livered by the noble and learned Lord on the woolsack (Lord Blackburn), and by my noble and learned friend opposite (Lord Watson), render it almost inexcusable on my part to add anything; nor would I do so if this was a question of Scotch law; but it is not a question of Scotch law; it stands upon grounds which affect the whole United Kingdom (with the exception of the point raised regarding the Trust Act, which I shall presently advert to).

I listened very attentively to the argument of Mr Graham Murray yesterday, who, I think, opened everything that has been brought before us to-day, and I listened to that argument with (if a Judge should ever have an inclination one way or the other) an inclination to come to a conclusion in favour of the appellant if I could do so according to law; because if I had been allowed to conjecture, and had put the question to the truster, whether or not he had intended that his widow should have the annual produce in the shape of the rents of unopened mines, possibly he would have answered in the affirmative, as by the trust-deed he was giving to her the benefit of, or the rents derivable from, those mines which had already been opened. But in a case of this kind, of course, there is no opening for conjecture or guess; we must determine the case according to the settled rules of law.

My Lords, I do not propose to consider any of the technicalities or limitations or difficulties which may beset a liferenter in Scotland, such as a widow seeking her terce, but I shall deal with the case upon the ground of a settlement in England or a trust-deed in Scotland. And I think that the laws of both countries are precisely the same—that is to say, a tenant for life as we should call him here, and a liferenter as he is called in Scotland, namely, the person to benefit under the trust-deed, stand in precisely the same position; each is entitled to the whole produce and profits derivable from that life estate, whatever they are; but in both countries equally he is subject to this limitation, that, as we say in England, he must not destroy the *corpus* of the estate, or, as it is more correctly expressed in Scotland, the substance of the estate is to be preserved and not destroyed; and in both countries it is subject to this also, that the settler may in either case expressly indicate a contrary intention—he might have said in this case that his widow should, if she had the rents derivable from opened mines, equally have the rents derivable from mines which were unopened That is the law of both countries, but that intention must either be expressly shown upon the face of the settlement or trust-deed, or it must arise by fair and reasonable implication. Now, I have looked at this trust-deed, and have read it over several times to see if there was upon the face of it anything that would express or indicate any such intention on the part of the truster, and I can find nothing but the words which have been relied upon by Mr Davey to-day, namely, that in the fifth place the widow is to have "the whole annual produce and rents of the residue and remainder of my means and estate, heritable and moveable, during all the days and years of her life." The words are not "produce and rents," but "annual produce and rents" of the estate. "Annual produce" means something arising and renewing itself *de anno in annum*, and is subject equally to the same limitation. If you were to put upon it the construction contended for by the appellant, then under the term "annual produce" you might take away in a few years the whole *corpus* of the estate. I can find, therefore, in the trust-deed no indication at all of an intention to carry it outside the settled rule of law in both countries, namely, that the *corpus* or substance of the estate is to be preserved, while, subject to that, the tenant for life or liferenter is to have all the annual produce from it.

My Lords, the only question which remains is as to the Trusts Act. At first I was a little puzzled, and induced to feel a doubt by the statement of Lord Shand, that he does "not entertain any doubt that a power to lease minerals never before worked is included" in the Trusts Act. But that Trusts Act is not to alter existing rights, but to facilitate the administration of trusts; and if the testator had indicated any intention, or given any authority to his trustees by the deed of trust to open mines, then the Trusts Act would have stepped in and enabled them to make leases for thirty-one years; or rather, if they had power to open mines, then it gave them power to make a lease for a certain period, viz., thirty-one years, instead of a lease for an uncertain period, namely, a tenancy for life. It was with that view that I asked Mr Graham Murray yesterday if he could point out in the trust-deed anything which enabled the trustees to deal with unopened mines; because if he could have established that point, it would have advanced him a step towards establishing his proposition; but he could not point out a word of the kind in the trust-deed; and I apprehend that giving to the Trusts Act the construction and effect which Mr Davey contended for would be taking a very wide line indeed. We must put a reasonable and proper construction upon it, and that falls very far short of what has been contended for here.

Interlocutor appealed against affirmed, and appeal dismissed with costs.

Counsel for Appellant—Davey, Q.C.—Graham Murray. Agents—J. & F. Anderson, W.S.—Grahames, Currey, & Spens.

Counsel for Respondents—Lord Advocate (Balfour, Q.C).—Macfarlane. Agents—Tait & Crichton, W.S.—William Robertson & Co.

COURT OF SESSION.

Tuesday, July 10.

FIRST DIVISION.

[Lord M'Laren, Ordinary.

LEVY & COMPANY *v.* J. & J. THOMSON.

Arbitration—Clause of Reference—Reference of Disputes as to the "Rights of Parties under the Contract"—Exclusion of Ordinary Action.

In a contract to build two steamships it was stipulated that failing delivery by a certain date the builders should pay liquidated damages at a certain rate per day, unless the delay was owing to causes beyond their control. The contract contained this

clause of reference—"In case any questions or differences shall arise between the parties hereto relative to the true intent and meaning of this contract, or the rights of parties under the same, they shall be submitted" to arbiters named. Timeous delivery of one of the ships was not made, and the builders were sued for liquidate damages under the contract. They stated in defence that the delay was owing to causes beyond their control, for which therefore they were not liable, and pleaded that the action was excluded by the clause of reference. *Held* that the question fell within the clause of reference.

Title to Sue—Agent and Principal—Mandate.

In a contract entered into by an agent for a foreign principal, who was disclosed, there was a clause by which the other contracting party bound himself to pay to the agent liquidated damages in case of delay. *Held* that the agent had a good title to sue for the damages.

By contract dated 4th and 6th May 1881, entered into between Messrs Edward A. Levy & Company, merchants, 72 Cornhill, London, as agents for the Australasian Steam Navigation Company, Sydney, New South Wales, of the first part, and Messrs John & James Thomson, engineers and shipbuilders, Glasgow, of the second part, the second party bound themselves to build for the first party two iron screw steamships, on the conditions and of the dimensions set forth in the contract, and in the specifications annexed and signed as relative thereto. The second parties bound themselves to make delivery of one of the vessels within ten calendar months, and the other within thirteen calendar months, from the first date of signing the contract.

It was stipulated that "in the event of said vessels respectively not being so completed and delivered till after said respective dates, the second party shall be bound, as they hereby bind themselves, to pay or allow to the first party, as agreed on, liquidated or fixed damages for any such delay the sum specified in the said specification, namely, in respect of each vessel £10 per day for every day that delivery of the vessel is so delayed, unless the delay has been caused by fire, or by the strikes or locksout of workmen, or other such cause beyond the control of the second party, and provided immediate notice shall be given at the time of the occurrence of such cause."

Then followed this clause:—"For which causes, and on the other part, the first party hereby bind themselves, as agents foresaid (but not individually), and the said Australasian Steam Navigation Company, to pay to the second party the sum of £78,000 sterling, as the agreed-on price of the said two vessels."

The clause of reference was in these terms:—"And in case any questions or differences shall arise between the parties hereto relative to the true intent and meaning of this contract, or the rights of parties under the same, they shall be, and (notwithstanding the arbitration clause in the foresaid specification, which shall be read as varied to the following effect) are hereby, submitted and referred to the amicable decision and final decree-arbitral of John Lennox Kincaid, Jamieson, engineer, Glasgow, whom failing from any cause, of Hazelton Robson Robson, engineer there, as sole arbiter, in the order above named, hereby mutually chosen, by whose decree or decrees-arbitral, interim or final, the parties shall be conclusively bound."

Two steamships were accordingly built by the defenders, named respectively the "Rockton" and the "Cintra," but timeous delivery was not made in terms of the contract. The "Rockton" was due for delivery on 4th March 1882, but was not delivered until 19th October 1882; the "Cintra" was due for delivery on 4th June 1882, but was not delivered until 15th February 1883.

This was an action at the instance of Messrs Levy & Company against Messrs Thomson to recover the sum of £2280 and £2550, as liquidated damages in terms of the contract, in respect of the delay in delivering the "Rockton" and "Cintra" respectively. The pursuers had paid the whole price of £78,000 for the two vessels, reserving their claim for the sums respectively now sued for.

The defence to the action was that the defenders' inability to complete the ships within the times stipulated in the contract was due to unavoidable causes, entirely beyond the defenders' control within the meaning of the contract, which were, in terms of the contract, duly notified to the pursuers. The main causes of the delay for which the defenders maintained that they were not responsible were set forth in the defenders' statement of facts—"(Stat. 2) . . . In the first place, a delay of not less than 47 days on each ship was caused by the defective character of the plans furnished by the owners. . . . (Stat. 3) In the second place, a delay of not less than 65 days in the case of the 'Rockton,' and of 80 days in the case of the 'Cintra,' was caused in consequence of considerable alterations on and additions to the work, made upon the express instructions of the owners' inspector. . . . (Stat. 4) In the third place, a delay of not less than 120 days on each ship was caused by the difficulty of obtaining delivery of the necessary quantities of iron and other materials. This difficulty arose from the enormous and unprecedented increase of the demand for shipbuilding and engineering work which took place suddenly a short time after the contract was made. . . . (Stat. 5) In the fourth place, a delay of not less than 30 days on each ship was caused by the abnormal scarcity of labour on the Clyde during the time of their construction. . . . (Stat. 6) In the fifth place, a delay of not less than 40 days was occasioned by strikes, and by the excessive and unprecedented irregularity of the workmen. . . . (Stat. 7) In the sixth place, a delay of at least 10 days on each ship was caused by the exceptionally inclement weather which prevailed during a considerable portion of the time when the ships were on the stocks." . . .

The defenders pleaded—(1) No title to sue. (2) The questions raised in the action being questions comprehended within the reference clause of the contract, fall to be decided by the arbiter therein named.

The Lord Ordinary (M'Laren) repelled these pleas and ordered an issue to be adjusted.

The defenders reclaimed, and argued that the pursuers had no title to sue, because the contract was made by them as agents for a known principal. The principal therefore should sue, unless the agent holds a mandate to sue, which in this

case depends upon a construction of the contract —Addison on Contracts, 72; Pollock on Contracts, 110; *Pigott* v. *Thomson*, 3 B. & P. 147; *Grey* v. *Pearson*, L.R., 5 C.P. 568; Mackay's Practice, i. 262; Story on Agency, sec. 393. The dispute was fairly within the meaning of the words "rights of parties," and therefore should be disposed of by the arbiter—*Pearson* v. *Oswald*, February 4, 1859, 21 D. 419; *Aberdeen Railway Co.* v. *Blaikie*, January 28, 1851, 13 D. 527, 16 D. 470, 23 Jurist, 237, 615; *Montgomerie* v. *Cainck*, June 23, 1848, 10 D. 1387; *Tough* v. *Dumbarton Water-Works Commissioners*, December 20, 1872, 11 Macph. 236; *Mackay* v. *Parochial Board of Barry*, June 21, 1883, *ante*, p. 697.

The pursuers replied that the rights of parties were clearly expressed in the contract, and that they had a good title to sue—*Fisher* v. *Syme*, December 7, 1827, 6 S. 216; *Bonnar* v. *Liddell*, March 9, 1841, 3 D. 830. The dispute here was not regarding the true intent and meaning of the contract, and therefore did not fall within the clause of reference—*M'Cord* v. *Adams*, November 22, 1861, 24 D. 75; *Savile Street Foundry Co.* v. *Rothesay Tramways Co.*, March 20, 1883, *ante*, p. 562.

At advising—

LORD PRESIDENT—The interlocutor of the Lord Ordinary in this case has disposed of the two first pleas-in-law for the defenders.

The first of these is founded upon the fact that the pursuers entered into the contract on which this action is laid, on behalf of the Australasian Steam Navigation Company, the contention being that that company, and not their agents, were the proper parties to sue this action. The plea depends upon the special clauses of the contract which is embodied in a probative instrument, and the language of which is expressed in a very careful and precise manner. The pursuers are described as the first party to the contract, in the capacity of agents for and on behalf of the Australasian Company, and the defenders, who are shipbuilders in Glasgow, are the second parties. The contract was executed in due form, and with the solemnities required by law, by Edward A. Levy & Co. on the one hand, and by the defenders on the other, and the deed bears to be duly signed by them in presence of two witnesses. In one of the clauses of the contract the first party stipulates very clearly and distinctly that they are not to be personally or individually liable for the contract price, which was to be paid by them in certain instalments and at certain times, as agents for the Australasian Company. On the other hand, the second party bound themselves in certain events to pay certain sums, not to the Australasian Company but to the first party, and these are the sums which it is now sought to recover in this action. The words of the contract are:—"The second party shall be bound, as they hereby bind themselves, to pay or allow to the first party, as agreed on, liquidated or fixed damages for any such delay the sum specified in the said specification."

The obligation is expressed in very distinct language, and payment is to be made to the first party. Indeed it could not be fulfilled by payment to anyone else. So that I do not see how anyone else would be entitled to recover payment except the first party, and the title to sue appears to me to be good. It hardly requires the cases of *Fisher* v. *Syme*, 6 S. 216, or of *Bonnar* v. *Liddell*, 3 D. 830, to support that contention, because it is one which rests upon the contract itself.

The second question is, how far the action or the subject of it is embraced in the clause of reference contained in the contract? and that is a matter of somewhat greater difficulty, because it is not very easy to distinguish between one case and another when an agreement to refer differences under a contract such as that now before us is expressed in a few words. It is generally from the very short way in which the agreement is expressed that the difficulty arises. But in the present case, although the language is brief, it is more than usually distinct. This arises from its simplicity and the absence of all qualification. The clause is as follows:—"And in case any questions or differences shall arise between the parties hereto relative to the true intent and meaning of 'this contract,' or the rights of parties under the same, they shall be, and (notwithstanding the arbitration clause in the aforesaid specification, which shall be read as varied to the following effect) are hereby submitted and referred to the amicable decision and final decree-arbitral of John Lennox Kincaid Jamieson, engineer, Glasgow, whom failing from any cause, of Hazelton Robson Robson, engineer there, as sole arbiter, in the order above named, hereby mutually chosen, by whose decree or decrees-arbitral, interim or final, the parties shall be conclusively bound."

I understand that neither the one nor the other of the gentlemen named as arbiters has had anything to do with the preparation of the contract, or with the execution of the work, but both have been chosen as qualified in point of skill, and in other ways for the duties which it is proposed shall be submitted to them.

I cannot say that I find in the clause any words which can be said to limit its application to questions or disputes arising during the execution of the contract. The words are very general, but I also think they have a plain signification. The claim is one for liquidated damage in respect of a failure to implement the contract within the stipulated period, and that claim is met by several defences—all working into this, that the defenders are not to blame for the time which was lost, the cause of delay being beyond their control. The exception which is pleaded by the defenders was made matter of express stipulation in the contract. The question accordingly is, whether this claim for liquidated damage, and the defence that the delay was not caused by anything which could have been avoided, is not a question for the arbiter, and after giving the case my best attention, and comparing it with the numerous authorities upon this branch of the law, I have come to the conclusion that it is. I think it is for the arbiter to determine (1) the question as to the fact of the delay; (2) the question whether the defenders are answerable for it; and (3) assuming that they are answerable, whether they are liable in the penalty of £10 per day imposed under the contract.

The result will be not to throw the case out of Court, but merely to send it to the arbiter to determine the rights of parties under the contract.

I therefore propose to remit to the arbiter named in the contract the claim and the defences which are set forth in the second, third, fourth, fifth, sixth, and seventh statements of fact. When we see the award we shall know how to dispose of the action.

Lord Deas concurred.

Lord Mure—I am of the same opinion. I have no difficulty as regards the plea of no title to sue, because it depends upon the terms of the contract itself. The defenders come under certain obligations to the pursuers under the contract, and it is clear that the persons whom the defenders make creditors in the obligations are the proper persons to sue this action.

The other point is a little more difficult, and such clauses as we have here appear to come under our notice with greater frequency every year. In the present clause there appears to me to be no qualifying words; they are quite general, and seem to cover this claim.

Lord Shand—In the ordinary case, even although a contract has been entered into, and made by an agent for a principal, the proceedings to enforce it fall to be taken by the principal, who must sue in his own name. But there is a specialty here upon the face of the contract. The plea upon the title to sue is met by the pursuers with the fact that the defenders have expressly undertaken to pay such liquidated or fixed damages as they may be found liable for to the pursuers themselves. That disposes of the first plea stated for the defenders.

In regard to the second plea, the case is distinguished from many previous authorities of the same class by the circumstance that there are no words to indicate that the disputes contemplated under the contract to be referred to the arbiter were disputes arising during the course of the work. The decisions of the Court have as a rule proceeded upon the view that disputes falling within clauses of submission were such as were concerned with the execution of the contract. In the present case the terms used are simple and comprehensive. The words used in *Mackay's* case were "matter, claim, or obligations" in connection with the works. Here the words used are the "rights of parties," and I think that those words are sufficiently comprehensive to include the disputes which have now arisen, and I therefore think the case should be remitted to the arbiter as your Lordship proposes.

The Court pronounced the following interlocutor:—

> "The Lords having considered the cause and heard counsel for the parties on the reclaiming-note for John & James Thomson against the interlocutor of Lord M'Laren of 19th June last, Adhere to the interlocutor in so far as it repels the first plea-in-law for the defenders: *Quoad ultra* recal the same: Find that the claims of the pursuers stated on the record, and the defences against that claim stated in the 2d, 3d, 4th, 5th, 6th, and 7th articles of the defenders' statement of facts, raise questions which fall within the arbitration clause in the contract libelled: To this extent sustain the second plea-in-law for the defenders, and in respect the arbiter first named is now dead, remit to Mr H. R. Robson, engineer, Glasgow, the arbiter second named in the contract, to determine the said questions, and continue the cause till his decree-arbitral shall be lodged in process, and decern: Find no expenses due to or by either party since the date of the Lord Ordinary's interlocutor."

Counsel for Pursuers — Mackintosh — Graham Murray. Agents — Webster, Will, & Ritchie, S.S.C.

Counsel for Defenders—J. P. B. Robertson—Ure. Agents—Dundas & Wilson, C.S.

Tuesday, July 10.

FIRST DIVISION.

GARRETT AND ANOTHER, PETITIONERS.

Public Records—Delivery of Deed Recorded in Sheriff Court Books for Exhibition to Witness—Informality of Execution—Conveyancing (Scotland) Act 1874 (37 *and* 38 *Vict. c.* 94), *sec.* 39.

> The executors-nominate under a last will and testament recorded in the books of a Sheriff Court presented a petition under sec. 39 of the Conveyancing (Scotland) Act 1874, to set up the deed. The informality of execution was that the designation of the attesting witnesses was wanting. The petitioners moved the Court to grant warrant for the delivery of the deed to them for the purpose of exhibition to one of the witnesses resident in India. The Court granted the motion on the petitioners' finding caution for the return of the deed *quam primum*, an extract duly executed being previously lodged in its stead.

The Conveyancing (Scotland) Act 1874 (37 and 38 Vict., c. 94), sec. 39, provides—"No deed, instrument, or writing subscribed by the granter or maker thereof, and bearing to be attested by two witnesses subscribing, and whether relating to land or not, shall be deemed invalid or denied effect according to its legal import because of any informality of execution; but the burden of proving that such deed, instrument, or writing so attested was subscribed by the granter or maker thereof, and by the witnesses by whom such deed, instrument, or writing bears to be attested, shall lie upon the party using or upholding the same, and such proof may be led in any action or proceeding in which such deed, instrument, or writing is founded on or objected to, or in a special application to the Court of Session, or to the Sheriff within whose jurisdiction the defender in any such application resides, to have it declared that such deed, instrument, or writing was subscribed by such granter or maker and witnesses."

This was a petition under the provision just quoted presented by J. H. M. Garrett of Saintfield, County Down, Ireland, and another, executors-nominate under the last will and testament of the late Alexander Innes junior, of Cowie House, to set up the said deed. Mr Innes