Tuesday, March 20.

FIRST DIVISION.

[Lord Adam, Ordinary.

SAVILE STREET FOUNDRY COMPANY *v.* ROTHESAY TRAMWAY COMPANY.

Arbitration—Reference—Exclusion of Ordinary Action—Executory Contract.

A minute of agreement for the construction and supply of tramway cars contained a clause of reference providing that in the event of any difference of opinion arising as to its meaning, or as to the manner of construction of the cars, or the materials employed therein, or the implementing of the provisions of the contract, such difference should be submitted to arbitration. After the cars had been delivered to the purchasers and used by them, a dispute arose as to whether the cars were conform to specification. *Held* that such a clause of reference was, according to the ordinary rule of law, intended to be confined to questions arising during the progress of the work, and did not exclude an action for payment of the contract price after delivery had been taken.

By minute of agreement dated 20th March 1882, the pursuers, the Savile Street Foundry and Engineering Company (Limited), carrying on business in Sheffield, undertook to make and supply to the defenders, the Rothesay Tramway Company (Limited), eight open and four closed tramway cars, conform to specification annexed to the said agreement. The price of the cars was to be £1120, and payment was to be made on delivery, or in the option of the defenders by bill at three months from the date of delivery. It was also specified by the minute of agreement that the whole of the eight cars were to be delivered on the tramway lines at Rothesay on the 29th May 1882 under a penalty of £1 per car per day in case of failure. The minute contained the following clause of reference:—"In the event of any difference of opinion arising as to the true intent and meaning of these presents, or as to the manner of construction of the foresaid cars, or the materials employed therein, or as regards the implementing or carrying into effect of the provisions herein contained, both parties hereby submit and refer such difference or differences to the determination of John Macrae, civil engineer, Edinburgh." The minute of agreement provided that the defenders should have the right of inspecting the work during the building of the cars. After the cars had been delivered, a dispute arose between the parties as to whether or not they were conform to specification, and payment was withheld by the defenders, in consequence of which this action was raised, concluding for payment of a sum of £1301, 8s. 8d., the contract price of the cars and the price of certain "extras." The pursuers also concluded for the price of iron-work and fittings supplied to two cars not embraced in the contract.

The defenders averred that the cars had not been delivered at the time agreed upon, and that when delivered they were found to be disconform to specification, the iron-work being defective and the castings having numerous flaws which were partially concealed by paint. The cars were also said to be too weak, and their condition was said to cause great dissatisfaction to the public.

The defenders further averred that in terms of the clause of reference above quoted, the matters in dispute were now depending before the arbiter, who had accepted the submission.

They pleaded, *inter alia*:—"(1) The action is excluded by the submission contained in the minute of agreement, and ought to be dismissed.

The Lord Ordinary repelled this plea-in-law, and before answer allowed the parties a proof of their averments.

The defenders reclaimed, and argued—The clause of reference contained in the minute of agreement applied to the present dispute. This case did not fall under the category of cases like *M'Cord* v. *Adams*, 24 D. 75, and *Kirkwood* v. *Morrison*, 5 R. 79, where the clause of reference was held to apply only to questions arising during the progress of the work contracted for. Here the clause included a reference upon all questions relating to the construction of the cars or the material used therein, and the present dispute having arisen upon those points an ordinary action was excluded.

Counsel for the pursuers were not called upon.

At advising—

LORD PRESIDENT—The pursuers have raised the present action in order to recover the price of certain tramway cars supplied by them to the defenders in terms of the minute of agreement and specification of 20th March 1882, and the answers which the defenders make to this claim are in substance—1st, that the cars were not delivered at the time agreed upon; 2d, that they were not conform to specification; 3d, that the accounts are overcharged. But an additional defence has also been stated that the action is excluded by the clause of submission contained in the minute of agreement. Now, that clause is in these terms—[*reads clause of reference quoted above*]. The important facts bearing upon the decision of this case are that at the time when these cars were handed over to the Tramway Company no objection was taken to their condition, and delivery was accepted. They were used for the purposes of the company, and it was not until they were so used that the defenders found out that they were disconform to contract.

Now, the rule of law in cases such as this is, that the clause of reference is to be confined to questions arising during the execution of the contract. Is there, then, anything in the words of the contract to take this case out of the ordinary rule? As far as I can see there is not—any question which was to arise as to the mode of construction of these cars, or as to the material which was to be used, ought clearly to have arisen during the execution of the contract, and had any such question arisen as to the mode of construction or as to the quality of the material used, it could easily have been determined by the arbiter. It would have been an easy matter also for the defenders to have overlooked the construction of these cars, and to have availed themselves of the right of continuous inspection, provision for

which was made in the agreement between the parties, but nothing of that kind was done. Now, I do not mean to say that the defenders are bound to take cars which are defective in their construction or made of bad material, but by delaying to take objection to the condition of these cars during the continuance of the contract they are deprived of the right of taking any advantage of the clause of reference.

The cars have been built, delivery has been taken, and the price is now payable, unless the defenders can give some satisfactory explanation why payment is to be withheld.

The words of the clause of reference to which our attention was specially directed, viz., "as regards the implementing or carrying into effect of the provisions herein contained," clearly refer to "the provisions" as to the construction of the cars. I can see therefore nothing in this case to take it out of the ordinary rules, and am for adhering to the Lord Ordinary's interlocutor.

LORDS DEAS, MURE, and SHAND concurred.

The Court adhered.

Counsel for Pursuers—W. C. Smith. Agents—Hope, Mann, & Kirk, W.S.

Counsel for Defenders — Trayner — Lang. Agents—Paterson, Cameron, & Co., S.S.C.

Tuesday, March 20.

FIRST DIVISION.

CARMONT, PETITIONER.

Trustee—Removal—Judicial Factor.

Circumstances in which in a petition by a person interested in a charitable trust, for removal of the trustees thereon, the Court *sequestrated* the estate and appointed a judicial factor *ad interim*.

This was a petition presented by the Rev. John Carmont, sometime Roman Catholic clergyman at Blairgowrie, for the removal of the Most Rev. John Strain, Roman Catholic Archbishop of St Andrews and Edinburgh, the Most Rev. Charles Eyre, Roman Catholic Archbishop of Glasgow, and the Right Rev. John M'Donald, Roman Catholic Bishop of Aberdeen, from the office of trustees under a trust known as the Mitchell Trust, and for the appointment of a judicial factor on the trust.

The Mitchell Trust was constituted by Captain Mitchell of Baldovie, Forfarshire, who died in 1865, by a deed of directions forming part of his settlement, which deed was in the following terms:—"To the Bishops of the Roman Catholic Church exercising their functions in Scotland, and including all of their order, whether or not designated as Bishops-Coadjutors, I bequeath in trust for the purpose after-mentioned" 200 out of 300 shares into which he appointed the residue of his estate to be divided, "that sum being destined to the special object of establishing and endowing an asylum for clergymen of the Roman Catholic religion officiating in Scotland who may be incapacitated by age or infirmity for the discharge of their sacred duties." The amount of the trust-funds at the date of presenting the petition was about £50,000.

The petitioner stated that he was fifty-six years of age, and incapacitated from duty on account of infirm health, and therefore had a material interest in the administration of the trust.

The averments on which the petition was founded were—(1) That loans of trust-monies had been made to churches without any bond or other security writ being granted therefor, and that interest had not been exacted on many of these loans; and (2) that the funds which should have been managed by the whole body of trustees acting together had been divided, so that the bishop of each of the three districts into which Scotland was at the time of such division divided by the Roman Catholic Church should manage one part of it, with the result that instead of one trust there were separate trusts, each placed for management in the hands of one trustee, and that the beneficiaries were thus relieved, not from the whole fund as directed by the testator, but from a restricted portion of it set apart to each particular district.

The petitioner averred that he considered this mode of administration illegal, and fraught with danger to those entitled to benefit by the trust, and, *inter alios*, to himself.

The trustees lodged answers, in which they admitted that the bequest had been divided into three separate funds. They stated that they had acted in *bona fide* in their administration of the trust, and that they were anxious to lose no time in restoring the trust to what they had now been advised was its proper and legal condition, as a single fund administered by a body of trustees. They stated that such of the money as had been invested on security was advanced on good security, but admitted that a part had been advanced to various churches in their dioceses without security. The major part of this, however, they had now replaced, and they were willing to replace the remainder. They averred that in each year they had expended on the purposes of the trust moneys equal to the full income of the trust-fund. They submitted that the trust was one which could not from its nature be managed by a judicial factor, and the appointment of such an officer would embarrass, if not defeat, the intention of the truster, who had selected his trustees on account of their official position, and given them large discretionary powers.

The petitioner, at the bar, added to the prayer of the petition an alternative craving the Court in the meantime, whether the trustees should be removed or not, to sequestrate the estate and appoint a judicial factor—*Morris* v. *Bain*, February 27, 1858, 20 D. 716.

At advising—

LORD PRESIDENT—The allegations of the petitioner here are of a serious character, involving grave imputations on the management of the trust, and his averments are practically admitted to a great extent. But the removal of these trustees from their office is a step which I am not prepared to take without more inquiry into the matter, so that the respondents may have an opportunity of making further explanations; and therefore I am of opinion that we should adopt