LORD DUNDAS—I agree. I think that if we did not apply the rule of the Act of Sederunt in this case we should reduce it to something very like a dead letter.

LORD ARDWALL concurred.

LORD LOW was absent.

The Court assoilzied the defenders.

Counsel for Pursuer—Moncrieff. Agents—Simpson & Marwick, W.S.

Counsel for Defenders—Watt, K.C.—Horne. Agents—W. & J. Burness, W.S.

Wednesday, December 22.

SECOND DIVISION.

[Lord Johnston, Ordinary.

ALSTON & ORR *v.* ALLAN'S TRUSTEES.

Arbitration—Reduction of Award—Failure to Exhaust Reference—General Reference as to Implement of Building Contract—Specification of Particular Questions—Award of Lump Sum.

By minute of reference the parties to a building contract referred to the decision of an arbiter "the whole questions now at issue as to the proper and complete implement of said contract, and the performance of the works embraced therein." The minute also enumerated particular questions which the arbiter was requested and empowered to decide. These were (1) whether the contractor had implemented his contract; (2) whether he had failed to do so, and if so in what respects and what deduction should be made therefor from the contract prices; (3) a claim for extras; (4) the deductions claimed by the employer; (5) the total sum remaining due by the employer; and (6) interest on that sum. The arbiter pronounced an award finding the contractor entitled to a lump sum with interest, but he did not give specific answers as to the first four of the above questions.

Held, in an action of reduction, that the arbiter was not bound to answer each question specifically, and that he was entitled to dispose of the whole matter by finding a lump sum due, and award *sustained*.

Miller & Sons v. *Oliver & Boyd*, November 10, 1903, 6 F. 77, 41 S.L.R. 26, *distinguished*.

Arbitration—Reduction of Award—Ultra fines compromissi—Building Contract—Work "to be executed in a tradesmanlike manner"—Observation by Arbiter that "first-class tradesmanlike job" could not be Expected at the Contract Price.

A building contract provided that "the work must be executed in a manner equal and similar to that at" certain specified houses already erected, "the whole work to be executed in a thoroughly complete and tradesmanlike manner." On the completion of the contract, disputes having arisen as to the execution of the work, the parties referred the questions at issue to an arbiter. The arbiter in a note to his interlocutor observed—"A first-class tradesmanlike job could not possibly be executed or expected at the contract prices . . . but on the other hand" the employer "was entitled to require that the work should be reasonably completed according to the contract and the standard set up." The employer raised a reduction of the arbiter's award on the ground that it was *ultra fines compromissi*, and founded on the above passage as showing *ex facie* of the award that it had been influenced by a consideration foreign to the question at issue, viz., the price.

Held that the award did not show *ex facie* that it had been influenced by considerations as to the price, and award *sustained*.

Messrs Alston & Orr, writers, Glasgow, raised an action against John Allan, wright and patternmaker, Glasgow, and John Herbertson, builder, Glasgow, concluding for reduction of proposed findings dated 5th July 1906, and an interlocutor dated 8th August 1906, pronounced by the said John Herbertson as sole arbiter in a reference between the pursuers and the defender John Allan. Mr Allan died on 26th October 1907, and his trustees were sisted as defenders on 5th November 1907.

The pursuers pleaded, *inter alia*—"(1) The said proposed findings and pretended interlocutor should be reduced, in respect that (*a*) they do not decide the questions submitted to the arbiter Mr Herbertson; (*b*) they are *ultra vires* and *ultra fines compromissi*; (*c*) they do not exhaust the questions submitted to Mr Herbertson; (*d*) the interlocutor was pronounced by Mr Herbertson upon considerations which were never submitted by the parties for his determination."

The defenders pleaded, *inter alia*—"(3) The arbiter's interlocutor of 8th August 1906 being *intra vires* of the arbiter, and regular and in order, is binding on the pursuers."

The pursuers in September 1903 contracted with Mr Allan, by missive offers and acceptances based on specifications, for the execution by Mr Allan of the wright, ironmongery, and glazing work of twenty-one cottages at Weirwood Park, Barrachnie, and nine cottages at Carlyle Drive, Hillington.

The offer for the houses at Barrachnie was in these terms—"I hereby offer to execute wright, ironmongery, and glazier works of cottages to be erected by you at Barrachnie, finished in the same style as cottages at Bogton Avenue, Cathcart, and as specification . . ." The offer for the houses at Hillington was in similar terms, except that it referred to the houses at Barrachnie instead of to those at Bogton Avenue.

The specification in both cases provided—"The whole work to be executed expeditiously in a thoroughly complete and tradesmanlike manner. . . ."

On the completion of the contract disputes arose between the parties as to the manner in which the work had been done, and Mr Allan raised an action in the Sheriff Court at Glasgow against the pursuers concluding for the balance which he alleged to be due. Before the record in that action was closed the parties entered into the said reference to John Herbertson.

The minute of reference bore—"Considering that disputes have arisen between us, the parties hereto, as to the proper and complete implement of certain contracts and the performance of the works embraced therein in connection with the wright, ironmongery, and glazier works of twenty-one cottages at Weirwood Park, Barrachnie, and nine cottages at Carlyle Drive, Hillington, and certain extra work and jobbings, all executed by me, the first party [Allan], at said cottages, and also in connection with the making and fitting up of a press for our, the second party's, place of business, and that on the order and instructions of us, the second party [Alston & Orr], the total balance claimed by me, the first party, as due to me by the second party being £640, 3s. 7d. (which balance is brought out as per statement annexed hereto); and considering further that we, the second party, apart from the deductions claimed by us in respect of inferior or omitted work by the first party, claim to be allowed as further deductions the sum of £52, 12s. 1d. sterling as the same is set forth in the statement annexed hereto. . . . Therefore we . . . agree to refer to the decision of the said John Herbertson the whole questions now at issue between us as to the proper and complete implement of said contracts and the performance of the works embraced therein, and the said other works and jobbings above mentioned. . . . And the particular points which the said John Herbertson is hereby requested and empowered to decide are (1) Whether I, the first party, have duly implemented my contracts for the wright, ironmongery, and glazier works of the said twenty-one cottages at Weirwood Park, Barrachnie, and said nine cottages at Carlyle Drive, Hillington? (2) Whether I, the first party, have failed to implement my said contracts or any of them? and if so, in what respects? and what deductions should be made from the contract prices in respect of such failure to implement my said contracts or any of them? (3) Whether the various sums claimed by me, the first party, as above mentioned, for extra work and for said press are justly due and owing to me? or if not, to what sums am I, the first party, entitled in respect of said extra and additional work? (4) Whether the second party are entitled to the deductions claimed by them, or any of them, and to fix the amount thereof? (5) What is the total sum remaining due by us, the second party, to me, the first party, in respect of the whole of the contracts above narrated? And (6) Whether and to what extent interest should be allowed to me, the first party, upon the sum found due to me? With power to the said John Herbertson to visit the *loci* of said various works, and also Bogton Avenue, Cathcart, and there, in presence of the parties . . . to examine the work done by me, the first party, and thereafter, if he considers it necessary, to have such further meetings with parties or their agents, and to call for such evidence, all as he in his absolute discretion may think proper to enable him to decide the whole matters in dispute. . . ."

The statement for the pursuers included business accounts incurred to them by Mr Allan in connection with the purchase by him of one of the houses.

The arbiter's note of proposed findings issued on 5th July 1906 was in these terms—"The arbiter, having considered the minute of reference, together with the statements of claim by the claimants and answers by the respondent, and the whole other productions in this reference, and having personally inspected the properties in question in presence of the parties, proposes to find that the claimants Messrs Alston & Orr are liable to make payment to the respondent Mr John Allan of the sum of £512 with interest at the rate of 5 per cent. per annum from this date till paid, and that the expenses of the reference, including the arbiter's fee and clerk's account, be paid by the parties equally."

Note.—"The arbiter has anxiously considered the statements and counter statements made by the parties in this reference regarding the disputes that have arisen between the parties as to the implement of the contracts and the performance of the works embraced therein. He does not think that any good purpose would be served by detailing the reasons that have led him to the decision above referred to. The parties have left the entire settlement of all questions between them to his judgment, and he considers that the sum proposed to be decerned for represents fairly and equitably the liability of Messrs Alston & Orr to Mr John Allan. A first-class tradesmanlike job could not possibly be executed or expected at the contract prices allowed to Mr Allan, but, on the other hand, Messrs Alston & Orr were entitled to require that the work should be reasonably completed according to the contract and the standard set up."

The interlocutor of 8th August 1906 was in these terms:—"The arbiter having heard parties' agents on his proposed findings, and carefully considered their arguments, and the whole cause, adheres to the proposed findings: Finds Messrs Alston & Orr liable to make payment to Mr John Allan of the sum of five hundred and twelve pounds (£512), with interest at the rate of five per centum per annum from 5th July 1906 till paid."

Note.—"On behalf of Messrs Alston & Orr it was maintained that the arbiter in his findings should categorically answer the six questions specified on page third of the minute of reference, whereas he had

only answered questions five and six, with the result that Messrs Alston & Orr were left in partial ignorance as to the lines on which the arbiter had proceeded in giving his decision.

"The obvious answer to this contention is that the questions referred to are not capable of detailed and definite answers within reasonable limits, and the real point at issue between the parties was, as to the amount payable by the one to the other. The first terrace of houses at Barrachnie was to be erected in accordance with a detailed specification, but taking Bogton Avenue houses as a standard, the second terrace at Barrachnie was to be erected in accordance with the first terrace, and the terrace at Hillington was to be similar to the second terrace at Barrachnie. Without going into details, the arbiter may state that he considers Mr John Allan did not complete the work in its entirety according to the contract and the standards set up, and in consequence of this he has disallowed what he considers a fair proportion of Mr Allan's claim, to compensate Messrs Alston & Orr for the defects discovered by him. He has also given careful consideration to Mr Allan's claim for extras and Messrs Alston & Orr's claim for deductions, and the net result arrived at is the sum decerned for."

On 6th January 1909 the Lord Ordinary (JOHNSTON) pronounced an interlocutor sustaining the defenders' third plea-in-law and assoilzieing them.

Opinion.—[*After narrating the facts*]—"The objections stated by the pursuers to Mr Herbertson's findings in the matter are—

"1st, That he has failed, in fact I think I may say declined, to give categorical answers to the first four points enumerated in the reference, and has contented himself with answering the fifth and sixth. I may dispose of this matter at once. I think there is no substance in the objection. As I have pointed out, the reference was emphatically one involving practical matters, and the arbiter was purely a practical man. He was taken to visit and inspect the subjects, and as all the houses were dittoes of one another, examples merely were examined, and the parties left the whole matter to him, renouncing probation. I do not think that there was any call for him to give categorical answers to the first four questions put. They were merely an unnecessary defining in detail of the mental process or consideration which the arbiter must go through in order to arrive at the real question at issue, namely, what was the sum still due. I think that it is evident from the proceedings that with great care the arbiter has applied his practical mind to the questions at issue, and has determined the true matter in dispute, viz., the fifth question submitted, or what remains to be paid. The sixth question was a separate one, which required a categorical answer, and it has received one.

"2nd. That Mr Herbertson has shown, by the notes to his proposed and final findings, that he has been influenced by a consideration foreign to the question at issue. If he has been so, there is no doubt that his award is *ultra vires*. But while I think Mr Herbertson has so expressed himself as to enable the pursuers to state a very specious objection on record, a careful consideration of what Mr Herbertson says shows that there is no substance in this objection either.

"In the note to his proposed findings of 5th July 1906 Mr Herbertson states 'a first-class tradesman-like job could not possibly be executed or expected at the contract prices allowed to Mr Allan; but on the other hand Messrs Alston & Orr were entitled to require that the work should be reasonably completed according to the contract and the standard set up.' So long as one knows nothing about the contract, or the meaning of the expression 'and the standard set up,' this statement by Mr Allan leaves room to contend with considerable force that Mr Herbertson had made the contract price the measure of the class of work to be exacted, which would clearly have been wrong. The class and style of work to be exacted depend on the contract and relative specification, and if Mr Allan has cut his prices too low he must suffer for it; he is not entitled to say, at anyrate I have given the money's worth. The money's worth might be far short of fulfilling the contract. But when one knows what the contract is, and knows that a standard for the style of work was fixed by reference to similar buildings already erected at Bogton Avenue, Mr Herbertson's meaning is at once explained, and it is seen that his reasoning is perfectly correct, and his award unobjectionable. But if there could be any doubt raised by his proposed findings, it is set at rest by his final findings of 8th August 1906, in the note to which, after his attention had been drawn to the point, he says—'Without going into details, the arbiter may state that he considers Mr John Allan did not complete the work in its entirety according to the contract and the standard set up, and in consequence of this he has disallowed what he considers a fair proportion of Mr Allan's claim to compensate Messrs Alston & Orr for the defects discovered by him. He has also given careful consideration to Mr Allan's claim for extras, and Messrs Alston & Orr's claim for deductions, and the net result arrived at is the sum decerned for.'

"Accordingly, I sustain the third plea-in-law for the defenders, who are now the representatives of Mr Allan, he having died *pendente processu*, and assoilzie them from the conclusions of the action."

The defenders reclaimed, and argued—(1) The minute of reference set forth specific questions, to which the arbiter was bound to give specific answers. He was not entitled simply to find a lump sum due without first answering the questions submitted to him. This was not a general reference but a reference of specific points, and if the arbiter did not deal with these he had not exhausted the reference. The

arbiter ought to have said in what respects the contractor had failed to implement his contract, and what deduction had been made in respect of each failure. It was impossible otherwise for the defenders to make a representation against the proposed findings. The claims involved in the questions enumerated were not *ejusdem generis*, and if they were not separately dealt with the award was invalid—*Miller & Son* v. *Oliver & Boyd*, November 10, 1903, 6 F. 77, 41 S.L.R. 26. In any event the deductions claimed by the pursuers, in so far as they involved business charges, should have been separately dealt with. The case of *Paterson & Son, Limited* v. *Corporation of Glasgow*, July 29, 1901, 3 F. (H.L.) 34, 38 S.L.R. 855, on which the defenders founded, was distinguishable, because there the arbiter was never asked to separate the different items of claim—*per* Lord Robertson. (2) It appeared *ex facie* of the arbiter's note to his proposed findings, in which he said that a first-class tradesman-like job could not possibly be executed at the contract prices, that he had been influenced by a consideration foreign to the question at issue, namely, the contract price. He was not entitled to take the price into consideration, but must determine whether the work had been done according to the contract between the parties, as contained in the specification and relative offer and acceptance. The award therefore could not stand—*Davidson* v. *Logan*, 1908 S.C. 350, 45 S.L.R. 142. In any event the pursuers were entitled to a proof to establish this ground of reduction, and would be entitled to examine the arbiter as a witness—*Glasgow City and District Railway Company* v. *Macgeorge, Cowan, & Galloway*, February 25, 1886, 13 R. 609, 23 S.L.R. 414; *Duke of Buccleuch* v. *Metropolitan Board of Works*, 1871, L.R., 5 E. & I. App. 418.

Argued for the defenders (respondents)—(1) There was a general reference, the sole purpose of which was to arrive at the amount due by one of the parties to the other in respect of the contract. The special questions were merely for the purpose of directing the arbiter's attention to the points therein raised. The arbiter could not arrive at a decision on the whole matter without taking these separate questions into consideration, and his award showed that he had done so. In *Miller & Son* v. *Oliver & Boyd, cit.*, the arbiter gave a general finding on questions which were not *ejusdem generis*, and there was nothing to show what questions the arbiter had considered. Here the claim was for various sums due under a contract for work done, and the various heads of claim were *ejusdem generis*, and that distinguished the case from *Miller & Son* v. *Oliver & Boyd, cit. per* Lord Trayner. The award could not be reduced on the ground that he had failed to distinguish between such questions as were put here—*Paterson & Son, Limited* v. *Corporation of Glasgow, cit.* (2) There was no evidence that the arbiter had been influenced by considerations foreign to the questions at issue. His notes showed clearly that though he had thought the price too low, he knew that he was not entitled to take that into consideration, and he had accordingly decided whether the contract had been fulfilled according to its plain terms. If the arbiter said, as the notes to his interlocutors had said, that he had not been influenced by extraneous considerations, he was final on that—*Glasgow City and District Railway Company* v. *Macgeorge, Cowan, & Galloway, cit.*

LORD JUSTICE-CLERK—We have had a very full debate here, but having heard the debate I have no difficulty or hesitation in holding that the judgment of the Lord Ordinary cannot be disturbed.

There was here a reference made to Mr Herbertson, the ultimate purpose of which was to decide the amount of the balance which was to be paid by one party to another. In the reference certain matters are stated in the form of questions to which it is desired that the arbiter should direct his attention, and which he is empowered to decide, but these matters only required to be considered in order that the arbiter might arrive at a decision on the real question between the parties, namely, the sum due by the one to the other.

Now, the first complaint is that while these matters are put in the form of questions, the arbiter has failed to give a separate answer to each of the questions, or to state the sum which he gave under each head. I am of opinion that the arbiter was under no obligation whatever to give such details. He was perfectly entitled to dispose of the whole matter by finding that a certain sum was due to the one party by the other. Of course, if there was anything in his decree-arbitral to indicate that he had failed to consider any of these matters, that might be a sufficient reason for setting aside the award. But is it so in this case? I am very clearly of opinion that it is not. Did he consider the various matters referred to in the questions? He says that he did. If he considered them he must then have proceeded to give effect to his views in arriving at the sum named in the decree-arbitral. There is no other possible way in which he could act. He must have put down opposite each question the proper sum, and then proceeded, either by summation or subtraction as the case might be, to find that the balance remaining over to either one or the other party was the amount in the decree-arbitral. I cannot read his note, which must be taken here as fact, otherwise than meaning that this was his method of proceeding. He says that without going into details he holds that Mr John Allan did not complete the work in its entirety according to the contracts and the standards set up, and in consequence he has disallowed what he considers a fair proportion of Mr Allan's claim. That must have been a sum in figures; it could be nothing else. Then he says he has given careful consideration to Mr Allan's claim for extras and Messrs Alston & Orr's claim for deductions, and the net result arrived

at is the sum decerned for. That plainly means and can mean nothing else than that he has put down a figure according to his judgment for the extras, has put down a figure for the deductions according to his judgment, and has thus made out the balance for which he decerns. All that appears to me to be in perfect order and sequence, and I know of no law which requires an arbiter to supply the details of how he disposed of the items of an arbitration if the Court is satisfied that he has exhausted the reference. I am clearly of opinion that there are no grounds for suggesting that he failed to do so in this case.

Then it is said that the two notes which he issued taken together indicate plainly that he set up a different standard from that which he was entitled to consider. I am not satisfied that he did anything of the kind. He says—"A first-class tradesmanlike job could not possibly be executed or expected at the contract prices allowed to Mr Allan; but, on the other hand, Messrs Alston & Orr were entitled to require that the work should be reasonably completed according to the contract and the standard set up." Now, of course, these words, "the standard set up," are very peculiar, but we see perfectly from his statement in the other note, and further from the facts of the case, how that word came to be used. He was, in considering the matter, to take as regards a certain row of houses a standard which was visible before his eyes, namely, certain other houses which were designated in the contract, and he had to decide whether, according to the standard which had been set up by the parties themselves, the work had been done as it ought to be done. He has held that it was not, and I cannot see any ground for impugning his decision.

There is, lastly, a question which might have created difficulty, namely, the question about the lawyers' account. It so happened that the lawyers had a good deal to do with the matter, and really are parties to this case. How that came about we do not know. There was a small account which had to be dealt with in order to bring out a balance. Now the arbiter was not asked to do anything with that except to consider it, and he was asked to consider it subject to the fact that he had a legal assessor qualified to advise him whether the charges in the account were reasonable or not. No proposal was made to put the matter before the official auditor, and I am of opinion that the decree-arbitral cannot be impugned upon that ground.

Upon the whole matter I come to the same conclusion as the Lord Ordinary.

LORD ARDWALL—I confess that at first I had some difficulties about this case, but after having heard it thoroughly debated I have come to the same conclusion as your Lordship.

The mainstay of Mr Mercer's case was the decision in the case of *Miller & Son* v. *Oliver & Boyd*, reported in 6 F. p. 77. But I think that case can be differentiated in most important particulars from the present. The main objection which is stated to the arbitration proceedings in the present case is that the arbiter did not answer specifically and in detail the various questions put, numbered 1 to 6 in the minute of reference; and it is said that that was just the same mistake as was made by the arbiter in *Oliver & Boyd's* case, and that therefore our decision in this case should follow the decision in *Oliver & Boyd*. But when we come to look at the two cases we find they are very different. In the first place, *Oliver & Boyd's* case arose out of an absolutely general clause of reference under a somewhat complicated contract. In that general clause there were no *termini habiles* for a reference between the parties. Naturally the parties were called upon to put in claims, and a claim was accordingly put in submitting certain questions and claims to the decision of the arbiter. Now these were very specific; they embraced claims of different kinds; and most important of all, the claims really constituted the reference to the arbiter, which he was bound to dispose of and to exhaust. Now in the present case we find that the arbitration arose out of a desire by both parties to put a stop to a litigation which was going on. All of us who have had experience of cases relating to building contracts in this Court know how expensive and troublesome they often are, owing to the difficulty of judging between the skilled witnesses on the one side and the skilled witnesses on the other, and to the immense amount of detail involved. So the parties here very properly resolved to enter into a reference to a skilled arbiter to decide the whole matters in dispute between them, and they began with a formal minute of reference which tells us specifically what is referred. They say—"Therefore we, the whole parties hereto, have agreed and hereby agree to refer to the decision of the said John Herbertson the whole questions now at issue between us as to the proper and complete implement of said contracts and the performance of the works embraced therein, and the said other works and jobbings above mentioned; and for the consideration of the said John Herbertson in determining and deciding all such disputes there are herewith submitted to him" a number of documents which are set forth. So we have here a complete reference of all the disputes which are specified in the narrative which precedes the clause I have just read. Further on in the minute of reference this clause is introduced—"And the particular points which the said John Herbertson is hereby requested and empowered to decide are"—and then there follow the six points of which we have heard so much in the present case. Now it appears to me in the first place that there was no obligation on Mr Herbertson (as there was on the arbiter in *Oliver & Boyd's* case) to decide specifically and in detail every one of these questions. They rather set forth, as the Lord Ordinary says, the lines on which he was to proceed in arriving at the determination

of the question submitted to him under the general clause I have read, and which are again referred to in points 5 and 6, which are in the following terms—"(5) What is the total sum remaining due by us, the second party, to me, the first party, in respect of the whole of the contracts above narrated? and (6) Whether and to what extent interest should be allowed to me, the first party, upon the sum found due to me?" Now that differentiates the case at once from the case of *Oliver & Boyd*, for here we have first a general reference, and then particular points, as they are called, which the arbiter is empowered to decide, and which are inserted, apparently, more for the sake of guidance and illustration than anything else. But, in the next place, when we inquire what was the reason for reduction being granted in *Miller* v. *Oliver & Boyd*, we find that it was because the arbiter had not exhausted the reference. It appears from Lord Trayner's opinion that the failure of the arbiter to deal specifically with the different claims left it ambiguous on the face of the decree whether the reference had been exhausted or not. What Lord Trayner in dealing with that matter says is—"It appears to me, therefore, that this finding of the decree-arbitral must be set aside because it is consistent with (that is, does not exclude) the view that the arbiter has not exhausted the reference." Here, again, this case differs from the case of *Oliver & Boyd*, because the notes of the arbiter clearly show that he did exhaust the reference and that he did consider every one of the points, and accordingly the first ground of decision in *Oliver & Boyd's* case is totally excluded. I need not go into the second ground of decision in *Oliver & Boyd's* case, which was that the arbiter had gone *ultra fines compromissi*, as it does not touch the present case.

The point which Mr Mercer founded on most strongly in argument was the account for lawyers' fees. But on turning to the contract in process it appears that these really form part of the building contracts between the parties, because the offer for the houses and the other matters which led to the expense begins thus—"With reference to above schedule and offer by me to do the wright, glazier, and ironmongery work at £158 per house, on condition that I am allowed £160 in respect of said work, I am willing and hereby agree to purchase house No. 4 of the block," and so on. The two things were thus quite inextricably bound up together, and really formed part of one and the same business transaction, and that being so it cannot be said they were not *ejusdem generis*. That the arbiter dealt with these is not doubtful, for in his note to the award he says—"He has also given careful consideration to Mr Allan's claim for extras and Messrs Alston & Orr's claim for deductions, and the net result arrived at is the sum decerned for."

It only remains to add that the question of interest is specially dealt with in the interlocutor, so that I am quite satisfied that so far from its appearing on the face of the proceedings that the arbiter did not consider all the questions, we have it stated on the face of the documents that he did consider them, and that the award he arrives at is the result of that consideration. Therefore it cannot be said either that he has not exhausted the reference or that he has failed to consider each of the points put to him.

With regard to the allegation that the arbiter took into consideration matters foreign to the reference it was pleaded for the reclaimers that Mr Herbertson allowed a consideration of this kind to interfere with his judgment, namely, that Mr Allan had undertaken to build these houses at an exceedingly cheap price, and that it was not fair to hold that he was bound to supply houses in conformity with the specification at such price. Now of course if the arbiter had adopted such views that would have been a most serious objection to the award, but I cannot find from either of his awards or notes anything to show that he did so. There is nothing to show that he did otherwise than try to find out what was justly due under the contract as it stood. On the whole matter, therefore, I agree that we ought to adhere to the judgment of the Lord Ordinary.

LORD DUNDAS—I agree with the Lord Ordinary and with your Lordships, and I confess that for my own part I consider this to be a reasonably clear case. Two points, and two only, I think, were argued as affording ground for reduction of the findings of the arbiter. Both of the grounds appear to me to be exceedingly slender and quite insufficient for the success of the argument. With regard to the first, I think that the arbiter was not bound to give specific or categorical answers to the first four points which are detailed in the minute of reference. These are not truly questions to be answered, but, as the minute puts it, "particular points which" the arbiter is "requested and empowered to decide." They are matters for his consideration, but they are plainly subservient to and included in the fifth point which raises the true question, namely, "what is the total sum remaining due . . . in respect of the whole of the contracts?" Now the arbiter has, I think, stated very reasonable and sufficient grounds for not attempting to answer these points in specific detail. He says that "the questions referred to are not capable of detailed and definite answers within reasonable limits, and the real point at issue between the parties was, as to the amount payable by the one to the other." But the conclusive consideration, as your Lordships have pointed out, is that it is quite clear that the arbiter has in fact decided all the particular points submitted to him, for he says in the note I have referred to that "without going into details, the arbiter may state that he considers Mr John Allan did not complete the work in its entirety according to the contract and the standards set up, and in consequence of this he has disallowed what he considers a

fair proportion of Mr Allan's claim, to compensate Messrs Alston & Orr for the defects discovered by them. He has also given careful consideration to Mr Allan's claim for extras and Messrs Alston & Orr's claim for deductions, and the net result arrived at is the sum decerned for;" and he has also dealt in terms with the question of interest. If the passage just quoted is collated with the text of the "points" (other than that in regard to interest) as stated in the minute of reference, I think it will be found to be exactly equivalent to a statement by the arbiter that he has considered and decided all of them. That is not only conclusive of this point, but it also to my mind affords a sharp ground of distinction between this case and the case of *Miller & Sons* v. *Oliver & Boyd* (6 F. 77). I think there are a good many grounds of differentiation, but this one alone is sufficient, because one of the grounds — and a sufficient ground — for reducing the award in that case was that there was nothing whatever to show that the arbiter had exhausted the reference, whereas in this case we have in the arbiter's note clear evidence that he has done so.

Upon the second question I need only say that I think the argument in favour of the objection can only be maintained by overstraining and indeed torturing the words of the passage in the arbiter's note, which is supposed to support it.

The pursuer's counsel did make a rather half-hearted motion for a proof, but it seems to me that there is really no relevant averment on record which could be sent to probation. On the whole matter I entirely agree with the Lord Ordinary and with your Lordships.

LORD LOW was absent.

The Court adhered.

Counsel for Pursuers (Reclaimers) — M'Lennan, K.C.—Mercer—Lippe. Agents —Erskine Dods & Rhind, S.S.C.

Counsel for Defenders (Respondents)— Wilson, K.C.—W. L. Mackenzie. Agents —Macrae, Flett, & Rennie, W.S.

HIGH COURT OF JUSTICIARY.

Friday, December 10.

(Before the Lord Justice-Clerk, Lord Ardwall, and Lord Dundas.)

WILSON AND OTHERS *v.* RENTON.

Justiciary Cases—Statutory Offence—Intimidation — Complaint — Relevancy — General Conviction — Conspiracy and Protection of Property Act 1875 (38 *and* 39 *Vict. c.* 86), *sec.* 7—*Trades Disputes Act* 1906 (6 *Edw. VII, cap.* 47), *sec.* 2 (1).

The Conspiracy and Protection of Property Act 1875, sec. 7—"Every person who, with a view to compel any other person to abstain from doing or to do any act which such other person has a legal right to do or abstain from doing, wrongfully and without legal authority . . . (2) persistently follows such other person about from place to to place, or . . . (4) watches or besets the house or other place where such other person resides, or works, or carries on business, or happens to be, or the approach of such house or place . . ." shall be liable to a penalty.

The Trades Disputes Act 1906, sec. 2 (1) —"It shall be lawful for one or more persons, acting on their own behalf or on behalf of a trade union, or of an individual employer, or firm in contemplation, or furtherance, of a trade dispute, to attend at or near a house or place where a person resides or works or carries on business, or happens to be, if they so attend merely for the purpose of peacefully obtaining or communicating information or of peacefully persuading any person to work or abstain from working."

A complaint charged seven persons that they, with a view to compelling two others to abstain from doing work which they had a legal right to do, on certain dates wrongfully and without legal authority did persistently follow the two others from the working place to their homes and from their homes to the working place, "and" did watch and beset the working place and their homes at the hours when they had to leave the working place to go home and their homes to go to the working place, "contrary to the Conspiracy and Protection of Property Act 1875, sec. 7."

Held (1) that the Conspiracy and Protection of Property Act 1875, sec. 7, only created one offence, although in its sub-sections it set forth different modes in which that offence might be committed, and consequently that the complaint was relevant although it set forth no particular sub-section and sought a general conviction; (2) that the Trades Disputes Act 1906, sec. 2 (1), did not alter the offence created by the Act of 1875, but merely made valid a defence which might and must be established by the evidence led, and consequently intimidation need not be averred in the complaint; and (3) that the "persistently following" and the "watching and besetting" not being alternative charges, a general conviction of the contravention charged was valid.

Clarkson v. *Stewart*, October 22, 1894, 1 Adam 466, 22 R. (J.) 5, 32 S.L.R. 4, *followed*.

Circumstances in which *held* that "watching and besetting" a person's house, and "persistently following" him in the street, was not "peacefully persuading" him to abstain from work in the sense of the Trades Disputes Act 1906, section 2 (1).

The Conspiracy and Protection of Property Act 1875 (38 and 39 Vict. cap. 86), sec. 7,