longest liver of the spouses, the trustees were to divide the estate among the children of the marriage in such proportions as Mary M'Kerrell might direct. The assignation was intimated to M'Call's trustees on 31st December 1869.

Mr Donald Smith died on 1st September 1855, survived by his widow and four children, all of whom are still alive. In November 1869 Mrs Donald Smith, on the occasion of her eldest son Alexander Smith's marriage, assigned her right to the £1000 to his marriage-contract trustees.

It was expressly stated in this Special Case that at this time Mrs Donald Smith had no recollection of the terms of her own marriage-contract, and believed that she was entitled to dispose of the £1000 as she thought fit. The assignation to Alexander Smith's marriage-contract trustees was intimated to M'Call's trustees on the 26th December 1870, about a year subsequent to the intimation of the assignation to the trustees of Mr and Mrs Donald Smith.

Mrs M'Call, the widow of the truster, died 8th February 1871, and a question arose to which set of trustees the legacy was payable. A Special Case was presented, to which the parties were—(1) M'Call's trustees, (2) Mrs D. Smith, (3) Mr and Mrs D. Smith's marriage trustees, (4) Mr and Mrs A. Smith's marriage trustees. The question submitted to the Court was, Whether Mr and Mrs Donald Smith's marriage-contract trustees or Mr and Mrs Alexander Smith's trustees were alone entitled to receive payment of the legacy of £1000?

KINNEAR for Mr and Mrs Donald Smith's trustees.

JOHNSTONE, for Mr and Mrs Alexander Smith's trustees, did not dispute that effect must be given to the assignation to Mr and Mrs Donald Smith's trustees, as first in date and first intimated, but he argued that the assignation of the £1000 to her son's trustees by Mrs Donald Smith might be regarded as an exercise of the power of apportionment given her by her own marriage-contract. She was entitled to pass from her own liferent for an onerous cause.

At advising—

LORD PRESIDENT—The argument for Mr and Mrs Alexander Smith's trustees is ingenious, but it must be considered in connection with the fact stated in the case that Mrs Donald Smith had no recollection of the terms of her marriage-contract. Persons have been held to have exercised a power of apportionment without reciting the power or expressly referring to it, but I never heard of an exercise of a power when the person did not know that he possessed the power. But further, Mr and Mrs Donald Smith's trustees are directed to hold for certain purposes irrespective of the ultimate destination of the fund. The liferent given to Mrs Donald Smith is alimentary and not assignable. To secure this alimentary liferent, if for no other purpose, her marriage-contract trustees would be entitled to hold the fund.

LORD ARDMILLAN concurred.

LORD KINLOCH observed that the question of apportionment could not be raised in this Special Case, the younger children of Mrs Donald Smith not being parties.

LORD DEAS—We have neither the materials nor the parties before us necessary to give an opinion on the question of apportionment, and on that ground I concur with your Lordships.

The Court held that Mr and Mrs Donald Smith's marriage-contract trustees were alone entitled to receive payment of the legacy, and to discharge the same.

Agents for Mr and Mrs Donald Smith's Trustees, as also for M'Call's Trustees and Mrs Donald Smith—Hamilton, Kinnear, & Beatson, W.S.

Agents for Mr and Mrs Alexander Smith's Marriage Trustees—Hope & Mackay, W.S.

Tuesday, November 28.

SECOND DIVISION.

TENNANT *v.* CADELL, *et e contra.*

Arbiter—Award—Reduction. Circumstances which *held*, on a proof, not sufficient to justify an action for reduction of the award of an arbiter.

These were two conjoined actions, the one at the instance of H. F. Cadell, Esq., Cockenzie, calling for payment from the defender Robert Tennant, Esq., Tranent, of the sum fixed by the award of an arbiter as the value of certain machinery, plant, &c., sold by the pursuer to the defender, and the other at the instance of Mr Tennant calling for reduction for several reasons of the decreet-arbitral.

The facts sufficiently appear from the following interlocutor and note of the Lord Ordinary:—

"*Edinburgh, 18th July* 1871.—The Lord Ordinary repels the reasons of reduction, and assoilzies the defender Hew Francis Cadell from the whole conclusions of the said action of reduction, and decerns; and in the petitory action at the instance of the said Hew Francis Cadell, decerns against the defender in said action, Robert Tennant, Esquire in terms of the conclusions of the said petitory action: Finds the said Hew Francis Cadell entitled to expenses in both actions, and in the conjoined actions, and remits the account thereof to the Auditor of Court to tax the same, and to report.

"*Note.*—The whole question in these conjoined processes is, Whether the award pronounced by Messrs John Geddes, mining engineer, Edinburgh, and Henry Cadell of Grange, dated 5th December 1870, is or is not binding upon Robert Tennant, who is defender in the petitory action, and pursuer in the action of reduction? If the award is valid and binding it must be enforced, and decree pronounced in conformity therewith. If it is invalid and not binding, Mr Tennant is entitled to have it reduced and set aside in terms of the conclusions of the action of reduction at his instance.

"In reality, therefore, the action of reduction is the leading action, and under it the whole question really falls to be tried.

"The award in question was pronounced by the referees appointed under a formal agreement between the pursuer and defender, dated 19th and 24th February 1870. The agreement is No. 14, and the award is No. 15, of the conjoined processes. Mr Tennant, the pursuer in the reduction, will be treated as pursuer in the conjoined processes, and Mr Cadell as defender.

"The grounds upon which the award is challenged are explained at length in the pursuer's record and pleas, which latter are twelve in number The grounds of reduction, however, resolve themselves into three—(1) That the award is *ultra vires compromissi*, that the referees have decided matters not referred to them, and not embraced in the submission; (2) That the referees have failed to ex-

haust the submission, and to decide upon claims *hinc inde* which were actually referred; and (3) that the referees have wrongfully refused to allow, or failed to allow, proof, and have wrongfully decided without proof or evidence, or at least without legal evidence. A great variety of minor objections to the proceedings of the referees are stated on record, or were referred to as arising upon the proceedings, but it is thought the whole objections may be dealt with as falling under one or other of the heads now mentioned.

"The pursuer declined to renounce probation, and at one part of the debate seemed inclined to insist upon a proof *prout de jure*. This was resisted, and the Lord Ordinary demurred to grant any such proof unless upon some special averment of corruption or legal corruption against the arbiters, which, by reason of its nature, could not be otherwise instructed, and he found no such averment upon record. Ultimately the parties by joint minute admitted the proceedings and procedure before the arbiters; and although they have not expressly renounced probation, the Lord Ordinary understood that neither of them asked probation unless the Lord Ordinary or the Court should think that there are relevant and material averments which may be proved by parole evidence. As the Lord Ordinary does not think that there are any such averments, he has pronounced judgment finally disposing of both causes.

"The defender Mr Caddell, under an agreement and assignation, dated in 1846, became sole lessee of certain coal-fields and salt-works near Cockenzie, and sole proprietor of certain machinery, railways, harbour fittings, and plant connected therewith. The proprietor of the lands, under whom the defender was lessee, was the late John Caddell of Cockenzie. While the old lease was current, and in June 1852, the defender Hew Francis Caddell got a new lease from the said John Caddell to commence as from 2d February 1854, and to endure for nineteen years thereafter. This new lease contained a variety of provisions and stipulations somewhat altering the rights of parties under the old lease, which had been contained in the family settlement of a former John Cadell of Cockenzie, dated 18th August 1808. The granter of the new lease, John Cadell of Cockenzie, through his trustee James Mylne, W.S., sold his estate in 1861 to the present pursuer Mr Tennant, but the lease, which had been fully clothed with possession, still subsisted, and the defender then became tenant of the subjects under the present pursuer. It was not disputed that the pursuer, although a singular successor, was bound by the whole conditions of the lease.

"When the lease came to be within a few years of its termination it became evident that various questions, some of them intricate and difficult, would arise between the pursuer and defender regarding their respective rights at the termination of the lease, which had practically subsisted for more than sixty years, and regarding the buildings, cottages, railways, fittings, and plant connected therewith. Negotiations seem to have been entered into, which resulted in the formal agreement between the pursuer and defender of 19th and 24th February 1870, by which the lease of 1852 and certain other leases held by the defender were renounced and put an end to, and held as having terminated as at 9th March 1870. The machinery and plant belonging to the defender on the subjects of the colliery lease, and which the defender had power to remove, were purchased by Mr Tennant at a valuation to be put on them by arbiters; and the parties named Mr John Geddes and Mr Henry Cadell, whom failing certain other parties, as referees, to determine the value, and then the agreement terminates with a very broad and general clause of submission to the same arbiters of all differences that may arise between them, and of all claims arising out of the said leases or out of the said agreement—all which are referred to the decision of the arbiters, by which the parties bind themselves to abide under a penalty of £1000.

"The Lord Ordinary thinks there can be no doubt that this reference was intended finally to settle and determine all questions and claims of whatever kind which might arise between the parties' submitters in reference to the termination of the leases, and their rights to fittings, fixtures, and plant. It was a double reference, not merely a reference to valuators for valuation, but a reference to arbiters for disputes; to fix, for example, what things were and what were not to be valued, and to determine upon all claims whether of damages or otherwise which the one party might have against the other. Nothing was excepted from the submission, and no limit was assigned fixing questions which were to be beyond the submission or beyond the powers of the arbiters to decide.

"Both arbiters accepted of the submission by formal minute. They appointed a professional clerk, and very voluminous proceedings took place before them. The proceedings are in process, copies of certain of them being held equivalent to the originals. The arbiters met the parties or their agents on the ground. They inspected the whole subjects, buildings, fittings, and plant in dispute. The parties were fully heard; repeated notes were issued by the arbiters, and voluminous written pleadings took place thereon. The argumentative pleadings, contained in a great many different papers, extend to several hundred pages. The fullest opportunity was given to both parties to give all explanations, to make all averments, and to offer all proof which they or either of them might think material. A great variety of documents was lodged with the arbiters bearing upon the questions at issue; and it was only after everything had been very fully discussed and considered, and after the arbiters felt themselves fully informed on the subjects in dispute that the arbiters issued their final award. The final award varies in many respects from the notes originally issued by the arbiters, their views having been altered to some extent in favour of the present pursuer.

"The Lord Ordinary has carefully perused the whole proceedings, and he does not think that any of the objections insisted in by the pursuer are well founded.

"1. The Lord Ordinary thinks that the award is not in any respect *ultra vires compromissi*.

"The pursuer's objection on this head is substantially that the arbiters have valued machinery, railways, and houses which they had no power to value. He says that they ought only to have valued machinery, railways, and houses which the tenant had power to remove; and as they have valued machinery, railways, and houses which the tenant had no power to remove, but which were the absolute property of the landlord, their award must fall. The answer is, that the referees were not only valuators but arbiters. They were not

only to fix values, but they were to determine what ought to be valued, and if a dispute arose as to the property of a subject, that dispute they were to determine.

"It is needless going into the details about the long railway which the pursuer claims as his property, or about the colliers' houses which the pursuer says were not erected by the lessee, but belonged to the former proprietor. The Lord Ordinary thinks that these were the very questions which the arbiters were appointed to decide. If the arbiters fairly decided these questions after proper proceedings, without legal corruption, their decision must stand whether it is in itself right or wrong. On a fair reading of the submission, and taking into view the admitted and proved circumstances of the parties, the Lord Ordinary cannot say that anything contained in the award is *ultra vires compromissi*. The very object of the parties was to exhaust by the reference all questions arising out of the leases or their termination. The whole questions decided are of this nature, and must have been in the view of both parties. Whether the conclusions reached by the arbiters were right or wrong is not the question. They do not appear to have decided anything which was not referred.

"2. The pursuer's next objection is, that the reference has not been exhausted, and that points and claims actually referred have not been decided on. This objection, which in one view is a little inconsistent with the first objection, is chiefly based on certain claims of damages which the pursuer says he had against the defender for injury to ground or for restoration of ground to an arable state.

"The answer is that all claims made by the pursuer have been disposed of by the referees. The whole deductions to which the arbiters thought the pursuer entitled they have given him by the award. His other claims have been disallowed.

"It is true certain claims are reserved in the award, and the pursuer maintained that these reservations made the award bad. But a reservation in favour of tenants or feuars is a reservation in favour of third parties, whose rights could not be affected by the award, as they had not consented to the submission, and had not become parties thereto. Their claims therefore were necessarily reserved, and would have been so even without express mention.

"In regard, again, to the claim for the woodwork of the bone and saw mills, and other subjects and machinery connected therewith, there was a dispute whether these subjects fell under the submission or not. The arbiters have quite properly disposed of this matter by valuing the subjects at £400, leaving Mr Cadell to claim the sum or not as he may be advised. If the subjects fall under the submission, the claim is disposed of; if they do not, the valuation of the arbiters goes for nothing. The sum is not sued for in the present conjoined actions.

"3. The only remaining ground on which the award is challenged is, that the arbiters decided the reference without requiring or allowing a proof. This was the main ground of reduction insisted in, and in some respects it raises questions of nicety and difficulty. The Lord Ordinary thinks that there was no such failure of duty on the part of the arbiters as to vitiate their award.

"(1) The arbiters themselves were men of skill, and were themselves the proper judges, without proof, of most, if not all, the questions which arose in the submission. For example, questions of valuation were submitted to the arbiters themselves, and the values were to be fixed according to the judgment of the arbiters themselves, and not according to the judgment of other and independent valuators whom the parties might adduce. In like manner, questions of what machinery and erections were 'necessary for and connected with the shipment of coals, &c., at Cockenzie,' were really questions of skill or of opinion, of which the arbiters alone were the proper judges. So a dispute as to what were to be considered, in the sense of the contracts, 'colliers' houses,' fell to be decided on inspection by the arbiters, and not on proof. Even a question as to when certain buildings were erected was, within certain limits, a matter on which the arbiters could judge without parole proof.

"(2) The arbiters had meetings on the ground and with the parties, and they were entitled to take the statements and explanations of the parties, and to proceed thereon. It could only be where some distinct matter of fact material to the issue arose between the parties that proof could be demanded. Now, the Lord Ordinary can hardly find in the whole proceedings any distinct and material issue of fact raised between the parties, unless it be the date when certain colliers' houses and other buildings were erected, or the dates when certain improvements were effected by the lessees; and this matter may well have been held by the arbiters to have been sufficiently settled and ascertained by the admissions and proceedings before them.

"(3) The arbiters were entitled to decide finally all questions regarding the relevancy or necessity of proof, and all questions regarding the competency or admissibility of particular kinds of evidence. In particular, the arbiters were entitled to admit and look at forms of evidence which would not have been received at a jury trial, or which would not have been admissible according to strict rules of law.—See the case of *Grant* v. *Girdwood*, June 23, 1820, F.C.; Bell on Arbitration, p. 140. Now, the arbiters had before them certificates by builders and others, and a variety of documents relating to the points in dispute, none of which were alleged to be forgeries, and upon which the arbiters might lawfully proceed, at all events to the effect of holding that the *onus* of the whole proof lay upon Mr Tennant. Indeed, questions of *onus* are always for the arbiters, and this consideration alone seems sufficient to dispose of the objection to the award. For—

"(4) The pursuer Mr Tennant never himself demanded a proof, and never himself offered to prove anything. He contented himself throughout the whole of the long pleadings with insisting that Mr Cadell was bound to prove certain things, and arguing that the arbiters should compel Mr Cadell to lead evidence. The Lord Ordinary has carefully looked through the proceedings, but he has failed to find anywhere a distinct offer of proof on the part of Mr Tennant. Mr Tennant often complains that Mr Cadell has not led proof, but he never offers to lead proof himself, nor does he ever distinctly table a proposition, and say that he, Mr Tennant, is prepared to prove it. In reality the dispute before the arbiters was a question of *onus*, or rather it was a question of what Mr Cadell was bound to prove, and nothing more. Now, this is not a case for reducing an award because the arbiters failed to allow proof to the party complaining. They

were never asked to do so, and the Lord Ordinary thinks that there was no failure of duty on their part. Reference may be made to the cases of *Kirkcaldy* v. *Dalgairns*, June 16, 1809, 15 F.C. 318; *Berry*, Dec. 15, 1827, 6 Shaw, 256, and 9 Shaw, 337; *Alston* v. *Chappell*, Dec. 17, 1839, 2 D. 248; *Ferrier* v. *Alston*, Jan. 28, 1843, 5 D. 456, H.L., 4 Bell, 161; *M'Donald* v. *M'Donald*, Dec. 8, 1843, 6 D. 186; *Mowbray* v. *Dickson*, June 2, 1848, 10 D. 1102; *Mitchell* v. *Cable*, June 17, 1848, 10 D. 1297; *Millar* v. *Millar*, March 10, 1855, 17 D. 689.

Mr Tennant reclaimed.

Dean of Faculty and Lee for him.

Solicitor-General and Balfour in answer.

At advising—

The Lord Justice-Clerk said that the argument raised no questions in the law of arbitration. The grounds for reduction were good if the facts upon which they depended had been made out. He agreed with the Lord Ordinary in thinking that these allegations had not been proved.

The other Judges concurred.

The Court adhered.

Agents for Pursuer—Dalmahoy & Cowan, W.S.
Agents for Defender—Macrae & Flett, W.S.

Thursday, November 30.

JOSEPH THOMPSON *v.* JOHN G. MUIR AND THE PAROCHIAL BOARD OF INVERESK.

Mandate—Parochial Board—Erasure. The meeting of a parochial board for the purpose of electing an inspector of poor for the parish was fixed for a certain day, and mandates were printed to be used of that date. The day of meeting was changed, and anterior to the day fixed the printed date was erased, and the proper one substituted. *Held* that these mandates were valid for the reason that the date was not "*inter essentialia*" of the mandate, and the words written on erasure being held "*pro non scripto*" the mandate became a general one to be used at a meeting convened for the purpose of electing an inspector of poor.

Mandate—Parochial Board—Adjourned Meeting. *Held* that mandates bearing to be used at a meeting of the parochial board of a parish to be held on 2d August for the election of an inspector of poor, or on any subsequent day to which said meeting might be adjourned, were validly used at a meeting held on a later day for the same purpose, although there had been no meeting on 2d August, and consequently no adjournment.

Thompson brought this action for the purpose of having it judicially declared that he had been duly elected inspector of poor-rates for the parish of Inveresk, and also for the purpose of reducing certain minutes of the parochial board of the same parish which bore that the defender John G. Muir had been duly elected to that office.

The Lord Ordinary (Mackenzie) assoilzied the defender, and found that John George Muir had been duly elected.

He remarked in his note:—"According to the report of the scrutiny committee, appointed at the adjourned meeting of the Parochial Board of Inveresk, held on 5th September 1870, for the election of an inspector of poor and collector of poor-rates, the defender Mr Muir had 54 votes, and the pursuer Mr Thompson 49. Of these 54 votes in favour of Mr Muir, the pursuer maintains that 14 votes given by Dr Sanderson on mandates, the first four votes stated in the second head of the list No. 13 of process, and the vote of Mr Spence, mentioned in article 13 of pursuer's condescendence, being in all 19 votes, are illegal and invalid, and fall to be disallowed.

"The Lord Ordinary is of opinion that the pursuer has failed to establish that there is any good objection to the votes given by Dr Sanderson on the mandates granted in his favour, in so far as sustained by the scrutiny committee. These mandates were obtained from the granters by Mr Bolton, an intended candidate; they bear to be in favour of Dr Sanderson, whom failing Mr Millar, whom failing Mr Chalmers. These mandates were delivered by Mr Bolton to Mr Chalmers, one of the mandatories. Mr Chalmers took these mandates to the meeting for the election of an inspector and collector held on 5th September 1870, and as he was obliged to leave the meeting, he delivered them to a person of the name of Doleman, with instructions to hand them to the clerk of the meeting, and to get them recorded at the voting in favour of Mr Fernie, one of the candidates. Mr Doleman, after Mr Chalmers left, handed these mandates to the clerk of the meeting when he called for mandates, with a request to that effect, but as he was not the mandatory, and as Dr Sanderson, the mandatory first named in the mandates, was present, this request was refused, and the votes on the mandates were recorded for the defender Muir as directed by Dr Sanderson.

"The Lord Ordinary is of opinion that neither Mr Chalmers nor Mr Doleman were entitled to act or vote on these mandates; that their request on behalf of Mr Fernie was properly refused, and that Dr Sanderson was entitled to vote upon them.

"The pursuer also objects to the act of the scrutiny committee in admitting 4 of these 14 mandates, viz., those of Mrs Boak, Thomas Moran, William Stewart, and John Slight, and maintains that they fell by reason of later mandates having been granted in favour of Mr George Smith, who voted on them in his favour. But these four mandates in favour of George Smith do not bear the date of granting, and they all refer to a meeting to be held on 2d August 1870, or any adjournment thereof, except that of John Slight, in which the date of the meeting for which it was granted is written on an erasure. The meeting called for 2d August was not held in consequence of a mistake made by the pursuer in calling the meeting, and there never was any adjournment thereof. Another meeting was called for 15th August 1870, but that also was abandoned owing to another mistake in calling the meeting. The meeting of 16th August, being the first meeting held for the election of an inspector and collector, was duly called, and was an entirely separate and independent meeting from that of 2d August 1870. The mandates in Dr Sanderson's favour are all dated, and confer authority to act and vote upon any matter relating to the appointment of an inspector and collector, not only at the meeting of 2d August 1870, but at any subsequent meeting. These four mandates were, it appears to the Lord Ordinary, rightly given effect to by the scrutiny committee.

"The scrutiny committee admitted the votes of Catherine Young, A. J. Christie, Charles Pearson,