever" between the parties between, *inter alia*, "the date of the subscription of the contract" and the whole work being finally completed. I see no sufficient reason why the latter date should be qualified by the addition of the words "by the original contractors."

But, further, the words which occur in the general conditions, "declare the contract at an end," are, in my opinion, open to construction. These words do not mean that the declaration puts an end to all the contractual obligations *hinc inde*, because the future contractual obligations and rights between the parties are at once expressly dealt with as being still obligatory. I am of opinion that there was no repudiation of the contract, that the two arbitration clauses still remained, after the architect's declaration, effectual so far as their original scope extended. It also appears to me that the original scope of these clauses covered the present dispute; I do not think they were merely executorial. On this point I agree with the Lord Ordinary.

I also agree with his Lordship that no relevant averments of disqualification of the arbiter have been made by the pursuers. References to the architect or engineer or other officer of one of the parties to a contract may, according to law, be agreed to; and, if agreed to, it seems to me they involve that the reference clause may be appealed to after a certain state of antagonism, and even of acute antagonism, between the contractor and the officer has supervened; and, I think, without very specific averments it is impossible to state a relevant case of disqualification. In my opinion there are no such averments here. . . .

LORD DUNDAS—I agree with your lordship. I gather from the Lord Ordinary's opinion that the arguments for the pursuers were not presented in the Outer House on at all the same lines as they were at our bar. The Lord Ordinary observes that the pursuers' "principal contention was that the defenders could not found on the arbitration clauses because they were in breach of contract in two respects, (first) in withholding a certificate, and (second) in rescinding the contract." Now, Mr Macmillan made it perfectly clear at our bar that he restricted his case, so far as the first conclusion of the summons is concerned, entirely to its alternative branch. The pursuers no longer found upon alleged breach of contract. It is admitted that the architect was entitled to declare, and did in fact declare, the contract at an end. The pursuers' contention is simply that certain work actually done by them, and unpaid for by the defenders at the date when the contract was declared at an end, was taken over by the defenders, who have had the benefit of it; and they sue accordingly for the sum by which, as they allege, the defenders were thus *lucrati*. The issue so raised is disputed by the defenders; but I think it is relevantly presented upon the record, and must be the subject of inquiry.

An interesting question is then reached, whether that inquiry ought to be by way of proof before the Lord Ordinary or should be remitted to arbitration in terms of the clauses of reference contained in the agreement and the relative conditions and regulations respectively, which, as provided by the latter document, must be "considered and held to be cumulative, and without prejudice to each other." If the latter of these alternative courses is (as I have come to think) the correct one, the Lord Ordinary's interlocutor, sustaining the defenders' first plea-in-law and dismissing the action, cannot in my judgment be allowed to stand. The proper plea to sustain in that view is the one which the defenders added by way of amendment at our bar. Mr Macmillan, however, contended vigorously for a proof. He argued that, the contract having admittedly been declared at an end by the competent authority, the provisions for arbitration were necessarily also at an end and had become inoperative. His argument fails, in my judgment, to give effect to the words which immediately follow the provision that "the architect shall be at liberty to declare the contract at an end"—(the clause occurs twice over in the conditions and regulations in almost identical terms), viz., "and the proprietors shall be at liberty thereupon to proceed with and finish the same at the expense of the contractors, or at their expense to contract with other persons to finish the same." The clause thus fully quoted seems to me to make it clear that if the contract is declared at an end by the architect it is not thereby ended to all effects and purposes; for the latter part of the clause expressly provides for what is to follow upon such declaration, and that term of the contract at least must necessarily survive the "ending" of the contract. And when one turns to the clause of reference it appears to me that it is for the arbiter, and not for the Court, to determine and adjust the liabilities of parties arising from the situation when the contract is declared at an end. I do not propose to examine the numerous reported cases as to the meaning and effect of ancillary clauses of reference in a contract of this kind. It may not be easy to reconcile all of them with one another; and very fine distinctions appear to have been drawn between the precise terms in which one clause or another has been expressed. The clause we have here to consider is in very wide terms. It refers to the arbiter, *inter alia*, "any question whatever arising . . . in connexion with the works, or as to . . . the execution of the works or adjustment of accounts . . . or otherwise," with power to assess damages, &c. It seems to me that it must be for the arbiter, and not for the Court, to adjust accounts between the parties arising from the situation which has occurred—and the possibility of which was from the outset in contemplation of the parties—of the contract being declared at an end and other contractors having been employed to finish the work.

The pursuers contend that, even upon this assumption, the architect has disqualified himself by his actings from performing the functions of arbiter in this dispute. But I agree with the Lord Ordinary in thinking that their averments on this point are not such as should be remitted to probation. The phrase used by the architect in his letter of 6th April 1912, "in my clients' interest," strikes me as an unfortunate one; but I do not think that that, or the rather vague averments of "*animus*," or the alleged use of the words "make it hot," indicate (as the Lord Ordinary puts it) "that the architect could not be expected to act in a judicial manner as arbiter."

It remains to consider how the pursuers' averments in support of their second conclusion ought to be dealt with. These seem to me to stand upon a somewhat different footing; and I have come to think that, although the separation of the case into two parts as regards procedure is inconvenient from a practical point of view, the matters raised by the second conclusion must be the subject of proof before the Lord Ordinary, and are not for the arbiter. The contract for the "seating" is embodied in certain letters which bear no reference to the original contract or to the arbitration clauses contained in it and in the relative conditions and regulations respectively, although that contract and the relative conditions and regulations must have been within the knowledge and contemplation of the parties. The pursuers also aver, and the defenders do not deny, that the "seating" contract "was obtained by the pursuers in competition with other contractors."

I think therefore that we ought to recall the interlocutor reclaimed against, sustain the defenders' new plea-in-law *quoad* the alternative branch of the first conclusion of the summons and parties' averments rela-

tive thereto; and remit to the Lord Ordinary to allow the parties a proof in regard to the second conclusion, and to proceed as accords.

LORD SALVESEN—As now presented this is an action to recover the value of work done, under a building contract which, while in course of its execution, was declared to be at an end by the architect in terms of a clause to which I shall afterwards refer, and the remaining work executed by other contractors. The main point in the case is whether the questions in dispute fall to be settled by arbitration under one or both of the two clauses of reference which form part of the contract, and which were to be treated as cumulative in their effect. The particular point presented for decision is one which has hitherto never arisen and is undoubtedly one of much difficulty.

By the principal contract the pursuers agreed to carry out the carpenter and joiner work of a church to be erected at Portobello according to plans and specifications prepared by Mr G. M. Watson, architect in Edinburgh. The price to be paid under the contract was a lump sum of £709, 10s., but there was the usual clause with regard to additions and alterations. In the general conditions and regulations which form part of the contract there occurs the following clause—[His Lordship quoted the clause, *supra*.]

After the work had proceeded for some time the architect expressed himself dissatisfied with the manner in which it was being proceeded with, and on 6th April 1912 he wrote a letter to the pursuers in which he stated that their delay with the work was so serious that he felt himself compelled in his clients' interest to declare the contract at an end. On record the pursuers aver that the delay was due to the architect's failure to provide detailed drawings timeously, and that he had no right to take such a drastic step. In the end, however, it was conceded by their counsel that whether the architect acted reasonably or unreasonably he acted within the powers conferred upon him by the contract, there being no suggestion that he had exercised his powers otherwise than in good faith. Other contractors were thereupon engaged to complete the unfinished work, and the defenders allege that the sums which it was necessary to pay them in excess of what the pursuers would have been entitled to had they completed the contract exceed the claim in respect of work done so far as not paid for.

The pursuers' main contention was that in the circumstances the defenders are not entitled to insist on the clauses of reference, these having fallen along with the contract itself, and they founded specially on the decision of the House of Lords in *The Municipal Council of Johannesburg*, 1909 S.C. (H.L.) 53. In that case it was decided that as there was an averment that the whole contract had been repudiated by the defenders the arbitration clause could not be appealed to by them if this averment were established. In the course of his opinion Lord Shaw said—"It does not appear to me to be sound law to permit a person to repudiate a contract and thereupon specifically to found upon a term in that contract which he has thus repudiated." This decision was considered and distinguished by the First Division in the case of *Hegarty & Kelly*, 1913 S.C. 377. Lord Mackenzie in the course of his opinion said—"If one party to a contract is in breach of it as regards a stipulation which goes to the root of the contract the other party has the option of rescinding the contract. If he does, then the contract with all its clauses goes, and amongst them the clause providing for a reference to arbiters." The circumstances of the present case are obviously not the same, for the architect in declaring the contract at an end acted within the powers conferred upon him by the contract itself. I am unable, however, to see that this makes any difference. The point is that the contract is no longer in existence so as to be specifically enforceable, and I think the legal consequences must be the same whether it is terminated in virtue of an arbitrary power conferred on the architect, or rescinded because the conduct of the contractors has been such as to justify the building owner in declaring himself no longer bound. In either case the contract must be appealed to in order to measure the claim of damages which arises against the party who is either in breach of it or who has consented that it should be ended at the discretion of the architect. The functions of the domestic tribunal appointed by the parties fall to be exercised upon the footing that the contract is executed, and that the points to be determined are points relating to material, prices, measurements, extras, and the like. Without express provision being made to that effect it cannot be assumed to have been in contemplation of the parties that claims of damages for failure to complete the work should be referred to the building owner's architect, who has ceased to hold any contractual relation with the contractors after the contract has been declared at an end. Provision might have been made for this, as for instance by adding to the clause which I have quoted some such words as these "as such expense shall be determined by the final decision of the architect." Somewhat similar language was used in one of the English cases to which we were referred, and in which accordingly the reference was supported. There are no such words here, and I think there is no doubt that a clause of arbitration which excludes the common law right of a party to appeal to the constituted tribunals of the country must be strictly construed. It is not inconsistent with this that power is given to the architect to assess damages. Such claims may be incidental to the supply of material which is not in conformity with the contract, and as the clause is general I think it must be confined in its application to the circumstance which the parties presumably contemplated, namely, of the contract being performed. In my opinion, therefore, the present claim is not excluded

from the consideration of the ordinary legal tribunals.

It was strenuously argued that the words "declared to be at an end" were not to be construed according to their ordinary meaning, but meant that no further work falling under the contract was to be performed by the original contractors. I am unable so to construe what appears to me to be perfectly plain language. The claim of the contractors for payment of work done, in so far as the defenders have been *lucrati* by such work, and which would primarily fall to be priced according to the schedules in the contract, and the claim of the building owner to set against it the extra expense which he reasonably incurred by the employment of new contractors, would still remain open on both sides. The only difference would be that the Court, and not the architect, would determine the amounts respectively due.

An alternative argument was submitted which it is not necessary to decide in the view which I have taken, but on which I think it right to express my opinion. It was said that the arbitration clauses in this contract were executorial, and therefore not enforceable after the contract had been either wholly completed or, as in this case, completed so far as the pursuers were permitted to do so. In the *Johannesburg* case Lord Shaw held that the arbitration belonged to this class, which was perfectly familiar to the law of Scotland. It is perhaps a little difficult to reconcile some of the decisions that have been pronounced by the Court of Session as to the arbitration clauses that are to be treated as executorial only and those which constitute a general reference of all disputes whether in the course of the contract or after its conclusion; but I am unable to assent to the view that the decision in the case of *Mackay*, 10 R. 1046, in any degree impairs the decisions of the First Division in the *Savile Street Foundry Company*, 10 R. 821, and *Beattie*, 10 R. 1094. In each of these cases a clause, which *prima facie* might have been construed as general, was held to be confined to questions arising during the execution of the contract, and I take it that similar clauses ought always to be so construed. In *Beattie* Lord Shand said—"It is now quite settled that unless the parties use words which distinctly signify that a reference is intended, the clause will include only disputes which may arise during the execution of the work such as questions as to the true meaning of the drawings, plans, and specifications. Unless the clause plainly covers more, the Court will hold that it embraces these executory matters only. If the parties wish to include disputes regarding money payments arising after the completion of the contract, that can be safely done only by using words that clearly cover such questions. That was done in the case of *Mackay*, but it has not been done here, and on the cases which have been decided we have no alternative but to adhere." It is to be noted that the reference clause in the *Savile* case referred, *inter alia*, differences of opinion "as regards the implementing or carrying into effect of the provisions herein contained," and that in the case of *Beattie* "any matter arising thereout (out of the work) or connected therewith." Accordingly if the only clause of reference in this contract had been that embodied in the general conditions, I should have followed the decision of Lord Kyllachy in the *Aviemore* case, 12 S.L.T. 494, and held it to be merely executorial of the contract. But the clause of reference in the contract itself does not seem to me to be capable of this limited interpretation, for it refers all differences "that may arise between the parties, from the date of the subscription of this contract by the parties until the whole work shall be fully completed, the last instalment paid to the contractors, and the work taken off their hands." The parties must therefore be taken to have intended that until accounts were finally squared between them the arbiter should have power to adjudicate on all matters arising out of the contract.

Assuming that the reference clauses are still enforceable, I do not think there are averments relevant to disqualify the architect from exercising his office. It was pointed out that in the letter of 6th April he spoke of the building owners as his clients, and that was said to identify him with their interests so as to prevent him from acting judicially. I do not think that this is a misdescription of his position. In the opinions of some of the noble and learned Lords who have decided similar cases the architect is spoken of as the agent of the building owner. I think that is his true position, and that the building owners are his clients. Nevertheless it is not, according to our law, considered against public policy to enforce a clause of reference though the reference be to the servant or agent of the building owner. It is also alleged by the pursuers that on one occasion the architect said that he "would make it hot for them," but I should be slow to assume that a casual expression of this kind, possibly uttered in the heat of a discussion, would indicate such a bias as would prevent the architect from acting judicially (so far as his position permits of his doing so) when a reference fell to be made to him. What is to my mind of far more importance is that the cause of the disputes is alleged to have been the personal fault of the architect, but that according to our decisions is not sufficient to withdraw from him the jurisdiction which the parties have chosen to confer. I cannot help saying that I think that in this respect the law of England is very much more satisfactory than our own. In the case of the *Bristol Corporation*, [1913] A.C. 241, Lord Atkinson said with regard to a similar question—"But though the contractor is bound by that contract, still he has a right to demand that, notwithstanding those pre-formed views of the engineer, that gentleman shall listen to argument, and determine the matters submitted to him as fairly as he can as an honest man; and if it be shown in fact that there is any reasonable prospect that he will be so biassed as to be likely not to decide fairly upon those matters, then the contractor is allowed

to escape from his bargain, and to have the matters in dispute tried by one of the ordinary tribunals of the land. But I think he has more than that right. If, without any fault of his own, the engineer has put himself in such a position that it is not fitting or decorous or proper that he should act as arbitrator in any one or more of these disputes the contractor has the right to appeal to a court of law; and they are entitled to say, in answer to an application to the Court to exercise the discretion which the fourth section of the Arbitration Act vests in them, 'We are not satisfied that there is not some reason for not submitting this question to the arbitrator.'" Now in this case I think we have exactly, on the averments of the pursuer, the condition of matters figured by Lord Atkinson, and, to use his language in a subsequent passage, I think the architect here "will necessarily be at once in a position of a judge and a witness." I agree with him that such a position is undesirable. Unfortunately, however, we have no Arbitration Act in Scotland which vests us with any discretion. Unless the arbiter has actually disqualified himself it is not relevant to consider whether a dispute arises from his own arbitrary or unreasonable conduct, and the Court has no power to extricate the contractor from the difficulties which he has brought upon himself by consenting to be bound by the decision of a person in whom he is presumed to have reposed implicit confidence, but who in fact is generally imposed upon him as a condition of his getting the work.

The only other point relates to a separate contract for the seating of the area of the church. This contract is embodied in two letters dated 15th and 19th September 1911. It is said by the pursuers, and not denied, that it was obtained by them in competition with other contractors to whom it was also offered. The two letters form a complete contract; and there is no reference in them to the general conditions which form part of the earlier contract nor to that contract itself. Nevertheless the Lord Ordinary has read into this contract the arbitration clause in the earlier, on the ground that it was ancillary to the earlier contract, and must be held to have been made under the same conditions; and also that the architect's letter in which he declared the contract at an end was accepted by the pursuers as applicable to both contracts. I do not think any such inference can be drawn from the mere silence of the pursuers. They aver that it came to their knowledge that the architect had given an order to another contractor to complete the church seats which were the subject of the smaller contract; and that, accordingly, they had no option but to accept the position which the building owners, through their architect, had taken up. On these grounds I see no reason for importing conditions into a written contract which are not expressed in it, or even referred to. The pursuers have relevantly averred a breach of this contract, and I think they are entitled to substantiate such breach and any claim which may arise out of it in the ordinary way.

LORD GUTHRIE—The arbitration clauses in the agreement between the parties dated 3rd and 13th August 1910 and in the relative general conditions and regulations, read together, seem to me general in their scope and not merely executorial. The Lord Ordinary only refers to the clause in the general conditions which, taken by itself, might well be read as executorial in its terms, and as a reference not to an individual but to the architect in the job, whoever he might happen to be. Looking however at the clause in the agreement (and the two clauses are to be held as "cumulative and without prejudice to each other") it seems to me that the case is indistinguishable from the case of *Mackay*, 10 R. 1046, both in the universal scope of the words and in the reference not to the architect as such but to an individual whom the employers could not change.

The other question, the alleged subsistence of the arbitration clause after the architect had declared the contract at an end, seems to me a very difficult one, owing chiefly to the provision that "the proprietors shall be at liberty thereupon" (that is after the architect's intimation) "to proceed with and finish the same at the expense of the contractors, or, at their expense, to contract with other persons to finish the same." But for this latter clause I should have had little difficulty in holding that questions merely about work already done, while the contract subsisted in its entirety, remained for the arbitration of the arbiter under the contract even although intimation had been given under the contract that the contractor was to cease work. The assumption of such intimation is that it is given for a good cause, or at least for a reasonable cause, and I do not see why the lawful action of the architect, acting for both parties and in the presumed interests of the work contracted for, should disqualify the arbiter (who, so far as this question is concerned, might be a different person from the architect) from adjudicating on claims arising in connection with work done before such intimation. It seems to me that the considerations arising in a case of repudiation of contract. as in the *Johannesburg* case, 1909 S.C. (H.L.) 53, are inapplicable where what has been done cannot be questioned because it has been done under contractual powers. Nor have I much difficulty with the construction of the words "declare the contract at an end." I agree with Lord Dundas in his view of the effect of the collocation of the immediately succeeding words. The proprietors are to "finish the same." The same in the hands of the new contractor can therefore only mean the contract work, and consequently its antecedent, the word "contract," must mean not the pursuers' agreement but their operations. I read the words "contract at an end," not in accordance with the pursuers' argument as equivalent to the time when the contract ceased to operate, but as meaning when the contractor ceased to be entitled to operate. My difficulty arises from the necessity in this case for the arbiter to deal with at least one question arising after intimation, namely, the ques-

tion of the expenses of other contractors in whose contracts he may or may not be named as arbiter. This element seems to me to make it less likely that the counterclaims which thus arise for adjudication would be sent to the arbitration of the arbiter under the contract. But, although I feel the force of this argument, I am not prepared to differ from the view of your Lordship in the chair and of Lord Dundas that the words fairly construed cover the dispute raised by the pursuers' claim in the second alternative of the first conclusion of their summons.

On the second question, that of alleged disqualification, I agree with the Lord Ordinary that no disqualification has been relevantly averred, and, differing from the Lord Ordinary, I think that the pursuers' claim for £60, in connection with the separate seating contract, must go to proof.

The Court recalled the interlocutor of the Lord Ordinary, *sustained* the plea-in-law for the defenders added at the hearing so far as regarded the first conclusion of the summons, and to that extent *sisted* the action; *quoad ultra* allowed a proof.

Counsel for Pursuers—Macmillan, K.C.—Mitchell. Agents—R. C. Gray & Paton, S.S C.

Counsel for Defenders — Macquisten — Scott. Agents—Alexander Morrison & Company, W.S.

Friday, June 30.

FIRST DIVISION.

[Sheriff Court at Elgin.

ALLOA PARISH COUNCIL *v.* URQUHART PARISH COUNCIL.

Poor—Settlement—Relief—Poor Law (Scotland) Act 1898 (61 *and* 62 *Vict. cap.* 21), *sec.* 1—"*Without having Received or Applied for Parochial Relief*"—*Relief Given to Woman for whose Behoof Money as Compensation for Death of her Husband had been Paid into and was Lying in Court.*

The Poor Law (Scotland) Act 1898 enacts, sec. 1—"No person shall be held to have acquired a settlement in any parish in Scotland by residence therein unless such person shall . . . . have resided continuously in such parish . . . without having received or applied for parochial relief."

A woman obtained on her own behalf and for behoof of her children in the Sheriff Court of S. £292, 18s. 4d. compensation for the death of her husband, under the Workmen's Compensation Act 1906, which sum was paid into court, quarterly payments of £12, 10s. being thereafter made to her out of the compensation. On 28th May 1911 they came to reside in the parish of A, where they continued to reside. On 12th January 1914 she was ailing and so were her children, and, the current quarterly payment of compensation being exhausted, on the 12th, 19th, and 26th January and on subsequent occasions she received payments of relief from the inspector of poor at A. On each occasion there was still remaining a substantial amount of the compensation, but the actual quarterly payment was completely exhausted. In an action by the parish of A against the parish of the woman's birth settlement for repayment of the relief given and for relief from further payments, *held* that the woman was not a proper object of parochial relief on the occasions when the inspector of A gave it to her, that consequently she could acquire and had acquired on 29th May 1915 a residential settlement in A, which parish could therefore not succeed.

The Poor Law (Scotland) Amendment Act 1898 (61 and 62 Vict. cap. 21), sec. 1, is quoted *supra* in the rubric.

The Parish Council of the Parish of Alloa, *pursuers*, brought an action in the Sheriff Court at Elgin against the Parish Council of the Parish of Urquhart, *defenders*, concluding for decree for sums already paid as poor relief by the pursuers to Mrs Jessie M'Gregor or Anderson and her children, and to ordain the defenders to relieve the pursuers of all further alimentary or other advances to Mrs Anderson and her children so long as she or they might require parochial aid and her or their settlement was in the parish of the defenders.

The defenders *pleaded*—"(1) The said Mrs Jessie M'Gregor or Anderson having by non-residence for the statutory period lost the residential settlement acquired by her late husband in the parish of St Ninians, and not having acquired a residential settlement of her own, and having been born in the parish of Urquhart, that parish is the parish of settlement and liable for the maintenance of herself and her children. (2) The said Mrs Jessie M'Gregor or Anderson and her children having been destitute and proper objects of relief on the various dates specified in the initial writ, and the pursuers having given relief on behalf or on account of herself and her minor children to the extent of £4, 12s., the defenders are bound to repay the said sum to the pursuers."

The *facts* appear from the note of the Sheriff-Substitute (VALENTINE), who on 1st July 1915 found in law that Mrs Anderson was not on any of the dates on which she received relief a proper object of parochial relief; that on 29th May 1914 she acquired a residential settlement in the parish of Alloa, and that the defenders were not liable to repay to the pursuers the sums paid by the latter to Mrs Anderson, and assoilzied the defenders.

Note.—"Mrs Anderson was born in the parish of Urquhart on 4th May 1871. On 6th July 1900 she married the late John Anderson, and there are five living children