Tuesday, March 7.

FIRST DIVISION.

[Lord Kincairney, Ordinary.

WEMYSS *v.* ARDROSSAN HARBOUR COMPANY AND OTHERS.

Arbitration—Reduction of Interim Orders and Proposed Findings of the Arbiter—Interdict ab ante.

Circumstances in which it was *held* incompetent to interfere with a pending arbitration by granting reduction of certain interlocutors of the arbiter, and a note of his proposed findings following thereon, and by interdicting him from taking any further proceedings pending the decision by the Court of certain alleged legal questions arising out of his actings.

By contract dated 4th and 9th February 1887, entered into between the Ardrossan Harbour Company, of the first part, George Lawson, contractor, Blairbeth, Rutherglen, of the second part, and Randolph Gordon Erskine Wemyss, of Wemyss and Torrie, in the county of Fife, of the third part, Mr Lawson undertook to execute certain specified works at the harbour of Ardrossan; Mr Wemyss bound himself as cautioner for Mr Lawson for performance of all the obligations contained in the contract; the Harbour Company bound and obliged themselves to pay to Mr Lawson the sums of money, at the times and subject to the conditions therein expressed; and all questions and claims arising under the contract were referred to the arbitration of John Wolfe Barry, civil engineer in London.

The contractor having failed to complete the works within the contract period which expired in October 1889, the same three parties entered into an agreement dated 2nd, 7th, and 8th November 1889, whereby the contractor and his cautioner agreed that the Harbour Company should on and after 11th November 1889 take possession of the whole works embraced under the contract, and should employ Messrs Lucas & Aird, contractors, London, to execute the works in so far as not completed, paying them the net cost of completing the whole works, with ten per cent. added for general supervision. The said agreement was followed by a further agreement between the same parties, dated 20th September and 4th, 6th, and 7th October 1890, whereby the arbitration clause in the original contract was corroborated, and all claims of every kind competent to any of the parties under the contract or the agreement were again referred to Mr Wolfe Barry.

Differences having arisen, and claims and counter-claims and answers having been lodged by the parties, the arbiter closed the record on 11th March 1891 and allowed parties a proof before answer of their respective averments. Proof was partly led in April 1891 and was adjourned before Mr Wemyss had finished his case. In June following the proof was again adjourned owing to the state of Mr Wemyss' health. In the autumn of 1891 certain negotiations took place with the view of arriving at an amicable settlement but they were not brought to an issue. On 1st December 1891 the arbiter fixed a further diet of proof for the 18th 19th and 20th January 1892. On 8th January Mr Wemyss' agent wrote to the arbiter in the following terms—"As you are probably aware, Mr Wemyss is abroad for the benefit of his health, and is not likely to be back for at least a couple of months. I understand that Mr Strang Watkins [the agent for the Harbour Company] has applied to you, and that you have fixed the 18th, 19th, 20th, and 21st for hearing and determining the matter in this reference. Some time ago I adjusted a joint minute with Mr Strang Watkins with the view of having matters amicably adjusted with the assistance of Mr Cunningham. I was not able to get that minute signed as I had not Mr Wemyss' address, but I have no doubt that on his return he will homologate what I have done, and sign the minute. In these circumstances I have to ask that the proposed proceedings be delayed."

On the same date he wrote to Mr Strang Watkins—"I think it is a pity that in present circumstances, and in his (Mr Wemyss) absence, you should press on the matter. If you do so, I have no doubt I shall be instructed to apply to the Court here to have the points of law raised by Mr Wemyss' counsel before the arbiter tried and decided." On the 18th of January, no appearance having been made for Mr Wemyss or Mr Lawson, the arbiter adjourned the diet till 20th January, "with certification that if no proof be then adduced by either party he shall then declare such party's proof closed, and shall proceed to hear any evidence the other party may offer, and shall also hear arguments if necessary *ex parte* and dispose of the questions submitted." On 20th January counsel for Mr Wemyss having appeared merely to protest against the arbitration proceeding, the arbiter declared Mr Wemyss' proof closed and proceeded with the case for the Harbour Company and made avizandum with the whole cause.

On 29th April 1892 the arbiter issued a note of the findings which he proposed to pronounce in the arbitration, the principal clause being as follows—"That the claim for £9271, 5s. 3d. for loss and damage sustained through extra work in handling and mixing materials made by said George Lawson and Randolph Gordon Erskine Wemyss, the contractor and cautioner, is one which I cannot competently entertain, having no jurisdiction to do so, it being one of those matters (to use the language of the arbitration clause) which are provided to be settled solely or exclusively by the engineer of the Ardrossan Harbour Company. That none of the other claims made by the said George Lawson and Randolph Gordon Erskine Wemyss, or either of them, are to any extent well founded. . . . That £55,244, 6s. 10d. is claimed by the said Harbour Company from Mr Lawson and Mr Wemyss as the

excess down to 31st October 1890 of the payments made by them to Messrs Lucas & Aird for contract work, over the cost of the same work calculated at schedule rates under the contract of 4th and 9th February 1887 with interest; and £7692, 17s. 6d., being 10 per cent. on the cost (£76,928, 15s.) of the work said to have been executed by Messrs Lucas & Aird up to said 31st October 1890, is also claimed by the said Harbour Company from Mr Lawson and Mr Wemyss. But as the works were not all completed at 31st October 1890, I propose, meantime, merely to pronounce an interim finding upon this head, to the effect that the sum due by the said George Lawson and Randolph Gordon Erskine Wemyss, as contractor and cautioner aforesaid, to the Ardrossan Harbour Company as at 31st October 1890, amounts to not less than £40,000; this finding being without prejudice to the final adjustment of the accounts between the parties. The sum named (£40,000) is not to be considered as an amount ascertained by me in respect of the claims of the Harbour Company, but as a payment which I consider may be safely and properly made on account of such claims, which will be finally dealt with after the works are completed. That the other claims made by the Ardrossan Harbour are (1) for £4100 of penalties for delay in the execution of the works down to 19th November 1890, under section 32 of the specification and interest; and (2) for £18,091, 14s. 6d. of compensation for loss, inconvenience, or obstruction occasioned by the contractor not fulfilling his contract under section 33 of the specification down to 5th October 1890, and interest. These claims (which may probably be found to be double claims for the same delay) I propose to reserve for determination hereafter, being of opinion that such claims ought to be dealt with once for all after the works are completed."

By a minute dated 9th May 1892 the Harbour Company craved the arbiter to make the proposed findings final, and to issue an interim decree giving effect to them for the sum to account found due as above. Mr Wemyss lodged a minute in answer protesting against further proceedings in the reference, on the grounds (1) that the arbiter had refused to admit evidence affecting, or to put in issue, the validity of the contract; (2) that he had refused to stay proceedings, but had allowed evidence to be led for one party when the other was absent and unrepresented; and (3) that the proposed interim findings, and any interim decree for payment, were *ultra vires*. After this protest was lodged no further steps were taken in the reference.

In June 1892 Mr Wemyss raised the present action against the Ardrossan Harbour Company, the contractor, and the arbiter, in which he concluded for reduction of the interlocutor of the arbiter declaring the pursuer's proof closed, and all the interlocutors which followed, and also the arbiter's note of his proposed findings and for interdict against the arbiter from "issuing any findings, decrees, or awards, interim or final, or taking any further proceedings under the said pretended arbitration, until the just rights of the pursuer have been ascertained in the process to follow herein."

The pursuer stated—"(Cond. 12) The claim put in by the pursuer in the arbitration was not for work done under the alleged contract or agreements following thereon, but was entirely for work done by him outside of and independent of the contract, all other claims competent to him being reserved. On the other hand, the counter claim lodged by the Harbour Company was only for penalties alleged to have been incurred under the contract for loss of traffic said to be due to the delay in completing the harbour works, and for excess of payments for work made to Lucas & Aird over the cost of the same work, calculated, in terms of the contract, down to 31st October 1890. No statement of the Harbour Company's claim as a whole against the pursuer upon the contract was lodged with the arbiter. The claim for loss of traffic is a purely speculative demand, and quite inadmissible under the said submission; and as regards the claims for excess of payments made to Lucas & Aird, no such demand could competently be made upon the pursuer in said submission, in respect the Ardrossan Harbour Works were not completed at the time, and it is believed the work has not even yet been certified as measured and complete. The arbiter had thus no proper claim before him on behalf of the Harbour Company, and notwithstanding the fact of the works not being completed at the time, he proposes to call upon the pursuer to pay £40,000 on account of a claim which he has sustained in the absence of the pursuer, who had no opportunity of meeting and resisting it. In these circumstances the arbiter was wrong (1) in declaring the pursuer's proof to be closed in his absence, and when he was unrepresented, and before he had led all his evidence, and in disallowing all his claims, his case in support of them being still incomplete; (2) in allowing the Harbour Company to proceed with evidence in the absence of the pursuer or his counsel or agent; (3) in hearing counsel for the Harbour Company on the whole case in the absence of the pursuer or his counsel or agent, and without any reply on their behalf; and (4) in issuing interim findings upon evidence which is one-sided and incomplete."

The pursuer pleaded—"(1) The arbitration proceedings complained of having been conducted in the absence of the pursuer, or anyone on his behalf, and against his protests, he is entitled to decree of reduction as craved. (2) The proposed interim findings being founded upon incomplete and one-sided evidence, ought to be set aside. (3) The proposed order upon the pursuer for a payment to account being *ultra vires* of the arbiter, and, *separatim*, being inequitable in the circumstances, the pursuer is entitled to interdict as craved."

It was explained for the defenders the

Harbour Company, with reference to the reasons advanced by the pursuer for asking delay, that he did not take proceedings to have the alleged legal questions, which the arbiter had disposed of, raised and decided in a court of law, and that he was not in fact abroad in January 1892.

They pleaded—"(1) The pursuer's averments are irrelevant. (2) The documents sought to be reduced being merely interlocutory orders and proposed findings, the action should be dismissed. (4) The arbiter's proceedings having been regular and valid, these defenders should be assoilzied."

On 13th December 1892 the Lord Ordinary (KINCAIRNEY) found that no relevant grounds were stated to support the conclusions of reduction and interdict, and dismissed the action.

"*Opinion.*—This is a very novel kind of action, and the defenders maintained in argument that it was wholly incompetent. I think that there is no precedent or warrant for it in our practice, and that it cannot be entertained.

[*After narrating the facts*]—"The ground of action is that all the proceedings of which the pursuer complains took place in his absence. He avers that he had gone abroad in bad health, and that the cause could not be conducted in his absence; that his advisers applied for delay, and had protested against the resumption of the proceedings in his absence; but that, notwithstanding, the arbiter, on the defender's motion, appointed the cause to proceed, and that the pursuer's advisers thereupon withdrew. These averments are not admitted, but must be assumed in the meantime. They are very bare and general averments. It is not said at what part of the Continent the pursuer was residing, whether his illness was so severe as to prevent his return to this country, or why his advisers were unable, after they had led proof for three days, to dispense with his personal attendance. Farther, it is not said that the arbiter acted corruptly, but only that he had gone wrong.

"I think that the note of the arbiter's proposed findings is not a document which admits of or requires reduction. It is no more than an expression of the arbiter's opinion or intention, and has no finality or effective or operative force. An arbiter, like anyone else, is free to express his opinions or intentions as he pleases, but it would be absurd to reduce the writing in which he expressed them. I know of no authority for the conclusions of reduction of the interlocutory orders, so long as no operative judgment has followed, or unless reduction of them were necessary to open the way for other competent conclusions.

"There remain for consideration the conclusions for interdict. I understood the defenders to maintain that it was wholly incompetent to interfere with a going arbitration by an interdict. I am not prepared to sustain that argument. As I read the judgments delivered in the House of Lords in *Drew* v. *Drew*, 8th March 1855, 2 Macq. 1, 27 Scot. Jurist, 273, the competency of such an action seems to have been regarded to some extent as an open question. But I think it can hardly be held now to be so. Such an action has been entertained in several cases—*Fraser* v. *Wright*, 26th May 1838, 12 S. D. 1049 (referred to in *Drew* v. *Drew*); *Young* v. *Arnott*, 14th July 1857, 19 D. 1000; *Pearson* v. *Oswald*, 4th February 1859, 21 D. 419; *Glasgow and South-Western Railway Company* v. *The Caledonian Railway Company*, 3rd November 1871, 44 Jurist, 29. In the two latter cases the arbiters were interdicted from entertaining certain questions which the Court held to be *ultra finis compromissi*. But it is clear from all the authorities that interdict will be granted only in exceptional cases, when it is made clear that injustice or much unnecessary cost would be caused by refusing to interfere.

"But the question is, whether the particular interdict here asked should be granted in the existing circumstances? Had this action been raised before any part of the proof to which the pursuer objects had been led, the case might have been different, because then it might have been represented that much unnecessary expense would be prevented. But here the proof has been taken, and no considerable benefit would result from interfering at this stage.

"The pursuer does not desire to put an end to this arbitration. He has no objection to the arbiter, and does not accuse him of corruption. He says that he has additional claims to bring before him. He wishes only a temporary interdict. Substantially, what he desires is, that the proceedings in the arbitration shall be sisted until the questions raised by this action are decided. These are the questions stated in his pleas-in-law, which may be said to be whether the proof which has been taken in his absence should be set aside, and (I suppose) the evidence taken of new, he being allowed to complete his proof; and whether the arbiter has power to pronounce an interim award, or ought to do so, if he has the power? It is an appeal to the Court to correct the arbiter in one point where it is said he has gone wrong, and to instruct him as to his power in the matter of interim awards, and also as to what it would be fair and equitable to do in that matter.

"I have been referred to no authority for an interference of that kind with a pending arbitration, and I think it would be very inexpedient if it were competent. *Prima facie*, no doubt, nothing can be more contrary to the fair course of an arbitration than to take the evidence of one party and to hear the arguments of one party in the absence of the other party, or to take the proof of one party and not the whole proof of the other party; but still it is not absolutely or in all circumstances illegal or unjust to do so. There may be circumstances which would fully justify such a course, and it would be impossible to decide in this case whether the arbiter was right or wrong without evidence, which would be very inconvenient; and I think there is no authority for appealing to the Court in a pending arbitration to instruct an arbiter what evi-

dence he shall take or what evidence which he has taken he shall strike out.

"I am far from clear that there is any relevant averment on this point, or any averment which would be relevant in a reduction of a decreet-arbitral, looking to the fact that there is no averment of corruption, and having in view the bareness of the averments which are made.

"With regard to the point as to the interim award, it is to be observed that the arbiter has express power to make interim awards, and that as yet he has made no interim awards. I think it impossible to say beforehand whether the interim awards which he may make will be within his power or not, or to give any directions or advice as to the sort of award which would be *intra vires* and also equitable. To do so would be invading to a very serious extent the province of the arbiter. If the arbiter does make an award which is beyond his power, the pursuer will have the benefit of that plea when the defenders seek to enforce the award.

"I think that at present the Court cannot interfere to any good purpose, and that the arbitration must take its course."

The pursuer reclaimed, and argued—It was equivalent to corruption on the part of the arbiter to hear the evidence and arguments of one party in the absence of the other, and to refuse the pursuer the opportunity of completing his proof—*Mitchell* v. *Cable*, 10 D. 1297; *Miller* v. *Millar*, 17 D. 689; *Adams* v. *Great North of Scotland Railway Company*, 18 R. (H. of L.) 1. He simply wished an opportunity of proving that he was absent from necessary causes beyond his own control. The interim finding for £40,000 was a random award, pronounced before the completion of the works, and was incompetent. It was the province of the Court, if satisfied that the arbiter's procedure was irregular, to interfere and prevent him giving operative force to the proposed order, and ordain him to allow the pursuer to be heard and to lead evidence. It was quite competent to interdict an arbiter *ab antea* from acting in a particular way—*Glasgow and South Western Railway Company* v. *Caledonian Railway Company*, 44 Jurist, 29.

Counsel for the defenders were not called on.

At advising—

LORD PRESIDENT—I agree with the Lord Ordinary that this is a very novel kind of action, for which there is no precedent in our practice. The reclaimers have practically admitted that it is unprecedented. The cases in which the Court has at the commencement of an arbitration granted interdict cannot at all be assimilated to the present proposal. These were cases in which on a legal ground the Court has pronounced against the arbiter entertaining claims which were in law demonstrably outwith the reference, and of these the most frequent illustrations are cases connected with railway arbitrations. But the present proposal is not a proposal that an arbiter should *ab antea* be prevented from entering upon the reference, nor is it a proposal that an operative decree—for example, an interim decree for money—shall be reduced, but that certain findings which have not an operative effect shall be reduced, and that upon the ground that the logical result of these findings, if not departed from, would be a decree contrary to the justice of the case.

It is quite plain that whether the arbiter was right or not in going on in the absence of Mr Wemyss, Mr Wemyss might convince the arbiter that his absence was justifiable and might be adequately accounted for, and that he should be allowed—it might be on conditions—to lead evidence on matters which the arbiter, hearing only *ex parte*, had provisionally pronounced upon. It is not necessary that the proceedings in an arbitration should be absolutely and inexpugnably logical in sequence, and it may be that the arbiter would reconsider points which he purported to have decided in the absence of the party who thus came to excuse his absence. In short, there is nothing here which makes it impossible that the ultimate result of this arbitration might be what the pursuer could admit was substantial justice. But is there any precedent or warrant for the Court interfering on the mere apprehension of an unjust result? and how could the interference of the Court be made effective? On neither question is there any proposal before us to which we could give effect. The findings which he asks are of a negative character. I asked, What does the pursuer wish us to do? Are we to interdict the arbiter from proceeding except on a specified course of procedure? It appears to me that what we are really asked to do is to interfere with an interlocutory judgment by an arbiter, and I apprehend that the Court would be very busy if they undertake to hear appeals from interlocutory judgments by arbiters. The question before us is raised in a crude form, but the hiatus in the conclusion of the summons is caused by the difficulty in formulating the order which the pursuer desires us to pronounce. I am entirely against creating such a novel precedent.

LORD ADAM concurred.

LORD M'LAREN—I am of the same opinion. We can only interfere with the decrees of arbiters by way of reduction when we have a final decree, and can only restrain them from proceeding when the proceedings are outwith the reference.

This case does not fall under either of these heads. We have here no final decree; everything is open. I should be sorry to discourage the idea that the arbiter may alter his opinion and give an opportunity to either party of leading further evidence, or do anything else in the nature of supplying an omission.

As regards the conclusion for interdict, however the claim may be disguised, the substance of it is that we are asked to interdict the arbiter from not hearing the pursuer's witnesses—to grant a negative

interdict. That has never been done, and I presume your Lordships will not make that order.

I only desire to add, that if the pursuer thinks he has sustained an injustice during the arbitration proceedings, and means to found on the proceedings in an action of reduction or other form of relief, he should be careful to give the arbiter every opportunity of retracing his steps and allowing what he has originally denied.

LORD KINNEAR concurred.

The Court refused the reclaiming-note.

Counsel for Pursuer and Reclaimer—J. C. Thomson—Readman. Agents—Millar, Robson, & Company, S.S.C.

Counsel for Defenders and Respondents The Ardrossan Harbour Company—C. S. Dickson—Ure. Agents—Blair & Finlay, W.S.

Tuesday, March 7.

FIRST DIVISION.

[Lord Kyllachy, Ordinary.

J. & W. WOOD *v.* TULLOCH.

Contract—Sale—Reduction—Innocent Misrepresentation—Essential Error.

A firm of coalmasters entered into an agreement for the purchase of a property, the agreement providing that the purchasers should have a certain time to put down bores and prove the property, within which time they might resile from the agreement. The purchasers subsequently brought a reduction of the agreement, on the ground that they had entered into it under essential error induced by the defender's—the seller's—misrepresentations. The misrepresentations alleged were that the defender had represented the extent of the property to be 132 acres, and its rental to be £157, whereas the true rental was 125 acres and the true rental £120, 10s. It was not alleged that the defender had made these representations fraudulently. The Court *assoilzied* the defender, *holding* that the pursuers had not stated a relevant case of essential error.

On 3rd March 1891 a minute of agreement was entered into between John Tulloch, proprietor of the property of Clayknowes in Stirlingshire, as first party, and J. & W. Wood, as second party, to the following effect—"The first party sells, and the second party buys, the property known as Clayknowes, situated near Greenhill Junction, in the county of Stirling, extending to one hundred and thirty-two acres or thereby, and including the moveables thereon belonging to the first party, and that on the following conditions, viz.—First, The price shall be £5750, and the cost of the transfer shall be borne by the first and second parties equally: Second, The second party shall be at liberty to put down bores, and otherwise prove the property, within one month of the date hereof, on condition of paying all damages incurred either to the first party or his tenants. The second party shall, 'on or before 3rd April next' (subsequently extended to May 3rd), 'declare whether they intend to go on with the purchase or to resile therefrom.'" . . .

J. & W. Wood made no intimation to Tulloch within the prescribed period as to whether they intended to go on with the purchase or not, but subsequently intimated that they had resolved not to go on with it. Tulloch thereupon raised an action against J. &. W. Wood to have it declared that by the foresaid minute of agreement he had sold them the property of Clayknowes, and to have them ordained to implement the purchase. On 12th November 1891 Lord Kyllachy pronounced an interlocutor in which he found and declared conform to the declaratory conclusion of the summons, and decerned conform to the conclusion for implement; and to this interlocutor the First Division adhered on 18th March 1891.

J. & W. Wood thereafter raised the present action against Tulloch for reduction of the minute of agreement of 3rd March, and of the interlocutor pronounced in the previous action.

The pursuers averred—"(Cond. 1) In the beginning of March 1891 the pursuers and the defender met with the view of considering as to the sale of the estate of Clayknowes. The defender stated to the pursuers at said meeting that the property contained 132 acres, and that the rental thereof was £159, and the pursuers, who had no knowledge themselves as to these matters, accepted the defender's statements and relied thereon. (Cond. 2) The pursuers signed the minute of agreement of 3rd March 1891 in reliance on the defender's said statements. . . . (Cond. 7) Down to this last date (18th December 1891) the pursuers had implicitly accepted and believed, and had relied on the defender's said statements as to the area and rental of the said property, which were of material importance in inducing the pursuers to enter into the said minute of agreement. On proceeding to arrange for the completion of the sale, which it had been held had been made, . . . they discovered that the said statements were incorrect, in respect that the area of said property was only 124·7 acres, or including half of the public road 125·23 acres, instead of 132 acres, and that the rental was only £110, 10s., or taking into account an unused and useless brickwork, £120, 10s. instead of £157. Until after 18th December 1891 the pursuers believed that the defender's said statements were entirely accurate, and acted on this belief."

The pursuers pleaded—"(1) The pursuers having been induced to enter into the said minute of agreement by material misrepresentations as to matters of fact relating to the subject of sale made by the defender, the pursuers are entitled to decree as concluded for. (2) The pursuers having entered