tion to the matter, and the whole of the fireclay track will require to be opened and the pipes lifted and relaid. So far as we have gone, I find that the drain has not been properly bottomed, and that not one pipe in twenty has been properly jointed. In some places, for a dozen yards at a stretch, the joints are perfectly open, no clay even being put in them. In other places a small piece of rope is put on top of pipe and no cement put in. In other joints cement has been run in, while no rope has been staved into the socket, and the result is that there are a great number of the pipes that have a projection of cement at bottom of pipe, and in several cases the pipes are about filled up. The area of pipe is 12½ square inches, and some of the pipes are so much filled up that only an opening of about 5 square inches is left. I have carefully stored one of such from each of the sections we have opened up, so as to produce it should any difficulty arise when we deduct the cost of redoing the work from the money in our hands belonging to the contractor. It is perfectly evident that the rope-yarn and cement have been kept at hand, and when any person was looking on the joints were done well enough, but immediately on going to any other part where work was going on the pipes were put in any way."

In consequence of this report the local authority had refused to pay Mr Scott what he alleged was due to him under the contract, and he had thereupon raised this action. He offered no further proof of his allegations against Mr Tait other than the reports referred to above.

The defenders pleaded, *inter alia*, that the action was excluded by the clause of reference contained in the contracts. The pursuers answered that the arbiter was disqualified from acting in the premises.

The Lord Ordinary (CURRIEHILL) pronounced this interlocutor:—"The Lord Ordinary having heard parties' procurators, finds that the claims made by the pursuer in this action are embraced by and fall within the clauses of arbitration to James Tait, the defenders' engineer, that the pursuer objects to the arbitration being proceeded with, on the ground, as alleged by him, that James Tait has disqualified himself from acting as arbiter, and that the pursuer states that in support of the alleged disqualification of Mr Tait he has no proof to offer other than the letters and report referred to in his answer to the defenders' statement of facts (art. 3): Finds that the said James Tait has not by said letters or report disqualified himself from acting as arbiter under said clause of arbitration: Therefore supersedes further procedure *in hoc statu*, in order that the parties may have the pursuer's claims forthwith submitted to arbitration as aforesaid, reserving in the meantime all questions of expenses, and grants leave to reclaim."

The pursuer reclaimed, and argued—The arbiter by his report, and particularly by the allegation of dishonest practices implied in the last paragraph, had disqualified himself from acting. Had he not been the engineer there could have been no doubt; but it was no part of an engineer's duty to impute motives. The case was within *Dickson* v. *Grant*, February 17, 1870, 8 M. 566.

Argued for the defenders—The offices of engineer and arbiter were not imcompatible, and Mr Tait had done nothing as engineer which he was not entitled to do in that capacity—*Trowsdale* v. *Jopp*, July 12, 1864, 2 M. 1334; November 15, 1865, 4 M. 31.

At advising—

LORD PRESIDENT—I do not see the slightest reason for recalling the interlocutor of the Lord Ordinary in this case. This is a reference of a peculiar kind, and without intending to repeat what I had occasion to say in *Trowsdale* v. *Jopp*, I will just say that references of this kind are common in practice not only because of convenience but of necessity. It is quite indispensable that some one should be able to settle summarily and immediately the disputes which arise in the course of the work. The question is, whether the engineer, who is also arbiter, has done anything to disqualify himself from acting as arbiter?

Now, what he complained of was the faulty execution of the work by the contractor. But it is to be kept in view that he had two duties—as engineeer, to superintend and control the contractor and his servants; and he had also his duties as arbiter. It is the combination which makes the case peculiar; but it is quite vain to say that because Mr Tait faithfully performs his duties as engineer he is thereby debarred from acting as arbiter. All that he did was to say that the works were not being executed according to contract. He does not make vague allegations; he is clear and specific in his grounds. Now, in such a state of matters as this to hold that Mr Tait is disqualified is just to hold that the two offices—that of engineer and arbiter—are incompatible and ought not to be conjoined. But it is too late to theorise, as the matter is quite settled in practice.

LORD DEAS and LORD SHAND concurred.

LORD MURE was absent.

The Court adhered.

Counsel for Pursuer (Reclaimer)—Asher—Pearson. Agents—Campbell & Smith, S.S.C.

Counsel for Defender (Respondent)—Kinnear—Moncreiff. Agents—Mackenzie, Innes, & Logan, W.S.

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*Friday, March 7.**

FIRST DIVISION.

[Lord Rutherfurd Clark, Ordinary.

MURPHY AND OTHERS *v.* SMITH.

Entail—Destination—Clause of Devolution—Whether "Heir and Disponee" of a Substitute is within a Clause of Devolution which struck at Substitutes.

By a disposition and deed of settlement certain lands were disponed in favour of a series of heirs, which terminated in the settler's daughters, "equally among them, share and share alike, their heirs and disponees." The deed recited an entail of even date, by which the settler entailed certain other lands in favour of his eldest son and a series of heirs, and contained this further clause, that in case the disponee under the deed of settlement, "or any of the heirs of his body, or any of the other substitutes before men-

* Decided February 6, 1879.

tioned, shall succeed as heir of tailzie under the said deed of entail," he should be bound to denude in favour of certain other heirs. The son of the eldest daughter succeeded as heir of tailzie, he having previously succeeded his mother in her portion of the lands disponed by the deed of settlement. *Held* that he was not bound to denude, as he had succeeded his mother as heir-at-law and not as a substitute within the meaning of the clause of devolution.

By disposition and deed of settlement dated 15th July 1812, John Wightman disponed the lands of Garloff to David Wightman, his youngest son, and the heirs of his body, whom failing to any other son that might be born to him, and the heirs of his body, whom failing to Nicholas, Mary, and Janet Wightman, his daughters, and any other daughters that might be born to him, "equally amongst them, share and share alike, their heirs and disponees." The deed recited an entail of even date, by which Mr Wightman had settled the lands of Breconside on his eldest son and a series of heirs, and which contained the following clause:—"Providing and declaring alwise, as it is hereby expressly provided and declared, and appointed to be engrossed in the infeftment to follow hereon, that in case the said David Wightman, or any of the heirs of his body, or any of the other substitutes before mentioned, shall succeed as heir of tailzie under the said deed of entail of the lands of Meikle and Little Breconside, in the parish of Kirkgunzeon, then he, or the other person succeeding thereto shall be bound and obliged, as they by their acceptation thereof bind and oblige themselves, to denude as to the lands hereby disponed in favour of my younger children, equally amongst them, and the heirs of their own bodies, and to convey the same to them accordingly." Under the disposition David Wightman succeeded to the lands of Garloff, and made up titles in ordinary form. He died without issue in May 1856, when he was succeeded by his sisters Nicholas, then Mrs Smith, and Janet, then Mrs Murphy. Their titles were duly made up as heirs of provision. Mary had predeceased her brother without being married. On Mrs Smith's death in October 1859, her son, the defender, succeeded as her heir to her *pro indiviso* half of Garloff. Besides the defender she had two other children—the pursuers Mrs Cryan and Mrs M'Dowall. Mrs Murphy died in 1874, and her share of Garloff fell to her eldest son, the pursuer Andrew Murphy. In 1875 the defender succeeded as heir of entail to the estate of Breconside. In consequence, the pursuers, viz., Andrew Murphy, Mrs Cryan, and Mrs M'Dowall, founding on the clause of devolution above quoted, called on him to denude in their favour of the lands of Garloff. They maintained that he was a "substitute" within the meaning of the clause.

The Lord Ordinary (Rutherfurd Clark) repelled this plea, and found the defender entitled to absolvitor. His Lordship added this note to his interlocutor:—

"*Note.*—[*After narrating the facts ut supra*]—In the opinion of the Lord Ordinary the destination terminated with the daughters of the disponer. They succeeded as the last heirs of provision, and on the death of Mrs Smith her share of the lands devolved on the defender as her heir-at-law. The addition of the words 'heirs and disponees' does not prolong the destination, nor does it add anything to the legal effect of the deed. The succession would have been the same though these words had been omitted. All this seems to be settled by the cases of *Leny* v. *Leny*, 22 D. 1272, and *M'Gregor* v. *Gordon*, 3 Macph. 164. Taken by mere force of law, the defender cannot, it is thought, be regarded as a 'substitute' within the meaning of the deed. He could not be so regarded if the words 'heirs and disponees' had not occurred; and the addition of words which are of no legal effect cannot, as the Lord Ordinary conceives, make any difference in his position."

The pursuer reclaimed.

Argued for him—The heirs of the daughters were substitutes. It was a question of intention, and that was what the testator intended. It was of no moment that the deed relating to Garloff was not an entail. A clause of devolution was perfectly consistent with a fee-simple title. That was the opinion of the Lord Justice-Clerk in *Munro* v. *Butler Johnstone*, December 18, 1868, 7 M. 250; and the other Judges reserved their opinions on the point, holding that it did not arise. There were other cases in which defective entails had been held good as regards clauses of devolution—*Eglintoun* v. *Hamilton*, June 3, 1847, 9 D. 1167—July 8, 1847, 6 Bell's Apps. 136; *Lady Hawerden* v. *Howden*, Feb. 2, 1866, 4 M. 353; *Fleming* v. *Howden*, Feb. 14, 1867, 5 M. 659—*rev.* July 16, 1868, 6 M. (H. of L.) 113.

Argued for the defender—A clause of devolution was absolutely foreign to a fee-simple title—Lord Cowan in *Munro* v. *Butler Johnstone*, *supra*. But here the question was this—Was the defender a substitute within the meaning of the clause of devolution? He was not. His mother possessed in fee-simple, and he succeeded as her heir-at-law. *Leny* v. *Leny*, June 28, 1860, 22 D. 1272; *Macgregor* v. *Gordon*, December 1, 1864, 3 M. 164.

At advising—

Lord President—The question in this case is, whether the clause of devolution in the deed of settlement of the unentailed estate applies to the defender, or whether to make it so he must not be either David Wightman or the heir of his body, or one of the substitutes mentioned in the clause of destination in the deed? Undoubtedly, in the plain meaning of the words Mr Smith is not mentioned in the clause of destination, and he is not a substitute. The last of the branches in the deed of settlement destines the estate to the testator's daughters, equally amongst them, share and share alike, and as the defender is only here as heir to a daughter, he has a right to the estate. Nothing is better settled than that one who succeeds only as heir to a last substitute is not an heir of provision nor himself a substitute. Therefore I hold that the clause of devolution does not apply, and I entirely agree with the finding of the Lord Ordinary, and with the grounds on which he has gone.

Lord Deas and Lord Shand concurred.

Lord Mure was absent.

The Court adhered.

Counsel for Pursuer (Reclaimer)—M'Laren—Kinnear. Agent—James Somerville, S.S.C.