Wednesday, June 28.

FIRST DIVISION.

[Lord M'Laren, Ordinary.

THOMSON *v.* MUNRO, *et e contra.*

Arbiter — Fines Compromissi — *Corruption* — *Reduction.*

It is competent in an action for implement of arbiters' award to inquire whether their actings have been *ultra fines compromissi*, but averments of corruption cannot be made except by a process in reduction.

In June 1879 Daniel Munro, joiner in Greenock, contracted with William Wilson Thomson, builder, Greenock, for the joiner work of three tenements of houses in Brisbane Street there. During the progress of the work numerous disputes arose between the parties regarding it, and they, by minute dated 9th March 1880, agreed to refer all such matters as had arisen or might arise between them to two skilled joiners, Gilbert Anderson Ramsay and Allan Bertram Smith, whose decision should be binding on both. On the 18th of June 1881 the referees by a final award found that the amount due to Munro by Thomson was £3044, 18s. 3d. under deduction of £2500 paid to account. Thomson refused to admit liability for the balance of £544, 18s. 3d. found due by him, and Munro brought an action against him for the amount in the Sheriff Court of Renfrew and Bute at Greenock. The grounds of defence were that the award was invalid, as dealing with extra work, which was alleged to be *ultra fines compromissi*, and that the partiality with which the arbiters had dealt with the questions and examined the parties amounted in law to corruption. Meantime Thomson raised an action against Munro in the Court of Session, and the Lord Ordinary having heard that there was contingency between the two actions, conjoined the Sheriff Court action with that depending in the Court of Session. The pursuer now demanded from the defender repayment of certain sums, alleging that the sum of £2500 already paid to him under the contract was above the value of the work done, and re-stating the assertions which formed his grounds of defence to the Sheriff Court action. The defender pleaded that the present action was excluded by the minute of March 9, 1880, and by the arbiters' award, and that the pursuer having consented to and acquiesced in the determination by the arbiters on the whole claims, could not now dispute their award. The two actions thus raised were really the same question—What was the amount payable by Thomson to Munro? and, according to the contentions of the parties, whether that exceeded or fell short of the sum of £2500 already paid to account?

The Lord Ordinary on the 18th of March found it "not proved that the arbiters exceeded their powers under the minute of submission, and *quoad ultra*, that the objections stated to their conduct and proceedings in the submission cannot be pleaded in defence to the action of implement, the award being *ex facie* regular or not challenged by reduction." His Lordship's opinion states that the first of these findings was based "on the ground that the reference of all matters in dispute that had arisen or might arise in relation to a contract for a lump sum, necessarily embraces what does or does not fall within the offer for a lump sum, and because the parties themselves and the referees are agreed that these and no others were the questions in dispute." And "on the second branch of the case, irregularity in the mode of conducting the reference, it must be borne in mind that under the Act of Regulations the only grounds on which the conduct of arbiters can be impeached are corruption, bribery, or falsehood. The word corruption has received a certain extension of meaning in the decisions of the Court so as to include all conduct that if unexplained might be regarded as corrupt, in the sense of indicating a bias in favour of one of the parties, such as refusing to take the proof of one of the parties, having heard the other. Nothing of this kind has been established in the present case. But I am further of opinion that until the decree has been reduced it must be treated as an operative decree, and that it is not within my competency in this action to reduce it, or to refuse effect to it on the ground of corruption."

Decree was accordingly given in the action at the instance of Munro, and he was assoilzied in the action at the instance of Thomson.

The pursuer reclaimed, and shortly afterwards raised an action of reduction of the award, in which defences had not been lodged when the reclaiming-note from the Lord Ordinary's judgment came before the First Division.

It was argued for pursuer—The action of the arbiter is *ultra fines compromissi*, but if it is not, then in their acting they have misconducted themselves, and therefore their award is not binding.

Authorities—*A* v. *B*, January 7, 1617, M. 662; *Birrell* v. *Dundee Jail Commissioners*, 21 D. 640; *Calder* v. *Mackay*, 22 D. 741; *Blaikie* v. *Aberdeen Co.*, 15 D. (H. of L. cases) 20; *Tough* v. *Dumbarton Water-Works Commissioners*, 11 Macph. 236; *Cameron* v. *Menzies*, 6 Macph. 279; *Millar* v. *Millar*, 17 D. 689; *Sharpe* v. *Bickerdyke*, 3 D. 102; *Alexander* v. *Bridge of Allan Water Co.*, 7 Macph. 492; Bell on Arbitration, 145, 154. As to the question whether reduction of the award was necessary or not—*Murray* v. *Mure*, 6 Macph. 145; 40 and 41 Vict. c. 50, sec. 11.

The respondent argued—There was no *prima facie* appearance of unfairness in the award. Arbiters were not bound to give details of their findings.

Authorities—*Johnston* v. *Cheape*, 5 D. 247; *M'Callum* v. *Robertson*, 2 W. & S. 344; *North British Railway* v. *Barr*, 18 D. 102; *Kirkwood* v. *Morrison*, 5 R. 79; Bell on Arbitration, 142, 175, 164, 39.

At advising—

LORD PRESIDENT—The interlocutor of the Lord Ordinary disposes of the two grounds on which Thomson resists the claim of Munro for a decree in terms of the award, by finding it not proved that the arbiters exceeded their powers, and that the objections to their conduct and proceedings are no defence to the action of implement. I agree with the Lord Ordinary in both of these findings, for it seems clear to me from the evidence that they are well founded. In the submission the parties "mutually agree to refer all matters in dispute that have arisen or may arise in reference to contract of joiner and car-

penter work of the buildings to the final decision of Mr Ramsay and Mr Smith." Now, these words are general, and it seems to me that what the parties intended to include in "all matters in dispute" must be determined by whatever the parties were disputing about, and this is clear from the letters which passed between the parties before the reference was made.

This was a building contract for a lump sum, but in the course of the work certain parts were dispensed with, and a reduction of the price was therefore necessary in respect of these; and, on the other hand, there was extra work to be performed by the contractor on the order of the employer, for which additional payments were to be made. Now, on both of these points the parties were disputing in their correspondence, and therefore the matters on which they were at issue were, what reductions of the price were to be made, and what was extra work, and to be paid for as such? And these matters were embraced in the terms of the reference.

But it is still clearer from portions of the evidence that the arbiters' powers included these points. Mr Ramsay says—"With regard to the provision in the specification as to written orders being given by the proprietor in regard to any jobbings, Mr Munro was always insisting upon having written orders from Mr Thomson for items that he objected to. Mr Thomson invariably refused to give written orders, but the items were always referred to us, and we, as a rule, insisted upon Munro doing the work, and we would deal with it at the end. So far as I know, Mr Thomson gave no written orders for such jobbing work. (Q) Did he ever to your personal knowledge order any part of that extra work for which you gave him this sum of £470, 12s. 3d.?—(A) He insisted upon all that work being done. Mr Munro refused to do it as being extra, and we ordered the work to be done, assuring both parties that in so doing we were preserving to ourselves the right to decide whether it was extra or not; we invariably made that plain to both parties." Mr Smith says—"(Q) While the contract was going on, or in the proceedings for settling the price of the contract work, did Mr Thomson ever intimate to you that he considered you had no right to deal with the question of extra work?—(A) No; on the contrary, he intimated that he expected we were dealing with the whole questions—the whole claims." And Thomson says—"Before we had a meeting with the arbiters there was a preliminary meeting at my office. It was arranged at that meeting in what way the arbiters should proceed. I furnished a list of my objections, and they were to look into these. It was arranged that they, as inspectors, should visit the building from time to time during its progress when necessary. It was contemplated that there might be other difficulties between Mr Munro and myself besides those which were then brought forward. (Q) Were the differences that had already arisen at the time of your first meeting differences as to deductions claimed by you on the one hand for work short of the contract, and extras claimed by Mr Munro for work additional to what was in the contract?—(A) Yes. It was my desire that the arbiters should visit the building for the purpose of satisfying themselves what was or what was not extra work." Now, after that it is hopeless for Thomson to contend that what was extra work, and what was paid for as extra work, was not submitted to the arbiters, and therefore that the arbiters exceeded their powers in dealing with these matters.

As to the other objections regarding the conduct and manner in which they dealt with the affair in the way of hearing parties and witnesses, I am of opinion that they cannot be stated except in a reduction, and therefore I am not prepared to give any decerniture which would prevent Mr Thomson from reducing the award if he thinks fit to attempt this. My reason for doing so is, that he has been prevented from stating his grounds for this in these conjoined processes. The Lord Ordinary has held that he could not lead evidence on this matter, and it is only fair to give him a chance of doing so if he wishes, and therefore I would propose to supersede consideration of this case till we see what becomes of the process of reduction. I need hardly say that this will keep the process in our hands, and in the meantime I propose to adhere to the interlocutor in so far as it contains findings for and deals with expenses, but supersede consideration of the reclaiming-note *quoad ultra.*

Lord Deas, Lord Mure, and Lord Shand concurred.

Counsel for Pursuer—J. C. Smith—Darling. Agent—W. Elliot Armstrong, S.S.C.

Counsel for Defender—Mackay—Begg. Agent—Andrew Clark, S.S.C.

Wednesday, June 28.

SECOND DIVISION.

[Lord M'Laren, Ordinary.

MONTEITH *v.* MONTEITH'S TRUSTEES.

Succession — Legitim — Collatio bonorum inter liberos.

A testator who was survived by one son and four married daughters, by trust-disposition directed his trustees to set apart from his estate a sum of £5000, and to pay the interest thereof to his son during his lifetime, and on his death to divide it equally among his issue. This provision was declared strictly alimentary. He directed the residue of his estate to be paid over to the marriage-contract trustees of his daughters (including those of a fifth daughter who had predeceased him leaving issue) in certain proportions. Each daughter had been provided at her marriage with a tocher settled on herself in liferent and her issue in fee. The son repudiated the provision in his father's will, and raised an action of accounting against his father's trustees and against his sisters and their respective marriage-contract trustees, in which he claimed legitim to the extent of one-fifth of a half of the free residue of his father's moveable estate, and called on his sisters to collate their marriage-contract provisions. *Held* (*rev.* Lord Ordinary, *diss.* Lord Craighill) that the sums provided as tochers in the respective marriage-contracts of the daughters were not to be reckoned in ascertaining the amount of the fund from which legitim was payable, on the