the Master was right in his construction of this order; and, as I have said, it is not one of the two Chancery forms of order, but a new order that we are called upon to interpret.

HART v. HART.

Imp. J. A. sec. 24, *subs.* 5.—*O. J.A.sec.* 16,*ss.*6.

Separation Deed—Interference with pending action—Agreement to refer to arbitration—Jurisdiction.

Where in an arrangement for a compromise and the execution of a deed of separation, entered into between the parties, during the trial of a divorce suit, it was agreed, amongst other things, that the petition and answer should be dismissed, and also that "in case of difference in working out these terms, matter to be referred to Mr. W. and Dr. D."

Held (1) There was nothing in above section of the J. A. to prevent the Court granting specific performance; (2) the clause as to reference to arbitrators did not oust the jurisdiction of the Court.

[June 23-24, Ch. D.—45 L. T. 13.

There were several questions involved in this case, and the judgment of Kay, J., is of great length. Only a note of those portions of it that concern the above points can be here given.

The action was for specific performance under the circumstances mentioned in the above head note.

The first objection raised was that the Court had no power to interfere with the action of the Divorce Court. Kay, J., referred to *Besant* v. *Wood*, L. R. 12 Ch. D.630, pointing out that the section of the J. A. refers to restraining a term "pending action," and he overruled the objection (1) because it was doubtful whether after the agreement in question, which contained the term "petition and answer dismissed," there was any pending action in the Divorce Court at all, (2) because, whether there was any pending action or no, he was not asked for an injunction to restrain it; (3) because there is nothing in the spirit of the above section of the J. A. to make him hold that because the agreement contained that one term, that an action, which at the time the agreement was come to was pending in the Divorce Court, shall be dismissed; the Court is absolutely by that prevented from directing specific performance of the whole agreement or any part of it.

The second objection raised was that the Court should refuse specific performance, because of the stipulation in the agreement, relating to reference in case dispute to certain arbitrators. As to this Kay, J., observed that in the case of this agreement one essential part of it had been to some extent performed, in that the litigation which was in progress had been compromised and put an end to—and, therefore, on the principle acted on in *Milnes* v. *Gery*, 14 Ves. 403, the Court ought to do its utmost to carry out that agreement by a decree for specific performance: and that he had to consider whether there was in the objection raised, such a formidable difficulty as the Court after all cannot get over and must give way to. He then considered at length the case of *Tillett* v. *Charing Cross Bridge Co.*, 26 Beav. 419, and the cases on which that proceeded, and other cases, and said:—

"All these cases seem to me to proceed on one and the same principle—a very simple and intelligible principle—that, when the agreement on the face of it is incomplete until something else has been done, whether by further agreement between the parties or by the decision of an arbitrator, this Court is powerless, because, there is no complete agreement to enforce. Applying that rule to this case, I find here an agreement which is quite, on the face of it, complete. The arbitrators are not to complete it; they are not to supplement any defect in it. That is not the purpose for which they are appointed, but it is merely that, in case of difference in working out these terms, the matter is to be referred to them. . . . In this case the deed is not to be such a deed as Mr. W. and Dr. D. approve, but a deed containing usual covenants, and the agreement is quite perfect and complete in itself without the clause of arbitration; the clause of arbitration is only added as a subsidiary clause in case a difference shall arise, which, as I have said, I cannot and ought not to contemplate as a thing that must inevitably happen. But whether it happens or not I do not think that the case comes within *Tillett* v. *Charing Cross Bridge Co.* or any other of the cases cited on this point, and I do not know of any authority for refusing to grant specific performance of an agreement like this, because of the addition of that clause, that in case of difference, that difference is to be de-