Saturday, June 19.

FIRST DIVISION.

[Sheriff of Lanarkshire.

WILSON *v.* PORTER.

Arbitration—Powers of Arbiter—Compensation—Ultra vires.

An arbiter having been appointed to decide upon a claim "in respect of accounts for goods and workmanship supplied by the first party to the second party," and objections by the second party thereto, issued a final award in which he set off against the amount of these accounts payments to account said to have been made by bills and a certain debt alleged to be due upon an independent transaction by the first party to the second party, and so brought out a balance against the first party, instead of in his favour. The second party having sued for payment of this balance, it was *held* (*diss.* Lord Deas) that the arbiter had no jurisdiction under the terms of the reference to entertain pleas of compensation; that the scope of the reference had not been extended by the actings of parties; and action dismissed accordingly.

On 17th March 1879 Charles Wilson, ironmonger, Glasgow, and John Porter, brickbuilder, Glasgow, entered into a minute of agreement and reference in the following terms:—"Whereas the first party has a claim against the second party in respect of accounts for goods and workmanship supplied by the first party to the second party, amounting said accounts to £1028 or thereby, and the second party has stated certain objections thereagainst; and whereas the parties have agreed to refer the said accounts and objections to the amicable decision of John Mathieson, manager to William M'Geoch & Company, ironmongers, Argyle Street, Glasgow, as sole arbiter: Therefore the parties have agreed to refer the said accounts, and do hereby agree to submit to the amicable decision, final sentence, and award of the said John Mathieson the amount of the aforesaid accounts, and the second party's objections thereto, with power to the said arbiter to hear parties, to examine witnesses, and take all manner of probation; and with special power, if he sees proper, to alter, vary, and modify or increase all or any of the items of said accounts, and also to award expenses to either of the parties if deemed equitable: And whatever the said arbiter shall determine in the premises, both parties bind and oblige themselves to abide by, implement, and perform, the one to the other, in so far as incumbent upon each, under the penalty of £100, to be paid by the party failing to the party observing or willing to observe, besides performance." Mr Mathieson accepted the office of arbiter, and on 19th April 1879 issued the following award:—"Having now finished the examination of the disputed accounts between Charles Wilson, ironmonger, Glasgow, and John Porter, brickbuilder, Glasgow, which were handed me as sole arbiter, per minute of agreement, and duly signed, I find there is a balance due to John Porter, amounting to the sum of £71, 11s. 4d. as per abstract annexed. And further, as the award is in favour of John Porter, I find Charles Wilson liable for the expenses of my fee, &c., amounting to the sum of ten guineas. I may add that in coming to this conclusion my actions all through have been guided by a strict desire to do justice to both parties irrespective of what the final result might be, and such being my finding I trust it will end any little misunderstanding that has existed between you; and feeling assured my efforts meet with your approval, I remain, most respectfully yours, JOHN MATHIESON, *Arbiter*.

"*Glasgow, April* 19, 1879.

"ACCOUNT.

"John Porter *Dr.* to Charles Wilson.

To amount of a/c. as per abstract,	£1028	0	0
,, Goods undercharged and omitted,	5	7	8
	£1033	7	8
By errors and overcharges	69	7	2
	£964	0	6

July	15/75	by Bill,	£300	0 0
Sept.	27/75	,, ,,	200	0 0
Nov.	29/75	,, ,,	200	0 0
Nov.	24/76	,, ,,	75	0 0
April	30/78	,, ,,	200	0 0
			£975	0 0

JOHN MATHIESON.

"ACCOUNT.

"Charles Wilson *Dr.* to John Porter.

To amt. of a/c. for hire of pony, &c.,	£60	11	10
,, Balance,	10	19	6
	£71	11	4

JOHN MATHIESON."

Wilson having refused to pay the balance of £71, 11s. 4d., on the ground that the arbiter had exceeded the scope of the reference by entertaining counter-claims and deducting the amount of the bills of exchange and of the account for hire of a pony, which he further alleged to be overcharged, Porter sued him in the Sheriff Court for the amount, and averred that "the parties dealt before the arbiter on the footing of the accounts on both sides being submitted." The defender averred that the arbiter's proceedings were incompetent, unjust, and illegal, he having exceeded his powers "by voluntarily, or in collusion with, or at the dictation of the pursuer, importing into the reference other matters not submitted or within the province of the referee, and wholly irrelevant thereto, and disposing of the whole matters summarily, and without assigning any grounds or reasons for his decision." Proof was led, in which the arbiter deponed—"On looking over the different accounts that were put into my hands, I understood that the deed of agreement empowered me to go over the whole of them, including Mr Porter's account, and the question of payments by bill or money. Apart from the minute of reference, there was no authority given to me about these accounts or payments." He further stated that at and previous to the meeting when the award was read Wilson had not objected to the counter-claims beyond stating that the hire of the pony was overcharged. Wilson deponed that on the first occasion when the account was rendered "I had said distinctly, 'This has nothing to do with your account against me, Mr Porter; the account against me is not in;' and I asked Mr

Maclachlan to draw the deed so that Mr Porter's account would not be in. When Mr Porter was entrusted with the minute of reference to give to Mr Mathieson, there was nothing said about his account being submitted—it was never breathed. I had no idea that the account was to be submitted nor the bills. The cash transactions were never mentioned. It was simply the pricing of the account. The first time I knew Mr Mathieson had taken to do with Mr Porter's account was the day he gave his decision in the Mechanics' Institute. He had never before then got any information from me about bills, or spoken to me about the contra account. When he stated his decision I said, 'You have nothing to do with that account at all,' and I protested against it." Porter stated—"In the course of the arbitration I never heard of any objection by Mr Wilson to the arbiter dealing with that matter of the pony hire."

The Sheriff-Substitute (GUTHRIE) pronounced an interlocutor in which he found "that the defender has not established any valid ground of objection to the award," and decerned against him accordingly, but found no expenses due to or by either party. This note was added:—

"*Note.*—It seems pretty clear that the defender admitted the account against him into the proceedings without stating distinctly, or at all, that he did not hold it to be within the submission. In these circumstances he cannot now be allowed to plead that it was *ultra fines compromissi.* But for this fact the terms of the submission, looking to the observations of the Lord Justice-Clerk in *M'Ewan* v. *Middleton*, 14th December 1866, 5 Macph. 159, would have made it very doubtful, to say the least, whether the arbiter was entitled to deal with any questions involving the plea of compensation. I am not prepared to say that, apart from explanations derived from the conduct of parties, a counter-claim is included in the phrase 'objections to the accounts.'

"While I am constrained to find for the pursuer, I am not able to say that the proceedings in the reference were altogether satisfactory; and as I feel that the defender might imagine that he had some reason to question their entire propriety I have not found him liable in expenses."

The defender appealed to the Sheriff (CLARK), who adhered, "but with this variation, that the pursuer is found entitled to his expenses in common form." He added this note:—

"*Note.*—If the award-arbitral is sound, or which is the same thing, if it cannot be set aside on the ground of alleged informalities, I do not see why the successful party should not be entitled to costs. The main, indeed the sole object of having recourse to arbitration instead of bringing the cause before the ordinary tribunals, is to obtain finality and save expense. But if instead of implementing the award-arbitral, the party against whom it is given chooses to propone defences, and thereby create litigation, in which he is ultimately found to be in the wrong, it follows, as matter of principle, that he should be found liable in the expenses, otherwise arbitration, instead of being a definite mode of settling a dispute, would become little else than a preliminary to litigation—in other words, a premium would be held out to those dissatisfied with the award to invoke the aid of the ordinary courts."

The defender appealed to the Court of Session.

Authorities—*North British Railway Company* v. *Barr*, Nov. 27, 1855, 18 D. 102; *M'Ewan* v. *Middleton*, Dec. 14, 1866, 5 Macph. 159.

At advising—

LORD PRESIDENT—It appears that Mr Wilson, the defender, is an ironmonger in Glasgow, and supplied certain furnishings to the pursuer. There were differences between them concerning the way the account was charged, and they agreed to refer it to a person in the trade. Now, the terms of reference are clear and distinct—[*reads minute*]. Looking to the nature of the account, the condition of the arbiter, his special qualification for the office, and the terms of the minute I have just read, it seems beyond all doubt that the question submitted was simply as to the details of the account. That being so, what has the arbiter done? He states the amount of the account as per abstract £1028; he adds something for goods undercharged and omitted, and deducts something for errors and overcharges, and brings out a remainder of £964, 0s. 6d. So far the arbiter rightly discharged his duty, and at that stage he became *functus officio.* But he did not stop there. He proceeded to set against the sum of £964, 0s. 6d. the amount contained in five bills of exchange, and he set on that side of the account also a counter-account for the amount of hire of a pony, &c.; and the result was that he held the account for ironmongery to be extinguished, and more than extinguished, by the counter-claim, and brought out against the defender a balance due by him to the pursuer of £71, 11s. 4d.

In these proceedings I am clearly of opinion that he exceeded his powers under the reference. He had nothing to do with counter-claims of any kind. I adhere strongly to the opinion I expressed in *M'Ewan's* case, to the effect that an arbiter has no power to entertain a claim of compensation unless specially referred to him, or unless the terms of the reference expressly include all claims and differences between the parties. The reason is obvious. In a court of law a Judge has power to entertain a plea of compensation, because he would have had jurisdiction to do so had it been put in the form of a claim in an action; but an arbiter has no such jurisdiction, because his powers are entirely a matter of contract between the parties.

But then it is said that the parties here extended the reference. I can only say that if what is here stated in the evidence is sufficient to constitute such an extension, I do not see what is to restrain any arbiter from extending his powers *ad infinitum.* I think there is no evidence whatever in support of such a proposition, and I am for recalling the interlocutor appealed against and dismissing the action.

LORD DEAS—The question seems to be whether this reference was meant to be limited to the particulars of the account, or was in substance a reference of all claims and counter-claims between the parties. The Sheriff-Substitute, who saw the witnesses, has construed it in the latter way; and the Sheriff has affirmed that interlocutor. I think it is not a question about the extension so much as about the explanation of the reference; and I am not disposed to differ from the decision of the Court below. I think this was an informal reference, and on these grounds I am for refusing this appeal.

Lord Mure concurred with the Lord President.

Lord Shand concurred with the Lord President, and remarked that the reference, so far from being informal, was constituted by a carefully drawn-up deed, which even had the formality of a testing clause.

Lord President—With respect to the remarks which have fallen from my brother Lord Deas, I wish to observe that I believe every word of the evidence given by the witnesses. That being so, I do not see why I am not as able to judge of the effect of that evidence as the Sheriff-Substitute.

The Court sustained the appeal and dismissed the action.

Counsel for Pursuer (Respondent) — Lang. Agents—Dove & Lockhart, S.S.C.

Counsel for Defender (Appellant)—Murray. Agents—Mason & Smith, S.S.C.

Tuesday, June 22.

SECOND DIVISION.

[Sheriff of Lanarkshire.

DOBBIE *v.* THOMSON AND OTHERS.

Process — Appeal from Sheriff — Competency — Value of Cause not exceeding £25—Sheriff Court Act 1853 (16 *and* 17 *Vict. c.* 80), *sec.* 22.

A landlord petitioned in a Sheriff Court for sequestration of a tenant for a sum exceeding £25. The Sheriff pronounced an interlocutor sequestrating the tenant and ordering certain effects to be sold. That interlocutor became final. The balance of the price after payment of the expenses of process was £17, 6s. 1d. It was claimed by other creditors of the tenant who claimed to be preferable to the landlord. *Held* that the competition between these creditors and the landlord was a new process, and that the cause not being of the value of £25 could not competently be appealed to the Court of Session.

Lockhart Dobbie, proprietor of the Hallcraig Mills, Airdrie, brought a process of sequestration for rent in the Sheriff Court at Airdrie against William Summerville, the tenant of these mills. Summerville's estates had been sequestrated under the Bankruptcy Statutes, but his trustees did not take up the lease nor in any way interfere with the working of the mills. The petition, as restricted by minute of 12th November 1879, concluded for sequestration for the rent due at Lammas 1879, being a sum of £53 with interest thereon, and the prayer of the petition was granted by the Sheriff-Substitute, and on appeal by the Sheriff, who on 14th November sequestrated and granted warrant to sell as much of the sequestrated effects as would pay the sum of £53. The nett proceeds of the sale amounted to £38, 17s. 7d. The taxed expenses of process amounted to £21, 11s. 6d. There was thus available to meet the £53 for which Dobbie had sequestrated a sum of £17, 6s. 1d. The pursuer craved authority to apply the nett proceeds of the sale in payment of the taxed expenses of process, and the balance of £17, 6s. 1d., in payment *pro tanto* of the £53, leaving due to him a sum of £36, 12s. 11d. The Sheriff-Substitute on 11th December 1879 pronounced this interlocutor:—"Approves of the report of sale and relative account of expenses of process and sale as taxed, in all, at £26, 17s. 6d. sterling: Allows the pursuer to apply the nett proceeds of sale, viz., £38, 17s. 7d., in extinction of the taxed expenses of process, amounting to £21, 11s. 6d.; and in respect certain claims have been lodged by creditors of the defender which require to be disposed of, appoints the balance of £17, 6s. 1d. to be consigned in the hands of the Clerk of Court subject to future orders; and appoints the case to be put to the roll on Friday first for hearing on the claims."

The claims mentioned in this interlocutor were lodged at the instance of John Thomson, David Black, and Robert Wood, workmen in the employment of the defender Summerville. They claimed £4, 8s. 9d., £4, and £4, being four weeks' wages due to them respectively. The pursuer having consigned the sum of £17, 6s. 1d. as divided, claimed the whole fund in part payment of the £53 due to him as quarter's rent. The competition was thus between the landlord for his rent and the workmen in the employment of the tenant, who founded on sec. 122 of the Bankruptcy Act of 1856, which provides that the wages of workmen, where such wages do not exceed £60 per annum, are to be entitled to the same privilege as the wages of domestic servants to the extent of a month's wages prior to the date of sequestration, and also founded on the Amending Act of 1875 (38 and 39 Vict. cap. 26), which extends the period, in the case of workmen whose wages do not exceed £50, to a period of two months before the date of sequestration.

The Sheriff-Substitute on 2d January 1880 issued an interlocutor dismissing these claims, on the ground that the statutes did not give servants any preference in a question with the landlord exercising his right of hypothec.

On appeal the Sheriff (Clark) recalled this interlocutor, found that domestic servants are preferable to the landlord's hypothec, and therefore ranked and preferred the claimants' and others in terms of their claim, and appointed the balance to be paid over to the petitioner Dobbie.

Dobbie appealed.

When the case was heard in the Second Division the Court drew attention to the fact that by the interlocutor of the Sheriff on 5th November 1879 the cause was exhausted save to the extent of £17, or rather of the £12, 8s. 9d. in dispute between the claimants. In these circumstances the Court invited argument on the question of the competency of the appeal under the Sheriff Court Act of 1853, sec. 22, which provides that it shall not be competent to appeal any cause not exceeding the value of £25.

The appellant cited the cases of *Wilson* v. *Wallace*, March 6, 1858, 20 D. 764; *Buie* v. *Steven*, December 5, 1863, 2 Macph. 208—to show that where a cause is originally of the value of £25 and upwards, the jurisdiction of the Court is not excluded by the circumstance that afterwards, but before the lodging of the appeal, the