to give to the landlord for the privilege of occupying and dealing in a particular way with the subjects let. It is no doubt true that mineral royalties or lordships are paid not for the use of the subjects let *salva rei substantia*, but for the right to dig and remove part of the estate, but the consideration paid to a landlord for the power to excavate minerals on his estate has been assimilated to rent paid for the use of the estate, leaving the *corpus* of it undiminished. A similar argument was urged against holding that mineral royalties should be taken into account in ascertaining the amount of the provisions which an heir of entail in possession is entitled to make for his widow and children, but in the case of *Lord Belhaven and Stenton*, 23 R. 423, it was held that in estimating the provisions which an heir of entail is entitled under sections 1 and 4 of the Aberdeen Act to make for his widow and children, the royalties payable under mineral leases during the year current at the death of the heir fell to be taken as part of the "free yearly rent" of the entailed estate, irrespective of the fact that the minerals were nearly exhausted. It was argued that the treatment of mineral rents or lordships as rents was only introduced by custom, but even assuming this to be so, it seems to me that the custom is now so well established, and in itself so reasonable, as to make it law. Again, in the case of *Robertson* v. *Clark*, 4 R. 1317, it was held (it is true by a narrow majority) that not only the fixed rent stipulated in a lease, but pactional rent payable in the event of divergence from the prescribed course of management, is secured by the landlord's hypothec. I am aware that this decision has been doubted, but even if a different view were taken of the point there decided it would not, in my judgment, affect the present case, as a penalty for breach of contract is very different from the return stipulated to be paid for the use and enjoyment of the subject let. For these reasons I concur with the Lord Ordinary in thinking that the liquidators erred in holding that the landlord in the present case has no hypothec or preference in respect of lordships or royalties.—[*His Lordship then dealt with the other question raised in the case.*]

LORD ADAM—I am of the same opinion. The first question stated by the Lord Ordinary is whether royalties are to be considered as rent. It seems to me that the moment it is settled that fixed rents under a mining lease are secured by the landlord's hypothec the pursuer's case here is hopeless, because it has been decided over and over again that royalties are just as much rent as fixed rents.

LORD M'LAREN—I also concur. I consider that these royalties are to be regarded as rent in accordance with the decisions, and also in accordance with the philosophical definition of "rent" and with the terms of this particular contract. As regards the decisions it may be observed that the inclusion of royalties under rent does not depend upon the use of any particular word or phrase, because the same determination was given in the case under the Aberdeen Act, where the words used are "rent or annual value," and under the Scottish statute giving right to a composition, where the words are "a year's maill as the lands are set for the time." I see no ground for distinction (in the question what is to be included under the term rent) between questions as to the landlord's security for rent and as to the measure of the superior's composition. We know that, taking a general survey of the different kinds of property—pastoral, agricultural, and mining—very different modes of payment of the landowner's share of profit are prevalent in different countries. Under our law the right of hypothec is intended to give the landlord a preference for this share of profit, on the ground that the tenant could earn no profit at all unless he had the use of the land.

Theoretically I should include under rent whatever is paid to a landlord as a consideration for the use of the land, or as his share of the profits derived from the land.

If, again, we take the economical definition of rent as being the difference between the return from the particular subject and that derived from the poorest land under cultivation, that applies equally to the case of royalties from a mine. The royalties vary with the quality of the ore, and may be taken to represent the difference between the returns from the particular mine in question and those from the poorest mine which it would pay to work. In that sense it is quite immaterial whether the return takes the form of royalty or of fixed rents.

Then in this particular contract, which, like other mining leases gives alternative returns by means of fixed rents or royalties, it seems impossible to predicate of these alternative considerations that the one is rent of the subjects and the other is not rent, or that the one is covered by the hypothec for rent and the other is not.

LORD KINNEAR concurred.

The Court adhered.

Counsel for the Liquidators—Salvesen, K.C.—Grainger Stewart. Agents—Mitchell & Baxter, W.S.

Counsel for the Appellant—Fleming, K.C. —Hon. W. Watson. Agents—Tods, Murray, & Jamieson, W.S.

Tuesday, November 10.

SECOND DIVISION.

[Lord Pearson, Ordinary.

MILLER *v.* OLIVER & BOYD.

Arbitration—Decree—Lump Sum Awarded where Claims not ejusdem generis Referred—Examination of Arbiter to Explain Award—Proof—Parole to Explain Writing—Competency.

An agreement for the transference of the goodwill and plant of A's business to B, and A's future employment by B

on a salary and commission, contained a reference clause referring questions regarding the true intent and meaning of the agreement to an arbiter. Disputes having arisen between the parties, they went to arbitration, and A claimed for certain sums of money alleged to be due for (1) value of goodwill, (2) salary, (3) commission on profits, (4) price of plant, and (5) damages for breach of contract. The arbiter by his award found A entitled to a lump sum. In an action for reduction of the arbiter's award at the instance of A, proof was led, and the arbiter, adduced by the defender, was examined as a witness and gave the items of which the lump sum awarded was composed. *Held* that the award fell to be set aside, it being impossible to discover from the award as issued which of A's claims had been sustained, and to what extent, or whether the arbiter had considered some of the claims at all, and that it was not competent to explain the award by the parole evidence of the arbiter.

Arbitration—Scope of Reference—Scope of Reference Extended by Actings of Parties.

In an arbitration under a reference clause contained in an agreement, the parties to the agreement lodged claims which were outwith the scope of the reference clause. Circumstances in which *held*, in an action of reduction of the arbiter's award, that parties by their actings had extended the scope of the reference.

Arbitration — Ultra fines compromisi.—Separability of ultra vires Part of Award —Parties Ordained by Arbiter to Execute Mutual Discharges on Implement of Award.

In an arbitration under a reference clause contained in an agreement various claims were lodged by one of the parties, and each of the parties claimed damages for breach of contract. The arbiter issued an award by which on implement thereof he found the parties mutually free of all claims, and ordained them to execute and deliver mutual discharges.

In an action of reduction of the award at the instance of one of the parties, it was admitted that the decree ordaining parties to execute mutual discharges was *ultra vires*. *Held* that the award fell to be reduced *in toto*, that portion of it which was *ultra vires* being inseparable from the rest.

This was an action at the instance of J. Miller & Son, printers, late of Rose Street North Lane, Edinburgh, and Andrew Carruthers Miller, the sole partner of that firm as an individual, against Oliver & Boyd, printers and publishers, Edinburgh, and Charles Ritchie, S.S.C., Edinburgh, who had acted as arbiter under a reference clause contained in an agreement between the pursuers and Messrs Oliver & Boyd. The pursuers sought reduction of the arbiter's award.

The facts sufficiently appear from the opinion of the Lord Ordinary (PEARSON), which was as follows:—"In this action the pursuer asks for reduction of a decree-arbitral pronounced by Mr Charles Ritchie, S.S.C., in a reference between the pursuer and the defenders. The main grounds of reduction are (1) that the decree-arbitral does not decide the questions submitted; (2) that it decides questions not submitted; and (3) that the lump sum of £618, 7s. 11d., which the arbiter fixed as payable by the defenders to the pursuer, was arrived at after deducting a sum in name of damages as payable to the defenders, the question of damages payable to the defenders not being within the reference. A further ground of reduction is stated, namely, that the arbiter received and considered statements bearing on the reference which were made to him by the defenders outwith the knowledge of the pursuers.

"The disputes between the parties had their origin in the carrying out of an agreement between them dated 15th and 20th April 1897.

"Prior to May 1897 the pursuer Mr Miller carried on business as a printer in Edinburgh under the firm name of J. Miller & Son. By the minute of agreement the defenders, printers and publishers in Edinburgh, agreed to purchase from the pursuer the goodwill, plant, machinery, fittings, and entire business properties belonging to and used by him in his premises. The defenders (by Art. 3) undertook to pay the pursuer £150 a-year in name of salary, until such time as a rearrangement of management might take place; the pursuer in return therefor undertaking to devote his entire time and energy towards the promotion of the business prosperity of the firm and its partners, and to be subject to their and their successors' directions in connection with the business of Oliver & Boyd.

"The second article of the agreement dealt with the price of the goodwill, and the fourth and fifth articles dealt with the price to be paid for the stock, plant, machinery, and fittings.

"Article second, stated shortly, provided as follows:—(1) It declared that the price of the goodwill had been mutually arranged to be £800, on the basis that the pursuer should introduce to the defenders not less than £1600 per annum 'of business turnover' prior to 30th June 1898, and failing his introducing that amount of business turnover the price of the goodwill was to be proportionally less. (2) The defenders bound themselves to pay the £800, or such lesser sum, to the pursuer 'as at 15th May 1897;' but it was declared that in no event should such payment be demandable from the defenders until 15th May 1902, 'unless this agreement shall be terminated previous to that date by the first parties,' that is by the defenders. (3) It was further declared that at 15th May 1902 it should be in the option of the pursuer to demand payment of one-half only of the price of the goodwill, and to allow the remaining half to remain in the business until 15th May 1907,

at 5 per cent. interest. (4) The interest on the price of the goodwill for the period down to 15th May 1902 was to be paid at the rate of 2½ per cent. per annum. (5) After certain other provisions, the article ends with an undertaking by the defenders to pay to the pursuer 'a commission of ten per centum upon the net profits of the whole printing business of Messrs Oliver & Boyd.'

"As to the price of the stock, plant, machinery, and fittings, it was provided by article 4 that it should be fixed by mutual valuation; and by article 5 that it should be payable, as to £500, at 15th May 1897; as to a further sum of £500 at 30th June 1898; and as to the balance at 15th May 1899. All three instalments were to bear interest at 5 per cent. per annum from 15th May 1897 till paid.

"Then followed this reference clause—'Should any question arise between the parties regarding the true intent and meaning of these presents, the same is hereby referred to Charles Ritchie, Esq., S.S.C., whom failing, to James Morton, Esq., Secretary, Union Bank of Scotland, Limited, Edinburgh, whose decision, whether interim or final, shall be binding upon both parties.'

"The parties further bound themselves to implement the agreement to each other under a penalty of £500 over and above performance.

"Questions having arisen between the parties, they requested Mr Ritchie to act as arbiter under the agreement: and after an ineffectual attempt to adjust a separate minute of reference embracing all the points in dispute, the parties proceeded with the reference under a simple acceptance by Mr Ritchie as 'arbiter nominated in the submission contained in the within-written minute of agreement.'

"The arbiter's acceptance is dated 5th April 1899, and on the same date he appointed parties to lodge claims within fourteen days, and answers in eight days thereafter. The adjustment of the record on the claims and answers was continued from time to time, and on 29th May 1899 the record was closed. Shortly afterwards certain amendments by the defenders were allowed to be added, with answers for the pursuer, and the record was of new closed on 22nd June. In the result, after a proof which lasted for several days, Mr Ritchie on 1st June 1900 pronounced the 'decree-arbitral' now under reduction. in which he finds the present defenders liable to the pursuer in a lump sum of £618, 7s. 11d., and decerns and ordains the defenders to make payment thereof to the pursuer, with interest at 5 per cent. from the date of the decree. He further finds the pursuer liable to the defenders in two-thirds of their expenses, and on the parties implementing the decree-arbitral he declares them respectively freed and discharged of all claims *hinc inde* in consequence of the minute of agreement or of the claims lodged in the submission, and ordains them each to execute and deliver a valid discharge accordingly.

"It is, I think, impossible to maintain this decree-arbitral as a good award under the very limited reference clause contained in the minute of agreement. Indeed it is difficult to see how any part of it can be supported if the scope of the reference is to be determined by the language of that clause taken by itself. But the defenders maintain, I think rightly, that it is competent on this question to have regard to the claims made by the respective parties, and in particular to the claims made by the party now challenging the award, in order to ascertain whether and to what extent the narrow scope of the reference clause itself has been enlarged. Even so, the defenders do not offer to support the decree-arbitral in its entirety, for it was conceded in argument that it is not maintainable in so far as it decerns for payment of money, nor in so far as it declares the parties (on implementing the decree) to be discharged of all claims *hinc inde* in consequence of the agreement and claims, and ordains them to execute and deliver discharges accordingly. But they contend that these are separable parts of the award, and that it should stand to all other effects. I assume meanwhile that they are separable, and proceed to consider whether so much of the decree-arbitral as remains is capable of being supported.

"This involves a consideration of the claims made in the arbitration, and of the position taken up by the respective parties on the closed record therein. Before doing so, however, it is right to advert to the pursuer's own statement in the record of this action of the circumstances in which the questions between them arose, and of the nature of those questions. This is to be found in the 8th, 9th, and 10th articles of the condescendence. It there appears that admittedly the pursuers' business was transferred to the defenders as at 1st May 1897; that a sum of £1000 was paid to the pursuer to account of the price of the plant, machinery, &c., the balance of the value (if any) remaining unpaid; and further, that the pursuer's employment with the defenders in fact ceased on 12th December 1898. The parties, however, were not at one as to whether the pursuer was (as he alleges) dismissed by the defenders, or whether he left upon receiving a lawful order with which he refused to comply. They were thus at variance, not indeed as to whether the agreement was terminated, but whether it was terminated by the defenders within the meaning of article 2 thereof. Further, the pursuer avers that the defenders and he had mutually agreed on £1340, 9s. 3d. as the price of the plant, machinery, &c., and that he did in fact introduce to the defenders over £1600 of business turnover prior to 30th June 1898. Both of these averments the defenders absolutely deny, both here and in their pleadings in the arbitration, asserting as to the first, that there had been no mutual valuation, but that they were willing to join in obtaining one; and, as to the second, that the turnover introduced by the pursuer had proved a source of loss, and was therefore not a 'business

turnover' at all within the meaning of the agreement, or in any view was not so to the extent of nearly £1600.

"Now, the pursuer sets out in condescendence 10 the sums which, in his view, were due to him at the date of his dismissal, being the sums which the defenders were refusing to pay. These were (taking them in the order in which they appeared in the pursuer's claim in the arbitration) a sum of £800 which he describes as being the value of the goodwill, which the defenders became liable to pay by dismissing the pursuer and so terminating the agreement; a sum of £4, 18s. 8d. being salary due to him down to 12th December 1898, when he was dismissed; a sum of 10 per cent. commission on the net profits of Oliver & Boyd's printing business from 1st May 1897, less £27 paid to account; a sum of £340, 9s. 3d. due him as the balance of the price of plant, machinery, &c., with interest; and a sum of £500 for failure on the part of the defenders to implement the agreement.

"These, then, being the matters in dispute between the parties, I could have understood the pursuer objecting to the defenders' laying them before the arbiter for his decision, as being wholly or in great part beyond the scope of the reference clause. But it is the pursuer who laid them before the arbiter practically in the very terms in which he has described them in Condescendence 10, but with one exception, namely, that instead of claiming that by terminating the agreement as aforesaid the defenders became liable to pay to the pursuer £800, he severs that item into two, and claims in the arbitration (1) that the defenders have terminated the agreement within the meaning of clause 2 thereof; and (2) that they are now liable to pay the pursuer £800. I will recur to this exception presently. But subject thereto, the pursuer's claim as lodged in the arbitration, and as it remained down to the date of the decree-arbitral, is a claim for an affirmation or finding of the defenders' liability to pay money. The phrase used varies; in two heads of the claim he affirms that the defenders are liable or now liable to pay certain sums of money; in other two that they are due or are now due certain other sums; and in the fifth that they should pay a certain other sum. The exposition given of these various claims in the Condescendence annexed to the claim as lodged is entirely on the same lines. It is hard for one who has lodged claims so expressed and so expounded to maintain successfully that the arbiter exceeded his powers in affirming pecuniary liability. If he had sustained the pursuer's claim *simpliciter* the proper finding would have been to affirm the defenders' liability to pay specific sums in terms of heads 2, 3, 5, and 6 of the claim, and in the same event I do not see that any objection could have been taken if he had lumped the items together and affirmed the liability to pay the total sum with interest as claimed under the respective heads.

"The pursuer points to his first plea-in-law stated in the arbitration as safeguarding his position, and I agree that it does so to a certain extent. That plea was—'The claimants are on a sound construction of the true intent and meaning of the said minute of agreement entitled to findings from the arbiter in terms of all their claims.' This plea, though somewhat peculiarly worded, was notice to all concerned that the pursuer regarded all his claims not only as being in conformity with the true intent and meaning of the agreement, but as being made under the agreement, and as depending for their validity upon a sound construction of that instrument. Even the pursuer's claim for £500 for breach of the agreement might possibly have been brought within that category as being based upon the express penalty clause of the agreement, and as being thereby distinguished from the counter claim of £1000 damages brought forward by the defenders, based on the pursuer's failure to discharge his duties in a competent manner. This counter claim certainly raised no question of construction, and admittedly the scope of the reference had not been extended so as to cover it.

"That being the state of the pleadings when the record in the arbitration was closed, it may well have been open to the pursuer to maintain, as he did, that the defenders' counter claim for damages was *ultra fines compromissi*, though he could hardly have maintained that the reference did not include his own sixth head of claim arising under the penalty clause, he having himself submitted that for decision. The procedure in the reference as regards these two claims was somewhat peculiar. As soon as the record was finally closed on 22nd Juue 1899, and indeed in the same interlocutor, the arbiter allowed parties four days in which to state whether they are to submit to the arbiter the whole matters in dispute stated on record, with certification that he would thereafter dispose of the reference as contained in the minute of agreement. Neither party having notified any objection, he issued on 7th July proposed findings, stating that he proposed to allow a proof on two points only, namely, the termination of the agreement, and the extent and nature of the turnover, in order that he might determine whether the claims made in respect thereof fell within the true intent and meaning of the agreement. He further stated his opinion that none of the other claims of either party fell within the reference, but allowed parties to represent against the proposed findings.

"Representations were lodged, and counsel were heard thereon, the pursuer maintaining that he was entitled to a proof of his whole heads of claim, but that the defenders were not entitlod to a proof of their counter claim of damages, which indeed the defenders conceded to be beyond the scope of the reference. In the result, however, the arbiter on 24th November allowed to the pursuer a proof of his averments in support of the whole six heads of his claim, and to the defenders a proof of their counter claim of damages. Some

days previously the arbiter had made parties aware that he proposed to allow this general proof, and this gave occasion for a protest by the pursuer, lodged on 22nd November, in which he protested that the evidence so far as adduced by him would only be led for the purpose of assisting the arbiter in deciding on the true intent and meaning of the agreement, and objected to any evidence being given to establish facts other than those bearing on the true intent aad meaning thereof; and he reserved all objections and pleas against the defenders' claims, and against the competency of the arbiter considering and adjudicating on any matters except the true intent and meaning of the agreement. This protest was repeated at the diet of proof before any evidence was led.

"This protest doubtless protected the pursuer against the objection that he had taken part without demur in a proof which included the ascertainment of the amount (if any) due upon the defenders' counter claim. But it does not appear to me to affect the pursuer's position otherwise, and in particular it does not affect his position on the closed record in the reference, as to which I bave already indicated my view. No doubt that position left it open to the pursuer to challenge the competency of the arbiter entertaining to any effect the defender's counter claim of damages. And if the arbiter had to any extent entertained that claim so as to diminish the lump sum which he finds due to the pursuer I do not see how that could now be rectified without reducing the decree-arbitral. But the arbiter is asked (as I think quite competently) whether he allowed any damages to the defenders for their alleged loss, and he depones that in point of fact he allowed none, and further that he did not award any damages in the case.

"This being so, the lump sum found due to the pursuer is not affected either way by any claim of damages. Nor is it affected by the item of ten per cent. commission on net profits set forth in the fourth head of the pursuer's claim, nor by the counter claim for repayment of £27 mentioned in head three of the defenders' claim, for it is admitted that these were both withdrawn at the hearing on evidence. Accordingly the question as to the competency of finding the lump sum of £618, 7s. 11d. due, with interest at five per cent. from the date of the award, is narrowed to this, whether that is a competent finding upon the four remaining heads of claim, viz., heads 1, 2, 3, and 5.

"Now these claims, so far as pecuniary, amount to £1145, 7s. 11d., of capital sums, with interest at different rates and for different periods, as set forth in the claims. Is it competent for the arbiter, upon such claims, to award a lump sum of £618, 7s, 11d., with interest at five per cent. from the date of his award? It is at this point that the case becomes somewhat narrow, and presents a good deal of difficulty, but I have come to be of opinion that the award should be supported as affirming liability to that extent. The pursuer's argument is, in the first place, that it was not competent to the arbiter to examine or alter the figures supplied to him in the claim, as the result of any inquiry into the facts, and that the parties in such a case must either agree on the figures which they furnish to the arbiter as the basis of his findings on the intent and meaning, or must ask the arbiter to hold his hand until they have the figures ascertained otherwise—I suppose by a court of law. I must say I cannot so read the pursuer's claims. He might have so framed them as to make that quite clear by omitting all specific figures and substituting (for example) for the figure £800 in the second claim the expression, 'the value of the goodwill as the same may be ultimately ascertained.' It would then have appeared that the second head of claim, so far as the arbiter had to do with it, was confined to questions as to the dates of payment and the rate of interest. The same might perhaps have been done with head 5 of the claim, though it is a little difficult to see how the process could be applied to head 3, so as to leave anything at all for decision. But the claims as they stand seem to me to be claims for the affirmance of the defenders' liability to pay the principal sums specified, and it would be a singular result that the arbiter was not entitled to award less than the sum so claimed, but that it must be all or none. Then it is said that at all events the arbiter's award of interest is erroneous and has no warrant in the agreement. I admit it is difficult to see how he makes the terms of the agreement fit his finding as to interest, but in my opinion the pursuer has failed to make out that the finding exceeds the limits within which an arbiter is entitled to go wrong.

"The pursuer further contends that the arbiter has failed to exhaust the reference, seeing that he omits altogether to make any finding upon the first head of claim. There can be no doubt of the importance of the first head, which claims that the defenders have terminated the agreement within the meaning of clause 2 thereof, for according as that is negatived or affirmed the pecuniary rights of the parties differ considerably. It is conceded on this record (Cond. 26) that at the hearing on evidence before the arbiter the defenders admitted that they had terminated the minute of agreement on 12th December 1898. This, however, does not necessarily involve the affirmance of the first head of claim as stated, and it was open to the arbiter to find that it was not terminated by the defenders within the meaning of clause 2 of the agreement. I think it is to be regretted that no specific finding was made upon this matter, as this head of claim is the one most clearly within the original reference. I was at first disposed to think that this omission was of itself fatal to the award, on the ground that the reference was not exhausted, the more so as, I think, the proper course here was to have made a separate finding applicable to each of the claims. But as regards this first head of claim, I think that it admits of being

regarded as merely introductory to the second claim, which is the only one directly dependent on it, and that they might really have been conjoined in one, in which case I hold it to have been within the province of the arbiter, after satisfying his own mind on the question of the construction of the second clause of the agreement as applied to the facts proved before him, to affirm the defenders' pecuniary liability for such amount as he thought right within the sum claimed in the second head.

"The proposed findings issued by the arbiter on 24th March 1900 were fully discussed before me by the pursuer, in order to show the considerations which may have entered into the arbiter's final decision. I doubt the competency of so using them, but in any case I think the award must speak for itself, and cannot be affected by the issue of proposed findings on which the arbiter may have changed his mind.

"As a separate ground of reduction, the pursuer pleads that the award was pronounced after the arbiter had received and considered statements bearing on the submission which were made to him by the defenders outwith the knowledge of the pursuers, as set out in Cond. 30 and 34. It is certainly to be regretted that the communications were made, but, taking all the circumstances into account, I think the pursuer fails to bring anything home to the arbiter which amounts to partial conduct, or which gives ground for saying that there has been a failure of justice as the result of these communications.

"In the result I hold that the award should stand, except in so far as it decerns for payment, and in so far as it deals with the matter of mutual discharges; and I rather think (though nothing was said about this) that the penalty clause is inappropriate to the award as now sustained, and should also go. Of course this result can only be reached by holding that these parts of the award which are to be reduced are so separable from the rest of it as to admit of being left out without affecting the remainder. The case of *Cox Brothers*, 1867, 6 Macph. 161, is an authority for holding that this is so as regards an incompetent decerniture for the amount found due, and I think the clause as to a mutual discharge of claims stands in the same position.

"In dealing with the expenses of the action I have taken account of the fact that both parties were largely responsible for the position into which the arbitration drifted; that by communicating with the arbiter privately the defenders gave some colour to the complaint which the pursuers make on that head, and that it was not until the proof closed that the defenders definitely abandoned the support of the decree-arbitral as it stood. But for these considerations I should have found the defenders Oliver & Boyd entitled to expenses, subject perhaps to modification on the ground of divided success."

On 14th April 1903 the Lord Ordinary (PEARSON) pronounced the following interlocutor:—"Sustains the reasons of reduction as to so much of the decree-arbitral libelled, dated 1st June 1900, and decerns and ordains the defenders, the firm of Oliver & Boyd, and the individual partners thereof, to make payment of the sum of six hundred and eighteen pounds seven shillings and elevenpence (£618, 7s. 11d.) sterling therein found due, with interest thereon; and also as to so much of said decree-arbitral as declares that the parties on implementing the same are respectively freed and discharged of all claims at the instance of the one against the other in consequence of the minute of agreement libelled, or of the claims lodged in the submission; and as to so much of the said decree-arbitral as decerns and ordains them to execute and deliver to each other at joint expense a formal and valid discharge accordingly; and also as to so much thereof as decerns and ordains both parties to implement and fulfil the said decree-arbitral in all points to each other under the penalty of five hundred pounds (£500) sterling, to be paid by the party failing to the party observing or willing to observe his part thereof over and above performance; and to that extent and effect reduces, decerns, and declares in terms of the reductive conclusions of the summons; *Quoad ultra* repels the reasons of reduction, and assoilzies the defenders from the conclusions of the summons; and decerns; and finds no expenses due to or by any of the parties."

The pursuers reclaimed, and argued—The defenders' claim of damages was outside the scope of the reference, and in any case it was withdrawn. It was impossible from the terms of the award to ascertain which claims the arbiter had dealt with, and his evidence was not competent to prove that the claim of damages did not affect the award—*Duke of Buccleuch* v. *Metropolitan Board of Works* (1872), L.R., 5 E. & I. App. 418; *Clippens Oil Company* v. *Edinburgh and District Water Trustees*, February 22, 1901, 3 F. 1113, Lord Kinnear, 1128, 38 S.L.R. 354; *Glasgow City and District Railway Company* v. *Macgeorge, Cowan, & Galloway*, February 25, 1886, 13 R. 609, 23 S.L.R. 414; *Alexander* v. *Bridge of Allan Water Company*, February 5, 1869, 7 Macph. 492, 6 S.L.R. 308. The decree-arbitral dealt with matters which should have been disposed of separately, and could not be covered by the award of a slump sum—*Paterson & Son* v. *Corporation of Glasgow*, July 29, 1901, 3 F. (H.L.) 34, 38 S.L.R. 855. The condition as to granting mutual discharges was *ultra vires*, and fell to be set aside; the award could not be upheld in part and reduced in part.

Argued for the respondents—The evidence of the arbiter had been properly admitted —*Glasgow District Subway Company* v. *Esselmont*, March 16, 1895, 22 R. 658, 32 S.L.R. 359. That a slump sum was awarded was no ground for reduction of the award. The arbiter's finding as to mutual discharges was properly separated from the rest of the award by the Lord Ordinary, and being separable that finding though *ultra vires* did not invalidate the rest of

the award—*Cox Brothers* v. *Binning & Son*, December 18, 1867, 6 Macph. 161, 5 S.L.R. 122.

LORD TRAYNER—The parties to this action entered into an agreement in April 1897 which contained, *inter alia*, the provision that "should any question arise between the parties regarding the true intent and meaning of these presents" the same was thereby referred to Mr Ritchie. Differences having arisen in the course of carrying out the agreement the parties requested Mr Ritchie to act as arbiter and decide the questions on which they were at variance. Mr Ritchie accepted of the reference, and in ordinary course ordered the parties to lodge their claims. The claim for the pursuers, the heads of which I shall notice immediately, presented questions for determination which were not questions as to the true intent and meaning of the agreement but questions of pecuniary liability, based upon certain provisions of the agreement regarding the true intent and meaning of which the parties were not at variance. No objection was made by the defenders to the arbiter proceeding to deal with the claims lodged by the pursuers; but, denying that the pursuers' claims were well founded, they themselves made a claim for damages on account of alleged breach of contract by the pursuers. The parties accordingly, in my opinion, by their actings extended the scope of the original reference, and the arbiter was entitled, as of consent of parties, to deal with the questions which were presented by the respective claims. The claims lodged for the pursuers asked the arbiter to decide (1) that the defenders owed them £800 for goodwill, (2) a small sum of salary alleged to be due, (3) a commission on the profits of part of the business, (4) a sum for payment of the price of plant which the pursuers had delivered to the defenders, and (5) the sum of £500 as damages for breach of agreement. The defenders, on the other hand, as I have said, claimed that they were entitled as against the pursuers to a sum of £1000 as for breach of contract. I have noticed thus the terms of the respective claims of the parties showing how far they each departed from the terms of the original agreement to refer, because after the arbiter had submitted to the parties the draft of the decree he proposed to issue, the pursuers took exception to it on the ground that it did not set forth specifically the arbiter's decision on "each point on which the parties are at variance as to its, (*i.e.*, the minute of agreement) intent and meaning." The suggestion in this document was that the pursuers had not submitted any questions to the arbiter except those which depended on the meaning and intent of the agreement, a suggestion which I think is at variance with the claims made by the pursuers, and their whole actings in reference thereto before the arbiter. The decision of the arbiter is set forth in his decree-arbitral now under reduction. He determined (1) that the defenders were liable in payment to the pursuers of the sum of £618, 7s. 11d; (2) he decerned for payment thereof with interest; (3) he found the defenders liable in a proportion of the expenses of the arbitration; (4) on implement of the foregoing findings he declared the parties freed and discharged of all claims of the one against the other; and (5) ordained them to execute and deliver to each other mutual discharges accordingly. The Lord Ordinary reduced the decree-arbitral in so far as concerns the second, fourth, and fifth of these heads as being *ultra vires*. The only part of the decree-arbitral that remains is the finding of £618 odds as due to the pursuers, and the finding as to the expenses of the arbitration. In this judgment the defenders acquiesce. But the pursuers maintain that the decree-arbitral should be set aside *in toto*, and in my opinion the pursuers are right in this contention. The first finding in the decree-arbitral is that a slump sum of £618 odds is due by the defenders to the pursuers. It does not say that this sum is all that is due to the pursuers by the defenders, and a strict reading of the finding does certainly not exclude the pursuers' right to demand more. But I will assume that the finding means to express the limit of the defenders' debt to the pursuers. Now, if such a finding had been pronounced upon a claim in which the various heads of claim had been all *ejusdem generis*, or on a claim for various sums as due under an executory contract for work done and materials supplied, I think no objection could have been taken to it. In such cases the question to be decided really is, what is the amount due by the one party to the other, and the arbiter may decide that by declaring or finding the amount without stating of what particular items that amount is made up. But I think the case is different where the arbiter is asked to decide upon a variety of claims different in character, and where the amount of each and the liability for which depend on different circumstances. In the general case the pursuers' claims included items widely divergent in character—value of goodwill, price of plant delivered, past-due salary as a servant, commission on business profits, and damages for breach of contract. From the decree-arbitral it is impossible to discover which of these claims has been sustained and to what extent, or indeed whether the arbiter had considered some of these claims at all. The amount found due might, for example, consist of a sum awarded in respect of goodwill, leaving all the other items of the pursuers' claims unconsidered and undetermined, for there is nothing to show that these other claims had been rejected or sustained in whole or in part. Or again, the sum found due may have been awarded partly for damages for breach of contract and partly for price of pant delivered, leaving undetermined the question of goodwill, of salary, and of commission, No doubt the arbiter under examination as a witness gives the items of which his slump sum is composed. But the arbiter cannot as a witness make his decree any better than it stands when issued. That decree must be read and con-

strued as issued, and its validity determined as at the date of it s issue without any explanation or addition which does not appear on the face of the decree itself. It appears to me therefore that this first 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. But I think the decree-arbitral is open to another objection equally fatal to its validity. He finds that on implement of his award as pronounced, the parties are mutually free of all claims the one against the other, and ordains them to execute and deliver mutual discharges accordingly. This part of the decree the Lord Ordinary has reduced as *ultra vires*, and if it is separable from the first finding then it may no doubt be reduced without affecting the validity of the decree so far as *intra vires*. But I cannot regard them as separable. The order to grant mutual discharges implies that in the arbiter's mind there existed mutual claims. But what did the arbiter consider to be the claims by the defenders that the pursuers were thus to discharge? There is nothing in the decree-arbitral which indicates the existence of such a claim, but I deduce from what the arbiter has done that he gave effect to some part of the defenders' claim for damages (the only claim made by them) and ordained the remainder to be discharged. It is, however, impossible to say what the arbiter's finding in favour of the pursuers would have been if no mutual discharges were to be granted. I take it that the granting of such mutual discharges had some value in the estimation of the arbiter, and had therefore some influence in determining the amount for which he held the defenders liable to the pursuers. In that view the addition of a finding which is admittedly *ultra vires* and not separable from the rest of the decree makes the whole decree invalid. I would only further observe that if the mutual discharges were not granted then the defenders' claim for damages for breach of contract remains untouched. It has not been disallowed. This again shows that the arbiter has not exhausted the reference. He has decided only on the pursuers' claims and left the defenders' counter-claim—which was as much presented for determination as the pursuers'—unconsidered, or at all events undetermined. I therefore think that the pursuers are entitled to decree of reduction as concluded for, and that the interlocutor of the Lord Ordinary should be altered to that effect.

The LORD JUSTICE-CLERK and LORD YOUNG concurred.

LORD MONCREIFF was absent at the hearing.

The Court recalled the interlocutor reclaimed against, and pronounced an interlocutor in the following terms:—

"... Sustain the reasons of reduction; reduce ... as craved, conform to the conclusions of the action: ... Find no expenses due to or by any of the parties up to 14th April last: Find the pursuer entitled to expenses since said 14th April." ...

Counsel for the Pursuers and Reclaimers—Campbell, K.C.—Cooper. Agents—Fletcher & Morton, W.S.

Counsel for the Defenders and Respondents—Clyde, K.C.—Hunter. Agents—Somerville & Watson, S.S.C.

Wednesday, November 4.

FIRST DIVISION.

CONDRON *v.* GAVIN PAUL & SONS, LIMITED.

Master and Servant—Workmen's Compensation Act 1897 (60 *and* 61 *Vict. cap.* 37), *sec.* 1 (2) (*c*)—"*Serious and Wilful Misconduct*"—*Stated Case—Competency—Question of Fact or of Law.*

A case for appeal under the Workmen's Compensation Act set forth:—In the mine in which the accident in question took place, special rules, Nos. 81 and 100 of the Coal Mines Regulation Act 1887, were in force, providing that workmen should stand clear of hutches in motion, and prohibiting all workers from entering or remaining in any place throughout the whole mine where not absolutely required by duty to be at the time, and from proceeding through any fence or passing any notice erected to indicate that danger existed. The appellant, a workman in the mine, had no personal knowledge of these rules, but could have read them at the pithead, where they were exhibited. The appellant worked at a bench to which the only approach was by a wheel brae carrying two sets of rails on which hutches ran. Opposite the opening to this wheel brae was a disused road which was fenced off, but in the fence a breach had been made, and, unknown to the pit officials, several of the workmen were in the habit of going through this breach and using the disused road as a convenient place to relieve nature. The appellant, who had gone through the breach to the disused road for this purpose, while attempting to return to his bench across the rails was caught by a hutch and injured. The Sheriff-Substitute held that the appellant's injury was attributable to his serious and wilful misconduct, and dismissed the application for compensation. The workman appealed, the question of law being whether his injury was attributable to his serious and wilful misconduct in the sense of the Act.

The Court *dismissed* the appeal and answered the question in the affirmative, on the ground that the question put was a question of fact, and that as there was ample evidence to support the Sheriff's finding and nothing to