At advising—

LORD ADAM—So far as I understand, the order of service has been intimated and served. There is no doubt that in the ordinary case such an order when served stops further procedure in this Court. The question of the competency of the appeal is, it appears to me, a matter for the Judicial Committee of the House of Lords to decide, and we cannot assume that it is so utterly and entirely incompetent that we are entitled to disregard the order of service. I am therefore of opinion that there can be no further procedure in the Court of Session, and that Lord Low should not pronounce any further order.

LORD M'LAREN—I have always understood that an order for service of an appeal stopped all further procedure in the Court below, the theory of our law being that a case cannot be in two places at the same time. It may be possible under a statute in certain cases to proceed with a cause in two courts at the same time, but there is no statutory provision of that kind applicable to the case before us, and therefore I think that there can meantime be no further procedure in this case in the Court of Session. The question of the competency of the appeal is for the Appeal Committee of the House of Lords.

LORD KINNEAR concurred.

Counsel for Pursuers—H. Johnston. Agents—Graham, Johnston, & Fleming, W.S.

Counsel for Defenders—Sol. Gen. Murray. Agents—A. & G. V. Mann, S.S.C.

Thursday, October 22.

FIRST DIVISION.

[Sheriff of Renfrew.

WRIGHT *v.* GREENOCK AND PORT-GLASGOW TRAMWAYS COMPANY.

Arbitration—Reference—Exclusion of Ordinary Action—Process—Pleading—Denial of Claim on Record—Extrajudicial Admission—Proof.

A contractor entered into an agreement with a tramways company to work and horse their cars, under which he was to be paid at a certain rate per mile for the distance covered. The agreement contained a clause appointing A, whom failing B, as sole arbiter for the amicable adjustment and determination of all questions and differences which might arise between the parties as to the true import and meaning of the agreement, or as regarded the implementing or failure to implement the same or any clause thereof, and generally for the settlement of all questions of what nature soever which should or might arise out of, or be in any way connected with, the said agreement, including all pecuniary claims by one party against the other.

After the termination of the agreement the contractor raised an action against the company for a sum which he averred to be the amount due to him for work done under the agreement during the last month preceding its termination, "conform to statement thereof prepared by the defenders, and letter from the defenders' secretary, sending said statment to the pursuer, and admitting the correctness of the amount sued for." The defenders met this averment by a simple denial, and also made certain counter-claims of damages in connection with the work done by the pursuer under the contract. The letter from the defenders' secretary to the pursuer, which was produced by the pursuer and admitted by the defenders to be genuine, bore that "the usual statement of account" was therewith sent, the sum brought out being exactly the sum claimed by the pursuer. The defenders pleaded that the action was excluded by the reference clause of the agreement.

Held (1) that in face of the defenders' denial of the pursuer's claim on record, the claim could not be held as admitted, or as proved by the admissions contained in the letter of the defenders' secretary; and (2) that the question raised thereby and by the counter-claims of the defenders were matters to be disposed of by the arbiter nominated in the agreement; and action *dismissed.*

By agreement entered into between Peter Benjamin Wright, contractor, and the Greenock and Port-Glasgow Tramways Company, dated 25th and 28th November 1889, the former agreed to provide as many horses, to be driven by his drivers, as should be required to draw the cars of the Tramway Company, and the latter agreed to pay Wright at the rate of per mile for the distance travelled by the cars.

By the 19th article it was provided that the agreement should be terminable on six months' notice by either party.

By the 21st article it was provided that for the amicable settlement and determination of all questions and differences which might arise between the pursuer and the defenders as to the true import and meaning of these presents, or as regards the implementing or failure to implement the same or any clause thereof, and generally for the settlement of all questions of what nature soever, which should or might arise out of or in any way connected with the said agreement, including all pecuniary claims by the one party against the other, the same should be submitted to Arthur A. Macfarlane, veterinary surgeon, Greenock, whom failing William M'Geoch, veterinary surgeon, Paisley, as sole arbiter, with all the usual powers competent to arbiters.

The agreement was brought to an end on March 2nd 1891, notice having been given six months previously by the Tramway Company in terms of the agreement. At

the date of the termination of the agreement Wright had been paid for all the work done by him under it down to 31st January 1891.

On 11th March Wright raised an action in the Sheriff Court at Greenock against the Tramways Company for the sum of £200, 14s. 2d.

The pursuer averred—"(Cond. 6)—The amount due to the pursuer by the defenders for the horsing of and providing drivers for their cars, and for the doing of the whole other work provided by the said agreement to be done by the pursuer during the month of February 1891 is £193, 0s. 1d., and for the 2nd day of March 1891 £7, 14s. 1d., amounting together to the sum of £200, 14s. 2d., conform to statement thereof prepared by the defenders, and letter from the defenders' secretary dated 9th March 1891 sending said statement to the pursuer, and admitting the correctness of the amount sued for, which sum of £200, 14s. 2d was payable to the pursuer on the 10th day of March 1891. (Cond. 7) The defenders have refused to pay the pursuer the said sum of £200, 14s. 2d., and the present action has been rendered necessary." . . .

The defenders replied to condescendence 6 by a simple denial, and further in a separate statement of facts they set forth the 8th article of the agreement, which provided that damages arising through accident or fault to third parties from the working of the company's cars, or incident thereto, should be borne in the proportion of 50 per cent. by the company and 50 per cent. by the contractor, and they made the following averments of counter-claim against the pursuer—"(Stat. 3) A claim has been made by a party who was injured on 11th November last for £500 damages, and negotiations are at present pending for a settlement of same. The accident is alleged to have occurred through the injured man leaving the front part of the car or driver's platform, which was in charge of the pursuer's servant, and the fault of the accident is attributed to the driver not stopping the car. (Stat. 4) On 23rd December 1889 one of the cars belonging to the defenders was run against a cart standing on the side of the road, from which the horse had been temporarily unloosed, and injury was done to the car by the shafts of the cart, and again on the 31st of December 1889 one of the company's cars was very seriously injured through coming into collision with a soda-water van, when one of the shafts of the van crushed through a panel in the front of the car. Again, on the 10th day of March 1890, through furious driving, one of the company's cars was run off the line, and came into collision with another of the company's cars going in the opposite direction, when both of the said cars were seriously injured. On 27th December 1890 one of the company's cars was driven against a lorry standing on the street, breaking a window and seriously injuring the woodwork of the car. The damage sustained by the company's car was through reckless driving or carelessness on the part of the drivers employed by the pursuer, and for whom he is responsible. Very frequently damage of greater or less extent was sustained by the company's cars through the recklessness or carelessness of the drivers employed by the pursuer, but in the cases particularly referred to above official intimations were sent to pursuer. The damage to defenders' cars as aforesaid is estimated at £150, which sum is due by pursuer to defenders."

The pursuer pleaded—"(3) Assuming that the clause of reference is in force, there being no dispute between the pursuer and defenders as to the amount of the pursuer's claim, the clause of reference does not apply. (4) The defenders are not entitled to retain the amount due to the pursuer until the indefinite claims they allege against him are determined."

The defenders pleaded—"(1) The subject of dispute falling under the reference clause of the agreement, the action is incompetent and should be dismissed, and the defenders found entitled to expenses."

The pursuer also founded on the letter dated 9th March 1891 addressed to him by Mr Louson Walker, the defenders' secretary, which the defenders admitted before the Sheriff to be genuine—"I send you herewith the usual statement of account for horsing the cars for the month of February, adding the horsing for last Monday, the 2nd of March, the total being £200, 14s. 2d. The sending of this statement has been delayed in the hope that before the 10th current some settlement would have been effected as to the claim for £500 which has been made against the company by Martin Cannon in respect of the accident on 11th November last, but I regret that so far no settlement has been come to, and, as you are aware, the Employers Insurance Co. of Great Britain, Limited, have repudiated liability. Should the company be found liable for the accident to Cannon, and the Insurance Company be able to make good their repudiation of liability, 50 per cent. of the loss will fall upon you and 50 per cent. upon the company in terms of agreement. Having regard to this, and considering the contents of your letter of 16th February, and the present position of the matter, the directors have instructed me not to pay the above sum of £200, 14s. 2d., but to lodge the money on deposit-receipt with the National Bank of Scotland, Limited, pending a settlement of Cannon's claim. The money will accordingly be placed on deposit-receipt to-morrow. Meantime the Insurance Company are negotiating without prejudice with a view to bringing about a settlement of Cannon's claim, which I trust they may be able to do very soon, and whenever a final arrangement of the claim and of the question raised by the Insurance Company has been effected, the whole of the balance due to you will at once be handed over."

On 29th April 1891 the Sheriff-Substitute (HENDERSON BEGG) repelled the first plea-in-law for the defenders, and appointed the parties to be further heard on 1st May.

On 1st May the Sheriff-Substitute pro-

nounced this interlocutor—"In respect the defenders do not ask for a proof of any of their averments contained in their statement of facts, ordains the defenders to pay to the pursuer the sum of £200, 14s. 2d., with interest thereon at the rate of 5 per cent. per annum from 10th March 1891 till payment, reserving to the defenders their claims mentioned in the said statement of facts, and to the pursuer his answers thereto," &c.

The defenders appealed, and on 12th June the Sheriff (CHEYNE) recalled the interlocutors of the Sheriff-Substitute, sustained the defenders' first plea-in-law, and dismissed the action.

"*Note.*—The terms of the reference clause in the agreement founded on appear to me quite as wide as those of the clause which came up for construction in *Mackay* v. *Parochial Board of Barry*, 1883, 10 R. 1046, and in my opinion exclude this action. It was urged that there was no room for this objection, in respect that there was really no dispute as to the pursuer's claim, the sum sued for being precisely the sum stated in the letter of the defenders' secretary, the genuineness of which was admitted by Mr Turner at the debate. The accuracy of the claim is, however, denied on record, and for all I know the defenders may be able to satisfy the arbiter, the proper judge of the matter, that the amount due is less than the amount claimed. I cannot, therefore, sustain this contention. I will only add that if I had taken a different view in regard to the defenders' first plea, I could not have allowed them a proof of the averments contained in the fourth article of their statement of facts, unless these averments had been made a good deal more specified than they are at present."

The pursuer appealed, and argued—As a matter of pleading the defenders' mere denial in answer 6 was insufficient, there being no attempt to explain away the productions by which the pursuer supported his averment that the sum sued for was conform to a statement prepared by the defenders themselves. It must therefore be taken that the defenders did not on record dispute the amount of the pursuer's claim, and that they did not was abundantly clear from the letter by the secretary to the pursuer dated 9th March 1891. Their denial of the accuracy of the pursuer's claim was merely a device to enable them to make their counter-claims, but as the pursuer's claim must be looked upon as liquid under their hand, they were not entitled to plead compensation in respect of these alleged illiquid counter-claims—*Scottish North-Eastern Railway Company* v. *Napier*, March 10, 1859, 21 D. 700. The action was not excluded by the reference clause in the agreement, because (1) there was no question under the agreement to be referred to the arbiter as the pursuer's claim was not disputed, and the defenders had made no relevant averment of counter-claims against the pursuer; (2) the arbiter nominated having no power given him to assess damages, the ordinary rule applied that he had no such power, and the defenders' counter-claims were claims of damages except one which was contingent—*Pearson* v. *Oswald*, February 4, 1859, 21 D. 419; *Tough* v. *Dumbarton Waterworks Commissioners*, December 20, 1872, 11 Macph. 236; (3) the reference clause was merely executorial of the agreement, and the agreement having expired was no longer in force—Bell on Arbitration, 75; *M'Cord* v. *Adams, &c.*, November 22, 1861, 24 D. 75; *Kirkwood* v. *Morrison*, November 6, 1877, 5 R. 79; *Beattie* v. *M'Gregor*, July 5, 1883, 10 R. 1094; *Saville Street Foundry Company* v. *Rothesay Tramways Company*, March 20, 1883, 10 R. 821. The pursuer was therefore entitled to decree for the sum sued for.

The defenders were not called upon.

At advising—

LORD PRESIDENT—The Sheriff-Principal has sustained the defenders' first plea-in-law and dismissed the action. That plea is to this effect—"The subject of dispute falling under the reference clause of the agreement, the action is incompetent and should be dismissed, and the defenders found entitled to expenses."

The first question is, what is "the subject of dispute," and when we look at the record there appear to be more than one, because, in the first place, the defenders decline to admit the claim made by the pursuer in the action. Mr Thomson has criticised the pleadings, and has shown that it would probably be easy to establish by evidence an extrajudicial admission by the defenders of the amount of the pursuer's claim, but that admission does not appear on record, the attitude of the defenders there being that they refuse to give any admission and deny the claim. It is, therefore, matter of dispute, in the first place, whether the sum of £200, 14s. 2d. is due by the defenders to the pursuer.

Even if Mr Thomson were entitled, as I think he is not, to hold the amount of the pursuer's claim as admitted, or as proved in fact by the admissions contained in Mr Louson Walker's letter of 9th March 1891, there would still remain the question whether the company is entitled to refuse payment of that claim till the determination of the claim by a third party referred to in that letter. The defenders state substantively on record that the pursuer is bound to make good 50 per cent. of the damage arising through fault or accident to third parties from the working of the company's cars in the instance specified. They further set out several instances of injuries being done to their cars through the fault of the pursuer's drivers, for which they say he is liable to them to the amount of £150.

These are the subjects of dispute between the parties, and we are not called upon to say whether the answers made by the defenders to the pursuer's claim are good or bad, it is enough that these defences are proponed in answer. Now, when we turn to the clause of reference we find it to be remarkably wide in its terms, and I cannot help thinking that the remark of the Sheriff is well founded, that its terms "are

quite as wide as those of the clause which came up for construction in the case of *Mackay* v. *Parochial Board of Barry*, 10 R. 1046." That case is very important, not merely because of the lucid judgment of Lord Rutherfurd Clark, but because the subsequent case of *Beattie* v. *M'Gregor*, 10 R. 1094, presented an opportunity to the late Lord President to bring together the law laid down in *Mackay* with the law established by another class of case which had occurred frequently during the previous twenty years, of which *Kirkwood* v. *Morrison*, November 6, 1877, 5 R. 72, may be taken as a type. His Lordship pointed out that in each case of the kind the question is one of construction of the contract, and turning to the clause in *Mackay's* case, he says—"Referring to that clause, Lord Rutherfurd Clark makes these observations in his very careful judgment, a report of which was laid before us—'The contracting parties may create a tribunal for settling differences which may occur in the course of executing the works, and which has no other function. But of course they may do more and extend it to the decision of any claim which may arise out of the contract.' Now, if parties would only keep in view that there are two kinds of reference, one of which includes only disputes arising in the execution of the contract, while the effect of the other is to refer to arbitration every claim and obligation that at any time arises out of the contract; if parties would only keep this in view there would be an end to cases of this class."

It appears to me that the case before us belongs to the wider class, and that effect must be given to it when disputes are shown on record to have arisen such as I have described. This leads to the result that the judgment of the Sheriff is right.

It appears from the examination of the contract which has taken place at the bar, that the arbiter has full power to issue an effective award, and therefore it is not necessary to keep the case in Court in order to give effect to the award in favour of the successful party.

LORD ADAM and LORD KINNEAR concurred.

LORD M'LAREN was absent on circuit.

The Court dismissed the appeal.

Counsel for the Pursuer—A. S. D. Thomson. Agents—Shiell & Smith, S.S.C.

Counsel for the Defenders—H. Johnston—Salvesen. Agent—A. C. D. Vert, S.S.C.

Tuesday, October 27.

FIRST DIVISION.

[Sheriff of Inverness, Elgin, and Nairn.

M'GILLIVRAY *v.* MACKINTOSH AND ANOTHER.

(*Ante*, vol. xxviii., p. 488.)

Process—Appeal—Competency.

In an action raised in a Sheriff Court, the Sheriff after certain findings assoilzied the defenders and found the pursuer liable in expenses. The pursuer having appealed, the First Division on 17th March 1891 affirmed the Sheriff's interlocutor as regarded certain of its findings, assoilzied the respondent, and found the appellant liable "in the expenses in this Court." The process having been re-transmitted to the Sheriff Court, the defenders had the account of expenses incurred by them in the Sheriff Court taxed, and the Sheriff-Substitute granted decree in their favour for the taxed amount. On appeal the Sheriff adhered.

Held (1) that the interlocutor of the First Division of 17th March having exhausted the cause, the interlocutors subsequently pronounced in the Sheriff Court were incompetent; and (2) that it was competent to appeal against them.

In an action of damages for breach of promise of marriage at the instance of Hugh M'Gillivray against Mrs Mackintosh, wife of and residing with William Mackintosh, farmer, Barivan, Nairn, the Sheriff (IVORY) on 9th October 1890 pronounced an interlocutor to this effect—"That the pursuer has failed to justify his delay in insisting on the defender fulfilling her promise, and that the defender has proved that when she married William Mackintosh the contract which had been entered into between her and the pursuer had been abandoned. . . . Finds in law that the defender is not liable to the pursuer in damages: Therefore to the above extent and effect sustains the defences, assoilzies the defender, and decerns: Finds the pursuer liable to the defender in expenses, and remits to the Auditor to tax the amount thereof and report."

The pursuer having appealed, the First Division on 17th March 1891 pronounced the following interlocutor—"Affirm the interlocutor of the Sheriff dated 9th October 1890, in so far as it 'finds that the pursuer has failed to justify his delay in insisting on the defender fulfilling her promise, and that the defender has proved that when she married William Mackintosh the contract which had been entered into between her and the pursuer had been abandoned:' Find also in law, in terms of said judgment, that the defender is not liable to the pursuer in damages, and to that extent sustain the defences: Assoilzie