Wednesday, March 19.

FIRST DIVISION.

[Lord M'Laren, Ordinary.

WILLIAM DIXON (LIMITED) *v.* JONES, HEARD, & INGRAM.

Sale—Contract of Sale—Clause of Reference—Action of Damages—Relevancy—Onus.

Merchants in Glasgow purchased a quantity of ore, to be "of usual good quality," and be shipped at Bilbao in certain monthly quantities, all disputes as to quality to be referred to a firm of analytical chemists in Glasgow. A cargo was on arrival, and after a reference in which it was pronounced not of "usual good quality," rejected by the purchasers as not conform to contract. In an action of damages by them against the sellers, the latter averred that the ore was of the contract quality when shipped at Bilbao. *Held* that this averment was relevant, and proof allowed, in which the sellers were appointed to lead.

Arbiter — Reference to a Firm — Proof before Referee.

Held that the referees were not entitled to take evidence, since the reference was made to them on account of their special knowledge, but that the award was not invalidated because the proceedings were conducted by one member only of the firm.

This action was raised by William Dixon (Limited), iron and coal masters, Glasgow, against G. W. Jones, Heard, & Ingram, merchants, Cardiff (against whom arrestments were used *jurisdictionis fundandæ causa*), concluding for payment of £1600. The circumstances were these—by sale-note of 31st July 1883 the defenders sold to the pursuers 30,000 tons of Campanil Somerrostro iron ore "of usual good quality," at 7s. per ton, f.o.b. at Bilbao. The contract contained among other provisions this clause of reference—"Should any dispute arise as to quality, the same to be referred to Messrs Wallace, Tatlock, & Clark, city analysts, Glasgow, whose decision shall be final."

In November 1883, 1780 tons of ore were shipped by the defenders on board the s.s. "Beignon" at Bilbao. When the ore reached Glasgow intimation was given by the pursuers to the defenders that it was not conform to contract, and that unless it were taken back by the defenders the arbiters named in the sale-note would be called in. The defenders refused to accept the rejection, and accordingly Mr Tatlock of Messrs Wallace, Tatlock, & Clark, the refereees, was called in. He took samples of the ore in the presence of parties' representatives, and heard evidence, first upon 30th November when the defenders were not represented, and at which diet evidence was led that the ship had had a fairly good voyage, and again on 4th December when both parties were represented. At the latter diet the defenders led evidence as to the quality of the ore, to which the pursuers objected, on the ground that the arbiter had been selected as sole judge of quality because of his skill. The defenders on their part objected to the validity of a reference proceeding before Mr Tatlock alone.

Upon 6th December Mr Tatlock issued the following award:—"The arbiters having sampled and analysed the cargo of Campanil iron ore *ex* the s.s. 'Beignon,' and having carefully considered the results of their own analysis, along with the evidence tendered for the parties, find that the ore in dispute is not of usual good quality, but that the difference between the quality of the ore in dispute and what is known as 'usual good quality' is represented by fourpence farthing per ton.—WALLACE, TATLOCK, & CLARKE."

The defenders refused to accept the award, and the pursuers, as the ore was blocking the access to their works, obtained a warrant for its sale from the Sheriff, and on 17th December it was sold by public roup for £890, and this sum was consigned in the hands of the Clerk of the Sheriff Court.

This action was then brought. The sum of £1600 concluded for was made up of freight, railway charges, demurrage on waggons pending the reference, and arbiters' fees and expenses.

The defenders averred (Ans. 3) that the "Beignon" was chartered by the pursuers, who had ample opportunity of testing the ore while it lay at Bilbao, and that they were requested to do so by the defenders. They further alleged that the sampling for Mr Tatlock was not conducted in a careful manner, but was, on the contrary, unfair and improper, and that too short notice was given to them of the arbiters' intention to take evidence. Objections were also (*inter alia*) taken that the arbitration proceeded before Mr Tatlock alone, and not the whole members of his firm. The defenders also alleged that no opportunity was allowed them of leading evidence as to the quality of the ore when shipped at Bilbao, and as to the standard of quality as stipulated in the contract, and that the award was issued without any evidence upon that point being before the arbiter. They also alleged that the ore was conform to contract, but that assuming that it was not, the pursuers were not entitled to reject it, but, according to the true meaning of the contract, were bound to take it, paying the contract price less 4¼d. per ton, the money value, according to Tatlock, of the shortcoming.

The pursuers pleaded that as the ore was not conform to contract they were entitled to reject it, and having suffered the loss condescended on, were entitled to decree.

The defenders pleaded—"(1) The cargo of ore *ex* 'Beignon' having been conform to contract, the pursuers were bound to accept the same. (2) The pretended award by Mr Tatlock cannot be founded on as an award under the reference in the contract—(1st) In respect that it was not pronounced by the arbiters named therein, and (2d) in respect of the grossly unfair and corrupt conduct of Mr Tatlock, as above stated."

On 4th March the Lord Ordinary pronounced this interlocutor—"Finds, in respect of the referees' award, that the cargo was disconform to contract, and was properly rejected, and allows the pursuers a proof of their averments of damage, and to the defenders a conjunct probation.

"*Opinion.*—The question which was argued in the Procedure Roll, and which I am to decide, is, whether this action is excluded by a clause of reference in the contract, and the award under that reference?

"By the contract in question the defenders sold to the pursuers about 30,000 tons of Campanil Somerrostro iron ore of usual good quality, at the price of 7s. per ton of 20 cwt. f.o.b. at Bilbao, to be delivered over fifteen months from September 1883, in about equal monthly quantities. By this contract it was provided that 'should any dispute arise as to quality, the same to be referred to Messrs Wallace, Tatlock & Clark, city analysts, Glasgow, whose decision shall be final.'

"The cargo of iron ore *ex* 'Beignon,' one of the cargoes shipped at Bilbao in execution of the contract of sale, was, on its arrival at the Clyde, considered by the pursuers to be defective in quality. The pursuers accordingly referred the question to the referees named in the contract, who, after notice to the defenders, took samples, heard parties, analysed the samples, and on 6th December 1883 issued a finding to the effect 'that the difference between the quality of the ore in dispute, and what is known as usual good quality, is represented by 4¼d. per ton.'

"The pursuers thereupon rejected the ore, and the defenders having refused to take it back, or to accept the award as a final decision, the pursuers had the ore sold under a warrant of the Sheriff, and now sue for damages in respect of the breach of contract.

"I have some difficulty in understanding the position taken by the defenders. In their second plea-in-law they treat the award as being null and tainted with corruption, while in their third plea-in-law they maintain that the pursuers were in fault for rejecting the cargo, instead of claiming an abatement from the contract price. What would have been the use of claiming an abatement of the price when the defenders were disputing the award I fail to see? I shall, however, consider the pleas in their order.

"The first branch of the second plea is founded on this, that while the reference is to Wallace, Tatlock, & Clark, the analysis was made and decision given only by Mr Tatlock, one of the partners of that firm.

"I am of opinion that the objection is bad, and that a reference of a scientific or professional question to a consulting firm is sufficiently executed if accepted by one of the partners. The reason is that a reference of this kind is an employment of the consulting firm, whether they be chemists, engineers, or conveyancers, in a matter in which they are to exercise their professional skill, and every such employment must be held to be given with reference to the known usages of the business or profession of the referee. The employment of a consulting firm by an individual does not entitle the employer to the services of all the partners, but only to such services from one or more of them as may be required by the nature of the business. An employment by two persons or parties to settle a question which they cannot settle for themselves is in my opinion in no way distinguishable from an employment by one. The analysis of the ore which is the object of the reference must be made by one of the partners of the consulting firm, and it is his opinion only that is of value. The signatures of the other partners would add nothing to its weight, and being superfluous they were, in my opinion, properly dispensed with.

"I also reject the second objection to the award, being the second branch of the second plea. There are no relevant averments to support such a plea. Mr Tatlock was not employed to judge of the quality of the ore upon evidence, but to determine it according to his own opinion as an analytical chemist, and he was not bound to adjourn the reference to allow of evidence being obtained from Spain or elsewhere, nor am I moved by the general allegations of unfairness in the whole mode of taking samples. I dare say the defenders were not satisfied with the samples selected by the arbiter, but it was not his duty to take the samples which the defenders might point out, but to select those which in his own judgment were fair average samples. In the absence of any specification of corrupt procedure on the part of the referee, I must assume that he did his duty, and that any mistakes which he may have made in the selection of samples, if such existed, were referable to error of judgment on the part of the referee, against which the law gives no redress.

"I am now to deal with the defenders' third plea with reference to abatement of the price. Now, under a general reference of any dispute as to quality to an analytical chemist, I am by no means prepared to affirm that the referee could not award an abatement of the price. True it is that this remedy would not be given by a court of law unless possibly in a very exceptional case, as, for example, if there were no market for the sale of such goods at the port of arrival, and if the cost of returning them to the seller would be out of all reasonable proportion to the damage resulting from defective quality. But the object in referring all questions to a professional referee may have been to enable him in certain contingencies to give a remedy which the law would not give. The powers of the referee in this case were sufficiently elastic, but I do not find that the referee has in fact awarded an abatement of the price. He finds no doubt that the difference between the quality of the ore analysed and usual good quality is represented by 4¼d. per ton, but he does not go on to say that the pursuers are to be allowed 4¼d. per ton in the settlement of the price. Very likely he may have been advised that this was not a legal remedy; in any view, I can only read his finding as meaning that he has a definite opinion—an opinion formed upon exact analysis and calculation—that the goods are 4¼d. per ton below usual good quality, and therefore not according to contract. By stopping at this point I think the referee meant to remit the parties to their legal rights under this state of facts, and I think further that the pursuers acted in accordance with their rights in rejecting the goods. If the defenders had been willing to submit to an abatement, very likely the difference might have been arranged. But they preferred to dispute the finding of the arbiter, and matters fell into the usual train of a rejection dissented from and a forced sale resulting in loss. It is still necessary that accounts should be squared with reference to this cargo, and I shall accordingly allow the pursuers a proof of the damage alleged, and the defenders a conjunct proof."

The defender reclaimed, and argued—(1) The award upon which the Lord Ordinary had proceeded was bad, because pronounced by only one

of the members of the firm referred to, whereas the reference should have been conducted in the presence of all the partners of the firm, and the award signed by each. (2) The ore changed character from the time it was shipped, and the defender should be allowed to lead evidence at the trial of its character at the port of shipment. The ore was unfairly sampled for the reference, and the whole procedure was so irregular that the award should be set aside. The referee was not entitled to hear evidence, but only to analyse and report.

Argued for the pursuers—The award was good and should stand; the whole matter had been submitted to the arbiter, and he had given his decision. It was not to be expected that in a reference of this kind each partner would perform an analysis. The ore by the contract was to be of a standard quality, and the result of the reference was that the arbiter found it was not up to that standard; the award should therefore stand. If proof was to be allowed the defender must lead.—*M'Cord* v. *Adams*, November 22, 1861, 24 D. 75.

The defenders added to their statement an averment that the ore was of the quality stipulated for in the contract when it was put on board.

At advising—

Lord President—The contract between the parties, which is dated 31st July 1883, is for the sale, by the defenders to the pursuers, of 30,000 tons of Campanil Somerrostro iron ore of usual good quality. The rest of the contract is immaterial to the present question except in so far as it shows that Bilbao was the port of delivery to which the pursuers' ships were to go to take delivery of the ore. The last section of the contract is the clause of reference, which is in these terms:—"Should any dispute arise as to quality, the same to be referred to Messrs Wallace, Tatlock, & Clark, city analysts, Glasgow, whose decision shall be final." Now, it seems that the question depends upon the nature of that reference. Is it a reference to a firm of analytical chemists, or is it not equally to any of the individual partners of that firm. Is it the whole, or is it any one of the partners, who is to say when the cargo arrives whether the ore comes up to being of "usual good quality?" I must say that a clause of reference of this character is very awkward in a contract of this kind, all the more when it appears that Bilbao, and not Glasgow, is the place of delivery of the iron. The defenders allege that goods of the usual good quality were loaded at Bilbao, and if on the ship's arrival at Glasgow the cargo has deteriorated, that this has taken place through exposure to rain or seawater, or to some other incident of the voyage. In a reference of this kind I am of opinion that the referee is not entitled to take evidence. His duty is simply to analyse and report. It seems that evidence of some kind was led before him, but the whole proceedings seem to have been most loosely conducted. The pursuers, it appears, produced witnesses to show that nothing took place upon the voyage that could have affected the quality of the ore, and some evidence was led as to its condition on arriving at Glasgow; but every other kind of evidence was rejected, and accordingly the defenders had no opportunity of proving the quality of the ore at the port of shipment. It seems as if the arbiter had changed his views several times in the course of the proceedings as to the nature and extent of the proof which he should allow. But I am disposed to think that we are not at all embarrassed by the proceedings which took place at the reference. We have the opinion of Mr Tatlock that the cargo in question when landed at Glasgow was not of the quality specified in the contract, and the question comes to be what is the effect of that finding? The Lord Ordinary has found that in respect of the referee's award the cargo was disconform to contract, and was properly rejected. I am not prepared to adhere to that interlocutor. I think it is quite relevant for the defenders to say that at the time when the cargo was delivered it was conform to contract. The burden of proving this must of course fall upon the defenders, who must therefore be prepared to lead in the proof.

Lord Mure—I agree with your Lordship in thinking that we cannot affirm the interlocutor of the Lord Ordinary as it at present stands. There can be no doubt that according to the terms of the contract, and especially to the clause of reference, the port of arrival was the place where the quality of the ore was to be tested, and where the opinion of a man of skill as to that quality was to be obtained. But the defenders say that they are prepared to prove that the ore when delivered on board this ship was of usual good quality; the *onus* of proving this must lie on them, and they must lead in the proof. I also agree with your Lordship in thinking that it was incompetent for the referee in the present case to take evidence. His duty was to express his opinion as to the quality of the ore after he had submitted it to analysis.

Lord Shand—I am of the same opinion. By the clause of reference any dispute which might arise between the parties was referred to a firm of analysts, and I think that it might fairly have been in the view of parties, that in the event of any analysis being required, it would be conducted by one of the members of that firm. But it was clear that analysis, and a reference to an analyst, might not be conclusive of all the questions that might arise, for the intervention of an arbiter, or even of a court of law might, as in the present case, become necessary. I agree with your Lordships in thinking that the utmost effect which we can give to Tatlock's award is to hold that the ore was not up to contract quality when it reached its port of destination, leaving it open to the defenders to prove, if they are able, that it was conform to specification at Bilbao. I think that it is upon this footing that the case must be sent to proof.

Lord Deas was absent.

The Court pronounced the following interlocutor:—

> "Recal the said interlocutor [of 4th March]: Of new repel the second and third pleas-in-law for the defenders: Allow the defenders a proof of their averments in answer to the third article of the condescendence as amended, and to the pursuers a conjunct probation: Allow the pursuers a proof of their averments of damage, and to

the defenders a conjunct probation: Find the pursuers entitled to their expenses in the Outer House since the closing of the record: Allow an account thereof to be lodged, and remit the same to the Auditor to tax and to report to the Lord Ordinary, to whom remit to decern for amount due, and to proceed as accords: Reserve the Inner House expenses incurred to date."

Counsel for Pursuers — Trayner — Lang. Agents—W. & J. Burness, W.S.

Counsel for Defenders—J. P. B. Robertson—Ure. Agents—Mackenzie, Innes, & Logan, W.S.

Wednesday, March 19.

SECOND DIVISION.

[Lord Kinnear, Ordinary.

REYNOLDS *v.* MILLER'S TRUSTEES.

Succession — Testament — Revocation—Resulting Intestacy—Husband and Wife—Exclusion of Jus mariti.

A testator who had several children, directed by his settlement that certain legacies be paid them, and the residue of his estate be divided equally among them. In the case of a married daughter, M, to whom he had left a legacy exclusive of the *jus mariti*, he directed her share of residue to be for her sole use exclusive of the *jus mariti*. By a codicil he revoked and recalled that part of his settlement by which he provided for his children, and made new provisions in lieu thereof, giving to M a special legacy exclusive of the *jus mariti*, and appointing the trustees to hold the residue of his estate, after payment of that and other legacies to his children, for behoof of one son in liferent allenarly, and his children in fee, and in the event of this son predeceasing him without issue, he directed his trustees to divide the residue equally among the children who survived him, the share of M to be for her own sole and alimentary use exclusive of the *jus mariti*. Subject to these alterations and additions he ratified the trust-disposition and whole clauses thereof. The son survived him, but died without issue before M. *Held*, by a majority of five Judges (*affirming* judgment of Lord Kinnear), that the fee of the residue had, in the event which had happened of the son's death after surviving his father, but without issue, fallen into intestacy, and therefore that the share of M therein had fallen *jure mariti* to her husband.

The Lord Justice-Clerk and Lord Young *dissented, being of opinion* that the will and codicil when read together clearly showed the intention of the testator to dispose of his whole estate, and that the ratification clause in the codicil operated to revive the disposition of the residue in the trust-deed in the event which happened, to the effect of preventing its falling into intestacy.

Robert Nasmyth, surgeon-dentist in Edinburgh, died in 1870 survived by six children—four daughters and two sons. One of the daughters was unmarried, and one of the others was a widow. He left a trust-disposition and settlement dated in 1868, and a codicil dated in 1869. By his settlement he directed his trustees to realise his whole estate for certain purposes, of which the third direction of the fourth purpose was expressed as follows:—"For payment to my daughter, Mrs Mary Elizabeth Nasmyth or Miller, wife of John Robert Miller, Esquire, Surgeon in the Indian Army, of £3000 sterling, for her own sole and separate alimentary use, exclusive of the *jus mariti* and right of administration of her said husband, and payable to her on her own receipt or discharge without the consent or concurrence of her husband." Each of his other children had a similar special legacy varying in amount, one of them being to the truster's son David Jobson Nasmyth after mentioned. The seventh head of the fourth purpose disposed of the residue of his estate, and was as follows:—"*Seventh*, In the event of there being any free residue of my said estates above conveyed after answering the purposes above expressed, I direct my trustees to make payment thereof, in equal shares and proportions, amongst all my lawful children above named, the share of the said Mary Elizabeth Nasmyth or Miller being for her own sole and separate alimentary use, exclusive of the *jus mariti* and right of administration of her said husband."

By the codicil he revoked and recalled the first to the seventh directions inclusive of the fourth purpose of his settlement, made certain alterations on the special legacies to his children, in particular increasing that to Mrs Miller from £3000 to £3500, this legacy to be for "her own sole separate alimentary use, exclusive of the *jus mariti* and right of administration of her said husband, and payable to her on her own receipt and discharge without the consent and concurrence of her husband," and leaving no special legacy to David Jobson Nasmyth. By the sixth direction of the codicil he divided the residue as follows:—"My said trustees shall hold the whole free residue and remainder of my estates conveyed in the said trust-disposition and settlement, after answering the purposes therein and hereinbefore expressed, for behoof of my eldest surviving son, the said David Jobson Nasmyth, in liferent for his liferent use allenarly, and of his lawful child or children, if he should any have, in fee, ... and in the event of the said David Jobson Nasmyth predeceasing me without issue, I direct my said trustees to make payment of the said free residue and remainder of my said estates in equal shares and proportions amongst all those of my lawful children above named who shall survive me, and the issue of such as shall predecease me *per stirpes et non per capita*, the share of the said Mary Elizabeth Nasmyth or Miller being for her own sole and separate alimentary use exclusive of the *jus mariti* and right of administration of her said husband." The codicil also contained this clause:—"And subject to these alterations and additions, I do hereby ratify and confirm the said trust-disposition and settlement in the whole heads, articles, and clauses thereof."

Neither in the settlement or the codicil did the testator exclude the rights of husbands, present