this—"The jurisdiction of the Court is not wholly ousted by such a contract," viz., the contract to submit the matter in dispute to arbitration. "It deprives the Court of jurisdiction to inquire into and decide the merits of the case, while it leaves the Court free to entertain the suit and to pronounce a decree in conformity with the award of the arbiter. Should the arbitration from any cause prove abortive the full jurisdiction of the Court will revive, to the effect of enabling it to hear and determine the action upon its merits. When a binding reference is pleaded *in limine*, the proper course to take is either to refer the question in dispute to the arbiter named or to stay procedure until it has been settled by arbitration. The latter course was adopted in *Caledonian Railway Company* v. *Greenock and Weymss Bay Railway Company* (10 Macph. 892), where the reference was to arbiters unnamed, but had been confirmed by statute. I cite that case, not as establishing but as illustrating the rule of procedure, which was in force long before its date."

Now in the case of the *Caledonian Railway Company* v. *Greenock and Wemyss Bay Railway Company* the extent of the arbitration clause was as follows:—"All differences which may arise between the parties hereto respecting the true meaning or effect of this agreement, or the mode of carrying the same into operation. . . . ." I think that is about as near the clause in the present case as one could well wish, for the clause reads thus—"Any dispute or difference . . . as to the construction of this agreement, or any matter arising out of or in connection with the same, shall be referred to a single arbitrator."

I humbly think that that law, which is treated by Lord Watson as being the well-established law of Scotland, and of which a previous illustration may be found in Lord Rutherfurd Clark's opinion in the case of *Mackay* v. *The Parochial Board of Barry* (10 Macph. 1046), was not altered—as was pled to us—by the judgment of the House of Lords in the *Johannesburg* case (1909 S.C. (H.L.) 53). In the *Johannesburg* case it was held that the contract had been so thoroughly repudiated that it was gone altogether. But I concur with Lord Mackenzie in the distinction he has drawn between the *Johannesburg* case and this case. I would also beg leave to repeat what I said in the *North British Railway Company* v. *Newburgh and North Fife Railway Company* (1911 S.C. 710), to the effect that, although there are traces in the *Johannesburg* case of a doctrine which seems to be good law in England and which I assume was rightly applied in the *Johannesburg* case—a case in which the whole stipulations fell to be construed by English law—viz., the doctrine that the Court may apply the arbitration clause or not as it thinks right in the circumstances—such a doctrine is wholly alien to the law of Scotland. If there is a binding reference, then to the tribunal which the parties have thus chosen the parties must go, and the Court has no dispensing power.

LORD KINNEAR—I concur.

The LORD PRESIDENT stated that LORD JOHNSTON also concurred.

The Court pronounced this interlocutor—

"Recal said interlocutor in so far as it repels the first plea-in-law for the defenders and allows proof: *Quoad ultra* adhere to the said interlocutor: Sist the cause to allow the parties to determine by arbitration the true meaning of clause VI (*a*) of the contract between them: Find the reclaimers entitled to expenses since the date of said interlocutor, and remit," &c.

Counsel for Pursuers—Chree, K.C.—Paton. Agents—Maxwell, Gill, & Pringle, W.S.

Counsel for Defenders—Morison, K.C.—Wark. Agents—J. & J. Galletly, S.S.C.

Saturday, October 26.

EXTRA DIVISION.

[Lord Dewar, Ordinary.

MACINTYRE BROTHERS *v.* SMITH.

Arbitration—Reference—Expenses—Fee to Arbiter—Remuneration not Stipulated for.

One of the parties to an arbitration refused to pay his share of the arbiter's fee on the ground that as no remuneration had been stipulated for, the common law rule applied that the arbiter in such a case must be presumed to act without remuneration.

Held that that rule is not applicable to the modern conditions of business, and that a professional man can no longer be presumed to give professional services gratuitously.

On 24th June 1911 Messrs Macintyre Brothers, building contractors, Glasgow, *pursuers*, raised an action against Alexander Smith, Glengarnock, Ayrshire, *defender*, for, *inter alia*, the sum of £31, 10s., being one half of the sum of £63, the fee fixed by the Auditor of the Faculty of Procurators in Glasgow as suitable remuneration to the arbiter in an arbitration between the parties. The defender disputed liability on the ground that the arbiter was not entitled to any fee.

The following *narrative* of the *facts* is taken from the opinion of Lord Dewar—"In this action Macintyre Brothers, building contractors, Glasgow, sue Alexander Smith, Glengarnock, Ayrshire, for £268, 4s. 7d., being the amount of the expenses incurred by the pursuers in an arbitration between parties, and found due by decreet-arbitral—together with the expenses of the clerk to the reference and half the arbiter's fee. The defender disputes liability on the ground (1) that the decree-arbitral was *ultra fines compromissi* and *ultra vires* of the arbiter, and (2) that the arbiter is not, in any event, entitled to a

fee. Neither party asked for a proof, and the material facts upon which the parties are agreed are as follows:—By agreement dated 27th February 1903 the pursuers agreed to purchase, and the defender agreed to sell, his whole interest in Nettlehirst Limestone Quarry for the sum of £4000. By the second article of the agreement it was provided that the price should include goodwill; and by the sixth article the defender bound himself not to carry on, directly or indirectly, by himself or others representing him, the business of limestone merchant within a radius of twenty-five miles of Nettlehirst Quarry for a period of thirty years, without the consent of the pursuers. And by the eighth article the defender further bound himself to introduce all his customers to the pursuers, and give what other assistance he could to keep up the output of the quarry purchased. And the last article provides—'In the event of any difference arising as to the meaning of these presents, or as to any dispute, difference, matter, or thing arising in any way out of or under this agreement, or to the contracts or conditions thereof, the same shall be referred' to an arbiter named. Differences did arise, and the parties requested Mr Cook, writer, Glasgow to decide the question on which they were at variance. Mr Cook accepted office, and ordered parties to lodge their claim and answers in usual form. The pursuers lodged a statement of claim, and craved the arbiter 'to find that the respondent (defender) had violated and infringed the said agreement in the manner and to the effect set forth in the aforesaid statement, and to grant decree - arbitral accordingly, with the expenses of the reference.' And in his answers the defender craved the arbiter 'to absolve him from the findings concluded for by the claimants (the pursuers), with the expenses of the reference.'"

After the usual procedure the arbiter issued a finding in favour of the pursuers, and on or about 19th June 1911 the pursuers took up the decree-arbitral and paid the sum of sixty guineas to the arbiter as remuneration. The pursuers then called on the defender to repay them one-half of the arbiter's fee, but the defender refused on the ground that as no remuneration had been stipulated for, the arbiter must be presumed to have acted gratuitously.

The pursuer pleaded, *inter alia*—"(3) The defender being bound to make repayment to the pursuers of one-half of the sum paid by the pursuers to the arbiter as remuneration, decree should be granted as concluded for."

The defender pleaded, *inter alia*—"(4) The said arbiter not being entitled to remuneration, the defender is not liable for any part of the payment alleged to have been made to him by the pursuers, and should be assoilzied from the conclusion therefor."

On 20th February 1912 the Lord Ordinary (DEWAR) decerned against the defender in terms of the conclusions of the summons.

Opinion.—[*After dealing with matters with which this report is not concerned*]—"The next question is whether the defender is liable for half the arbiter's fee. The arbiter is a solicitor, and although he had not stipulated for a fee in advance, and no arrangement had been made regarding it, neither party, I understand, expected him to act gratuitously. Accordingly, after the decree-arbitral was issued and the pursuers' account of expenses had been remitted to the Auditor for taxation, the pursuers wrote to the defender on 3rd February 1911 stating that the Auditor had fixed the diet for taxation for 8th February, and suggesting that parties might agree upon a fee for the arbiter, and failing agreement the Auditor would be asked to fix it. The defender did not reply to this letter, nor did he appear before the Auditor, and the diet was adjourned. On the 8th February the pursuers again wrote to the defender stating that the diet had been adjourned until the 13th February, and on that date the Auditor would be asked to fix the arbiter's fee whether the defender was present or not. The defender did not state any objection to this course, and the Auditor accordingly fixed the arbiter's fee at sixty guineas. This fee the pursuers paid, and they now claim half thereof from the defender, and I think that in the special circumstances they are entitled to succeed. The defender does not aver on record, nor did his counsel state in debate, that he expected the arbiter to act gratuitously or that the fee fixed was unreasonable. I gather both from the defender's pleadings and the argument of his counsel that he understood from the beginning that Mr Cook was to be paid for his services, and that he would have been quite willing to pay half the fee if the decision had been in his favour; but he is so disappointed with the result that he proposes to disregard the understanding regarding payment, and now pleads that as the office of an arbiter is honorary, there is no legal obligation upon him to pay any fee at all in the absence of express stipulation. I think he is too late in taking that plea.

"No doubt the general rule is that the arbiter is presumed to act gratuitously, and unless he stipulated for remuneration he has no legal claim to enforce it. But where the circumstances show that there was an understanding that the arbiter's services should be paid for, and one of the parties has paid a reasonable fee without objection, he may, I think, recover half thereof from the other party. This was decided in the case of *Henderson* v. *Paul*, 5 Macph. 628. In that case the reference was to an accountant, and although there was no express stipulation that he should be paid, the facts showed that parties understood that he was to be remunerated, and one of them having paid the fee was held entitled to recover half thereof from the other party. The Lord Justice-Clerk said (page 632)—'The presumption, no doubt, is that an arbiter acts without any right to remuneration; but the presumption is capable of being reargued, and I find what satisfies me, in the facts of the

case, that the presumed condition did not hold in this case;' and the special facts were, I think, exactly what we find here, viz.—(1) The arbiter was a professional man who rendered services to the parties of a similar kind to those for which he was paid in the exercise of his profession; (2) the payment was made in implement of an understanding which existed when the submission was entered into; and (3) the payment was made without warning or objection by the defender. (See also *Edinburgh Oil Gas Light Company* v. *Clyne's Trustees*, 13 S. 413, where it was held that a party was barred from objecting to a fee paid to an arbiter on the ground that he had failed to intimate an objection in due time; and the case of *Murray* v. *North British Railway Company*, 2 F. 460, where it was questioned whether the old rule was now applicable with the same absoluteness as formerly.)

"On the whole matter I am of opinion that the pursuers are entitled to decree as concluded for, with expenses."

The defender reclaimed, and argued—Here no special professional skill was required, and the arbiter was simply acting in a purely judicial capacity, and so the common law rule applied that, apart from agreement, an arbiter cannot demand a fee except where special knowledge is required—*Murray* v. *North British Railway Company*, January 26, 1900, 2 F. 460, 37 S.L.R. 370; Bell on Arbitration (2nd ed.), p. 312.

The pursuer was not called upon.

LORD KINNEAR— . . . I have still, however, to dispose of the question as to whether the defender is liable for half of the arbiter's fee. The pursuers have paid the whole of the sum of £63, the fee fixed by the Auditor of the Faculty of Procurators in Glasgow as a suitable remuneration for Mr William Cook's services as arbiter, and in the conclusions of the present action they include a conclusion for £31, 10s., the half of that sum. The defender resists this conclusion on the ground that an arbiter is not entitled to remuneration for his services unless remuneration has been expressly stipulated, and that in the present case there was no such stipulation. The Lord Ordinary has held that the pursuers are entitled to the sum for which they sue. He says —"The defender does not aver on record, nor did his counsel state in debate, that he expected the arbiter to act gratuitously, or that the fee fixed was unreasonable. I gather both from the defender's pleadings and the argument of his counsel that he understood from the beginning that Mr Cook was to be paid for his services, and that he would have been quite willing to pay half the fee if the decision had been in his favour." The Lord Ordinary has thus based his judgment on the existence of an understanding or agreement between the parties.

I am not prepared to hold that there was any express agreement, but I agree with the Lord Ordinary that there is nothing in the circumstances nor in the defender's averments on record to suggest that he expected the arbiter to act gratuitously, nor do I think that there was reasonable ground for any such expectation.

I have no doubt that the arbiter was entitled to remuneration, and that the defender is liable for the half. It is doubtless true that a rule has been recognised in our law by which an arbiter was debarred from claiming remuneration for which he had not stipulated in terms. I agree, however, with what Lord Trayner said in *Murray* v. *North British Railway Company* (1900, 2 F. 460, at p. 464), that that general rule cannot be stated now with the same absoluteness as formerly. It is indeed stated by the text writers, but the rule was laid down at a time when arbitrations were not so common as they are now, and when the natural inference from the circumstances generally attending them was supposed to be that an arbiter was invited to undertake a purely friendly office for the settlement of differences between persons who did not desire to litigate. But now that arbitration as professional work has become so common in the ordinary course of business, there seems to me to be no reason whatever for supposing that when a professional man is asked to undertake the labour and responsibility of solving a disputed question which requires the exercise of professional skill and experience for its solution, he is invited to act gratuitously. It is an implied term of the contract between him and the parties either that he shall work for nothing or that he shall be paid for his services. Whether the one or the other is the true implication is a question to be solved by the ordinary custom and understanding of business men. I think that in accordance with general practice the rule must now be assumed that a professional man undertaking the duties of an arbiter is entitled, in the absence of any agreement to the contrary, to be remunerated for his services as arbiter in the same way as he is entitled to receive remuneration for his services in any other professional employment. The general rule is that a request for professional service implies a promise to pay for it, and I do not see why this rule should be the less applicable because the particular service is for the benefit of two parties who are at variance with one another.

In the present case the parties referred all differences and disputes in connection with their agreement to a writer in Glasgow. In carrying out the reference the arbiter has, as a professional man, expended time and labour, and no reason has been suggested why he should have agreed to do so gratuitously.

I have accordingly no difficulty in holding that the arbiter was entitled to remuneration, and that the defender as one of the parties to the arbitration is liable for half.

LORD DUNDAS—I concur.

LORD MACKENZIE—I concur.

The Court adhered.

Counsel for the Reclaimer—Macmillan, K.C.—Macquisten. Agent—R. S. Carmichael, S.S.C.

Counsel for the Respondent—Moncrieff, K.C.—Fenton. Agents—Simpson & Marwick, W.S.

Thursday, November 21.

FIRST DIVISION.

[Lord Skerrington, Ordinary.

M'ADAM *v.* SCOTT.

Proof—Parole Evidence—Admissibility to Explain Written Documents—Discharge—Ambiguity.

M. sued S. for payment of £500, which he alleged was due to him under an agreement for the settlement of (1) an action by M. against T. & Co., of which firm S. was a partner; (2) an action by T. & Co. against M.; and (3) an action by M. against S. M. averred that the agreement provided that all three actions were to be withdrawn, that T. & Co. were to pay him £2500 at once, and that S. was to pay him a further sum of £500 within a reasonable time. The sum of £2500 was paid to M., but S denied liability for the further sum of £500, and in defence to the present action produced (1) the following letter from M. to S., dated 5th December 1910:—"I hereby acknowledge that all sums of money due by you to me, and all claims by me against you or your firm of (T. & Co.) and partners, are hereby discharged, and I agree to withdraw the actions at my instance against you and your firm of (T. & Co.) and partners on the understanding that (T. & Co.) and partners also withdrew their action against me and abandon all claims against me"; and (2) the following receipt signed by M., dated 7th December 1910:—"Received from (S.) the sum of Two thousand five hundred pounds, being sum agreed to be accepted by me in full settlement of all claims at my instance against him and his firm of (T. & Co.) and partners." S. maintained that these two documents taken together constituted a complete and final discharge, and that, the documents being unambiguous, parole evidence that £500 was still due was incompetent. The Court *allowed* a proof *habili modo* on the ground that the documents were ambiguous and could not safely be construed without knowledge of the facts to which they related.

Essential Error—Discharge Granted sine causa—Relevancy.

S. paid to M. £2500 under an agreement to settle certain litigations between M., S., and a firm of which S. was a partner. M., in respect of the said payment, granted a receipt in full of all claims at M.'s instance against S. and his firm . . . and partners. M. averred that by the agreement S. personally was bound to pay him a further sum of £500, and that by granting the receipt he did not intend to discharge that claim, which he had not then in contemplation, and the discharge of which would have been gratuitous. *Held* (*per* Lord Skerrington, Ordinary) that M. had stated a relevant case for challenging the receipt on the ground of essential error.

Opinions reserved in the Inner House.

On 8th March 1912 David Wilson M'Adam, commission agent, 50 Wellington Street, Glasgow, *pursuer*, raised an action against George Turner Scott, stockbroker, 135 Buchanan Street, Glasgow, *defender*, for payment of £500 in respect of an agreement entered into for the settlement of (1) an action at the pursuer's instance against James Turner & Company, stockbrokers, Glasgow, and the individual partners of the said firm, of whom the defender was one; (2) an action at the instance of James Turner & Company against the pursuer; and (3) an action at the instance of the pursuer against the defender. Along with his defences to the present action the defender produced the letter dated 5th December and the receipt dated 7th December 1910 which are quoted in the rubric.

The following *narrative* of the *facts* is taken from the opinion of Lord Kinnear:—"The pursuer brings this action against the defender Mr Scott for £500, which he alleges to be the sum which he and the defender had agreed that the defender should pay in order to the settlement of an action raised by the pursuer against him. His averment is that he had raised an action against the defender's firm of James Turner & Co. and the individual partners of that firm, who, he says, are the defender Mr Scott and Mr James Turner. He avers further that a counter action was raised by James Turner & Co. against him, both actions arising out of the same transaction. There were, therefore, two actions to which the pursuer and the defender's firm were parties. Then he says, further, that in addition he raised a separate action against the defender himself for the payment of certain commissions. Whether that separate action had any connection with the two other actions or not does not appear, or whether it arose out of the same transactions; but there is a perfectly distinct averment that it was a separate action against the defender. Then he goes on to aver that in the course of the procedure a proof was appointed, first, in the actions with the firm for a day in December 1910, and another and separate proof in the other action against the defender personally in January 1911; that the parties made an agreement for the settlement of those actions; and that the terms on which they agreed were that the defender and his firm should pay the pursuer £2500 in consideration of the withdrawal of the action