cussion, and nothing to the contrary has been decided since.

A clause of this description is quite common in many kinds of contracts. In mineral leases, for example, we often find it introduced, and in that class of contract, of which those between landlord and tenant is an instance, it is very common, when buildings have to be erected, or kept in order, or taken over at a valuation, all to be done at the sight of parties named. It was never contemplated surely that the death of one of the parties would end a reference of that kind.

Now, the question to be determined is, whether such a principle as I have referred to applies to the present case. And the answer to this question depends upon the terms of the clause of reference—[*His Lordship here read the clause quoted above*]. Now, to my mind nothing could better meet the present case than the decisions I have referred to. The terms of the clause of reference favour the application of the principle, as something has to be done for the common interest of the parties, without relation to disputes or differences between them, and clearly no exception can be taken to the qualifications of the arbiter. I can have no possible doubt, then, that a reference such as this does not fall by the death of the party referring. If I am right in what I have said so far, then it appears to me that there is an end of this case without requiring to seek for any further authority. But there is one other point to which your Lordships referred upon which I should like to say a word. Your Lordships remarked that this case was a reference for behoof of the trust, and that as the trust still existed the reference could not fall by the death of the original trustees. It happens that Mr Baxter issued a draft award which was communicated to the parties, and it was only after seeing its terms that the objection was stated that the reference had fallen by death. I can only say that it is rather awkward for the pursuers that the plea was not stated until after the draft award was issued. But a reference by trustees is undoubtedly a reference for the trust, and it exists in the persons of the assumed trustees. I therefore agree with your Lordships on this latter point also, but I prefer to base my judgment upon the grounds which I stated first.

Lord Mure—This is a question of considerable importance but it does not appear to me to be attended with very much difficulty. It is the case of a reference by trustees to a competent referee to fix the balance due to or by a trust estate, and to tax business accounts. While the reference was proceeding the old trustees by deed of assumption elected two new trustees, who were vested with all the rights and liabilities of the old trustees. In these circumstances it seems to me that the new trustees undoubtedly became parties to the reference, and did not require to be brought into it by minute. I am equally clear that the reference did not fall by the death of the original trustees.

Lord Shand—I think there are several reasons for sustaining this decree-arbital, any one of which appears to me to be sufficient. First, it is not the case of parties who have a difference of opinion as to their rights. There is no dispute here; all that is desired is an adjusting of accounts. Now, it is quite settled that when the reference is executorial of a contract, or when it occurs during its continuance, the death of either of the parties referring does not necessarily end the reference. Now there is no question here that the object of the reference is to strike a balance between the parties, and no exception can be taken to the party chosen as referee; therefore I think that the reference would have been a good one even if it had been entered into by the truster and he had died before it was completed. But, in the second place, this is a reference by trustees, and the death of those who entered into the reference will not end it, for the trust subsists by the assumption of new trustees. On that ground alone it is not voided by the deaths of Black and Learmont. But, third, even if any doubt existed as to whether the reference had fallen by the death of the original trustees, there can be no doubt that the question of personal bar comes in against the pursuers of this action. The pursuers need not have sisted themselves as parties to the reference; yet the business accounts show that not only did they take up the trust, but also the reference, both by their attendances and by the active part which they took in the proceedings. It is impossible in that state of matters for them now to turn round and say that they were no parties to the reference, for at any rate they were trustees of the deceased.

With reference to the clause at the end of the minute of reference, by which the parties bind themselves and their respective heirs, executors, and successors to implement and fulfil the award of the referee, that to my mind leaves the reference, as far as the trustees are concerned, unaffected. It is like a bond of caution, or a guarantee to implement, and does not create a personal obligation on the trustees as to any balance which may be found due. It was really a bond that the trustees would make the funds of the trust furthcoming so far as they would go, and the mere existence of that clause could not make the reference personal, but it remained in all respects a trust reference. I am therefore for adhering.

The Court adhered.

Counsel for Pursuers — Mackintosh — Shaw. Agents—Curror & Cowper, S.S.C.

Counsel for Defenders — Guthrie — Dickson. Agents—J. & A. Hastie, S.S.C.

Saturday, July 14.

FIRST DIVISION.

BLAIR, PETITIONER.

Evidence—Foreign—Evidence Required in Foreign Court of Witness residing in Scotland—19 *and* 20 *Vict. c.* 113.

The Act of 1856, "to provide for taking evidence in Her Majesty's dominions in relation to civil and commercial matters pending before foreign tribunals, 19 and 20 Vict. c. 113, provides, sec.

1, that "Where, upon an application for this purpose, it is made to appear to any Court or judge having authority under this Act [including by sec. 6 the Court of Session] that any Court or tribunal of competent jurisdiction in a foreign country before which any civil or commercial matter is pending is desirous of obtaining the testimony, in relation to such matter, of any witness or witnesses within the jurisdiction of such first-mentioned Court, or of the Court to which such judge belongs, or of such judge, it shall be lawful for such Court or judge to order the examination upon oath upon interrogatories or otherwise, before any person or persons named in such order, of such witness or witnesses accordingly." . . . By sec. 2 "a certificate by . . . a consul-general of a foreign power in London, that any matter in relation to which an application is made is a civil or commercial matter pending before a Court in the country he represents having jurisdiction in the matter so pending, and that such Court is desirous of obtaining the testimony of the witness to whom the application relates, shall be evidence of the matters so certified." . . .

This was a petition by Thomas Blair, notary-public in Dunfermline, setting forth that he had been instructed by the Consul-General of the German Empire to apply under this Act for the examination of two witnesses residing near Dunfermline on a civil or commercial matter pending before a German Court certified by the German Ambassador at the Court of Saint James to have jurisdiction.

The petitioner prayed the Court to order the examination of the witnesses referred to in the petition on oath before himself, and to grant an order for their attendance at a time and place named in the petition, and grant authority to cite them for that purpose.

The Lord President intimated that in a previous case of *Robinow*, the papers in which were before him, the Court had refused to grant the order for the witnesses to attend before a commissioner suggested in the petition, and had appointed the evidence to be led before the Sheriff-Substitute of the district in which the witnesses resided.

The Court appointed the evidence to be led before the Sheriff-Substitute at Dunfermline, and granted warrant to cite the witnesses.

Counsel for Petitioner—G. Wardlaw Burnet. Agents—Henry & Scott, S.S.C.

Saturday, July 14.

FIRST DIVISION.

GILMOUR'S TRUSTEES *v.* KILMARNOCK HERITABLE PROPERTY INVESTMENT COMPANY.

Public Company — Winding-up — Liquidator— Companies Act 1862 (25 *and* 26 *Vict. c.* 89), *sec.* 43.

Section 43 of the Companies Act 1862 provides for the keeping by a company registered under the Act of a register of mortgages, and for the entry of certain particulars relating to each mortgage granted by the company in such register, and further provides that if any property is mortgaged without such entry being made, every director, manager, or office-bearer, "who knowingly and wilfully authorises or permits the omission of such entry shall incur a penalty not exceeding £50." In a petition for the winding-up by the Court of a public company a creditor objected to the appointment as liquidator of a person of whose appointment all the other creditors and shareholders approved, the ground of objection being that he had while secretary of the company omitted to see to the entry in the register of mortgages of a heritable bond granted by the company before he entered office, and the entry of which had been omitted by his predecessor. The Court *repelled* the objection.

Observed (*per* Lord President) that in the circumstances the fault was trivial, and would not have inferred the statutory penalty.

The Kilmarnock Heritable Property Investment Co. (Limited) was registered under the Companies Act 1862 and 1867 in June 1874. Its objects were the acquiring for building purposes of land in or near Kilmarnock or elsewhere, borrowing money on the security of the capital or property of the company, lending money on heritable security, and in general the transaction of every kind of business transacted by building and property investment companies. The capital was £25,000 divided into £10 shares.

This was a petition by the trustees of the late Boyd Gilmour, creditors of the company to the amount of £4000, for the judicial winding-up of the company.

The petitioners set forth that the shareholders of the company had never exceeded seven in number, that two of these were now deceased, and of the other five three were bankrupt, and that nominal dividends only would be paid by their estates; that the business of the company had for some time been unprofitable, the profit and loss account showing a considerable loss.

The petitioners suggested an accountant in Glasgow as liquidator.

Answers were lodged for the company and David Broadfoot, accountant, who had for some time been secretary of the company, in which it was stated that in consequence of the state of the business it had been resolved prior to the presentment of the petition, by special resolution duly passed, to wind-up the company by voluntary liquidation, and that the respondent Broadfoot be appointed liquidator; that the resolutions had on 26th June (the day subsequent to the petition being served) been duly confirmed as required by the statutes. It was also set forth that the other creditors (of whom there were 15), whose debts amounted in all to £9935, did not concur in the petition.

Answers were also lodged for all the creditors, other than the petitioners, adopting the answers for the company.

Both sets of respondents submitted that the voluntary liquidation with the respondent Broadfoot as liquidator ought to proceed.

At the bar both parties consented to an order