Tuesday, December 21.

SECOND DIVISION.

(SINGLE BILLS.)

SMITH *v.* WILLIAM DIXON LIMITED.

Process—Jury Trial—Order for New Trial—Failure to Proceed within Twelve Months—"Sufficient Cause for the Delay"—Inability to Pay Expenses Found Due on Amendment of Record—A.S., February 16, 1841, *secs.* 41, 46.

The defenders in a jury trial, against whom a verdict had been pronounced, successfully moved on 3rd November 1908 for a new trial. Thereafter the pursuer craved leave to amend the record, which was granted on condition of his paying the expenses incurred since the date of the adjustment of issues. In December 1909, the expenses not having been paid and no further steps taken, the defenders moved for absolvitor in terms of sections 41 and 46 of the Act of Sederunt of 16th February 1841, in respect of the pursuer's failure to proceed to trial within twelve months of the order for a new trial. The pursuer opposed the motion, and alleged that his failure to proceed was due to his inability to raise funds to pay the expenses in which he had been found liable.

The Court *granted* the motion.

Observed (*per* the Lord Justice-Clerk) that it was only in extreme cases that such a motion was granted.

The Act of Sederunt Regulating Proceedings in Jury Causes, of date 16th February 1841, enacts—Section 41—"That all the regulations as to notices of trial . . . as to not proceeding to trial . . . and all other matters and things herein provided for regulating the conduct of parties as to trials, shall be the same in the case of a new trial as in the case of an original trial." Section 46—"That if . . . the pursuer . . . shall not proceed to trial within twelve months after issues have been finally engrossed and signed, the Court shall proceed therein as in cases in which parties are held as confessed, unless sufficient cause be shown for the delay to the satisfaction of the Court. . . ."

In August 1907 Archibald Smith raised an action in the Sheriff Court at Hamilton against William Dixon Limited, concluding for damages at common law, and alternatively for a sum under the Employers' Liability Act 1880 (43 and 44 Vict. cap. 42), in respect of the death of the pursuer's son, who was in the defenders' employment. Proof having been allowed, the pursuer, on 7th October 1907, appealed to the Court of Session for jury trial. On 30th November 1907 amendments for the pursuer and the defenders were allowed and an issue approved. The trial took place on 23rd and 24th March 1908, when the jury returned a verdict for the pursuer and assessed the damages at £100. On 3rd November 1908 a new trial was allowed on the motion of the defenders. Thereafter the pursuer again proposed to amend his record, and on 21st May 1909 the amendment was allowed, and in respect thereof the defenders were found entitled to expenses since 30th November 1907.

On 21st December 1909, these expenses not having been paid and no further steps having been taken by the pursuer, the defenders presented a note to the Lord Justice-Clerk, praying his Lordship to move the Court, in respect of the failure of the pursuer to go to trial within a year and day of the granting of the new trial, to assoilzie the defenders.

Argued for the defenders—There was no doubt that section 46 of the Act of Sederunt, 16th February 1841, was in virtue of section 41 applicable to the case where a new trial had been granted—*Russell* v. *M'Knight's Trustee*, January 26, 1900, 2 F. 520, 37 S.L.R. 380. The defenders were therefore entitled to absolvitor, unless the pursuer could show sufficient cause for his failure to proceed, and he had not done that. It was true that the defenders' account of expenses had not been taxed, but they were not bound to incur the expense of taxation when they had been informed by the agents who formerly represented the pursuer that the pursuer would not be able to find the money to pay the account.

Argued for the pursuer—The pursuer could not proceed without paying the expenses in which he had been found liable to the defenders. It was not possible for the pursuer to raise the necessary funds unless he was given time to do so. That was sufficient cause within the meaning of the Act of Sederunt for not proceeding to trial, and the motion should therefore be refused.

LORD JUSTICE-CLERK—It is only in extreme cases that we grant a motion of this kind. But this seems to me to be a very extreme case. The pursuer here obtained a verdict by leading evidence in support of a case of which notice was not given on record. The verdict was set aside and a new trial granted. After considerable delay the pursuer proposed to amend his pleadings. The amendment was only allowed on condition of the pursuer paying the whole previous expenses in the cause. These expenses have never been paid. It is said that the defender has never called on the pursuer to pay these expenses and that the account has not been taxed. I do not think that the defenders were bound to incur the expense of taxation, in view of the intimation by the pursuer's agents that no money would be paid under the decree. The pursuer changed his agents time after time, and at the last moment the new agents intimated that the expenses would be paid. If there ever was a case to which the rule of the Act of Sederunt ought to be applied, it is this case. I am of opinion that we ought to follow this rule and to grant absolvitor.

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.