December the Lord Ordinary, "on cause shown, continued the adjustment of record until Tuesday, 13th inst."

On 13th December the Lord Ordinary pronounced this interlocutor—". . . On the motion of counsel for defender, and in respect the pursuer has failed to sist a sufficient mandatary in terms of interlocutor of 15th ulto., assoilzies the defender from the conclusions of the summons, and decerns."

In both actions the pursuer reclaimed, and argued—(1) He should be given another opportunity of sisting a mandatary. (2) In any case the interlocutor should be only dismissal and not absolvitor.

Argued for the defenders—(1) No further opportunity should be given to the pursuer of sisting a mandatary. (2) The proper decree was absolvitor—Mackay's Manual of Practice, pp. 239 and 310; *Gordon* v. *Gordon*, December 17, 1822, 2 S. 86 (93); *Gray* v. *Ireland*, July 18, 1884, 11 R. 1104, 21 S.L.R. 766.

At advising—

LORD PRESIDENT—In this case the Lord Ordinary has assoilzied the defender from the conclusions of the summons "in respect the pursuer has failed to sist a sufficient mandatary" in terms of an interlocutor referred to.

I am satisfied that ample opportunity was given to the pursuer, on more than one occasion, to obtemper the order of the Court, and I do not think this is a case in which there is any reason to give more time. My only doubt after the discussion was whether the Lord Ordinary's interlocutor should have been one of dismissal instead of absolvitor. On looking into the authorities and inquiring into the practice of the Court I am satisfied that decree of absolvitor is properly granted. The principle that has governed the practice requires that persons who sue before the Court must do so under the recognised rules of the Court, and if they are not prepared to comply with these rules the party whom they sue is entitled to have done with the action altogether.

I am therefore of opinion that the interlocutor reclaimed against should be adhered to.

LORD KINNEAR, LORD JOHNSTON, and LORD MACKENZIE concurred.

The Court adhered to the Lord Ordinary's interlocutor, dated 13th December.

Counsel for the Pursuer and Reclaimer—A. M. Stuart. Agent—C. Strang Watson, Solicitor.

Counsel for the Defenders and Respondents—D. P. Fleming. Agent—W. B. Rankin, W.S.

Thursday, March 16.

FIRST DIVISION.

[Sheriff Court at Glasgow.

NORTH BRITISH RAILWAY COMPANY *v.* WILSON.

Contract—Arbitration—Decree-Arbitral—Objections—Reference to Man of Skill—Parties Coming before Arbiter Prematurely.

A contract between a railway company and a quarrymaster for the construction of a siding provided that the company should form the permanent way of the siding and execute certain other work connected therewith, and that on completion of the work the quarrymaster should pay to the company the cost of the labour incurred and interest on the cost of the permanent way, &c., as the amount of such cost, and interest should be determined by the company's engineer. The railway company brought an action against the quarrymaster for payment of (1) the balance of a lump sum certified by the engineer as the amount expended on wages, and (2) interest on a lump sum certified by him as the value of the materials. The defender maintained that the sums certified were excessive; that no details were ever furnished to him; and that he never was afforded an opportunity of being heard.

Held that the company had failed to make a proper demand under the contract in respect that while the engineer was no doubt made the final judge of the amount if the parties failed to agree, that did not absolve the company from furnishing to the defender a properly detailed account, and action dismissed as premature.

On 12th January 1910 the North British Railway Company, *pursuers*, brought an action against William Wilson, quarrymaster and contractor, Glasgow, *defender*, in which they sought payment of the balance which they alleged to be due on an account for work done and wages expended in connection with the construction of a siding at Croy Station.

The following narrative of the *facts* is taken from the opinion of the Lord President:—"Now the matter arises out of a contract, and the contract between the parties had to do with the construction of certain works at Croy Station. These works were divided into two portions—the works shown coloured green and the works shown coloured red on a plan; and the fourth article of the contract is—'The first party' [that is, the North British Railway Company] 'shall thereupon construct the permanent way of the said siding and connection coloured red on the said plan and execute the other works shown coloured red on the said plan so far as not executed by the second party; and on the completion thereof the second party shall pay to

them the cost of the labour incurred by them, and interest on the cost of the permanent way, materials, and of the drain, and of the retaining wall shown on the said plan, at the rate of 4½ per centum per annum . . . as the amount of such cost and interest shall be determined by the engineer of the first party.' Then the fifth clause is—'The first party shall execute the works coloured green on the said plan, and the second party shall pay to them interest on the cost thereof as determined by the said engineer at the rate of 4½ per centum per annum . . . as the amount thereof shall be determined by the said engineer.'

"Now the work was done and a bill was rendered by the North British Railway Company which is appended to the initial writ, and is—'To amount expended in wages, &c., on siding and alterations at Croy Works coloured red on plan, Estimate No. 2, £187, 9s. 1d.' I leave out all the matters of interest and cash payments on the other side. And then on 11th November—'To interest on value of materials, &c., in siding and cabin at Croy, half-year to date £1107, 15s. 1d., at 4½ per cent. per annum, £24, 18s. 6d.'

"That bill not being paid the present action was raised, and in the course of the proceedings there was lodged a certificate from the engineer that the amount expended in wages, &c., at the place in terms of the agreement amounts to £187, 9s. 1d., and the value of materials to £1107, 15s. 1d., and upon that certificate the Sheriff-Substitute and the Sheriff-Principal have granted decree, the Sheriff-Principal particularly resting his judgment upon the observations of Lord President Inglis (then Lord Justice-Clerk) in the case of *Trowsdale* v. *The North British Railway Company*, 1864, 2 Macph. 1334."

The defender pleaded, *inter alia*—"(1) The pursuers' engineer being under the contract in the position of an arbiter he ought to have given the defender an opportunity of being heard upon a detailed statement regarding the cost of labour and material, and having failed to do so the certificates founded on are not binding on the defender and ought to be set aside. (2) Alternatively, the pursuers' engineer not having personally ascertained the cost of the labour and material, and his certificates having been based on an erroneous statement placed before him by the company's employees, the certificates founded on are not binding on the defender and ought to be set aside."

On 24th March 1910 the Sheriff-Substitute (FYFE) granted decree as craved, holding that the parties had mutually agreed to refer the matter to the pursuers' engineer, and that they were therefore barred from challenging his award.

On appeal the Sheriff (MILLAR) adhered.

Note.—"Under the contract the determination of the amount of the sums in dispute was referred to the engineer of the first party. He has granted his certificate. The defender maintains that the accounts upon which he granted that certificate were not submitted to him, nor did the referee hear them upon the question of the amount. It seems to me that that question has been settled in several cases. In the case of *Trowsdale & Son* v. *The North British Railway Company*, 2 Macph. 1334, the Lord Justice-Clerk Inglis says at p. 1338—'These submissions have received the sanction of practice, and being legal are extremely convenient, not only for railway companies but also for contractors; because nothing is so indispensable in the construction of works of this nature under contract as that any dispute that may arise, as the execution of the work proceeds, should be settled at once and without delay; and no one in the position of an arbiter could settle such disputes in such a summary way, often without any other evidence than his own knowledge, but the engineer of such works, who is necessarily familiar with all their details.' It seems to me that the result of that opinion is that it is for the arbiter to determine in what way he should inform his mind so as to come to a proper decision between the parties. If he determines to proceed upon his own knowledge, without further inquiry, Lord Justice-Clerk Inglis' opinion necessarily infers that he is entitled to do so. Of course if the defender averred facts and circumstances which showed that in giving his decision the arbiter acted corruptly or dishonestly, that would be another matter, but there is no such averment upon this record. Accordingly I think the interlocutor of the learned Sheriff-Substitute should be affirmed."

The defender appealed, and argued—(1) The account sued on was overcharged. The appellant had asked for a detailed statement of the sums charged, but the arbiter had refused to furnish it or to hear him on the subject. In making up the account the arbiter had not relied on his own skill but on information supplied by the pursuers' employees. In so doing the arbiter had erred, for he was bound to hear both sides before issuing his award—*Mitchell* v. *Cable*, June 17, 1848, 10 D. 1297; *M'Nair's Trustees* v. *Roxburgh*, February 16, 1855, 17 D. 445; *Cameron* v. *Menzies*, January 25, 1868, 6 Macph. 279, 4 S.L.R. 235; *Adams* v. *Great North of Scotland Railway Company*, November 27, 1890, 18 R. (H.L.) 1, 28 S.L.R. 579; *Holmes Oil Company, Limited* v. *Pumpherston Oil Company, Limited*, July 17, 1891, 18 R. (H.L.) 52, 28 S.L.R. 940; *Lanarkshire and Dumbartonshire Railway Company* v. *Main*, July 17, 1894, 21 R. 1018, 31 S.L.R. 826. This was not the case of a reference to the opinion of an expert, as in *Trowsdale & Son* v. *North British Railway Company*, July 12, 1864, 2 Macph. 1334, on which the Sheriff had relied, but a remit to the pursuers' engineer as an arbiter who was bound to exercise his functions judicially. (2) The arbiter had acted *ultra fines compromissi*, in respect that he had wrongly charged the defender with the cost of rebuilding the wall of the siding, which but for the engineer's want of skill would not have fallen.

Argued for the respondents—(1) The Sheriff was right. This was not an arbitration in the strict sense of the term, but a remit to a man of skill as an expert to assess the cost of the work done. Such a referee was not bound to hear parties, but was entitled to satisfy himself as he might think proper—*M'Gregor* v. *Stevenson*, May 20, 1847, 9 D. 1056; *Trowsdale* (*cit. sup.*) at p. 1338; *Logan* v. *Leadbetter*, December 6, 1887, 15 R. 115, 25 S.L.R. 110; *Paterson & Son, Limited* v. *Corporation of Glasgow*, July 29, 1901, 3 F. (H.L.) 34, 38 S.L.R. 855; *Stevenson* v. *Watson* (1879) L.R., 4 C.P.D. 148; *Alston & Orr* v. *Allan*, 1910 S.C. 304, 47 S.L.R. 203. The only alternative would be for the arbiter to allow a proof, and this the parties wished to avoid. To say that failure to furnish details and vouchers rendered the arbitration invalid was unsound where as here the reference was executorial and not judicial. (2) It was not averred that the arbiter had acted *ultra fines compromissi*. To entitle a party to raise that question the fact must be specifically averred on record.

At advising—

LORD PRESIDENT—In this case I think the pursuers have gone too fast; but I am bound to say that I do not think the case was argued upon the grounds upon which I feel bound to dispose of it. The argument directed to us was entirely directed to what the engineer ought to have done. . . . [*His Lordship gave narrative supra*]. . . . The part of the defence upon which we had most of the argument was that the pursuers' engineer did not personally make up a statement of the cost of the labour and materials referred to, but he relied on being furnished with accurate information placed before him by the pursuers as correct without any investigation. No detailed statement was ever submitted to the defender, and he never had an opportunity of being heard by the pursuers' engineer. Now it was with regard to that that the learned Sheriff quoted the case of *Trowsdale*, and I think the quotation was much in point. I do not think it is a good case of complaint that the pursuers' engineer did not personally make up a statement, but relied on collected information. One in the position of an arbiter, such as this engineer, is entitled to get at his facts as he pleases.

But while I say all this, I think the action is entirely premature, and that upon the ground that I do not think the pursuers here have made as yet a proper demand under the contract. What the defenders have got to pay is the cost of the labour incurred by them, and interest on the cost of the permanent way materials and of the drain and of the retaining wall shown on the said plan, at the rate of 4½ per centum per annum, as the amount of such cost and interest shall be determined by the engineer of the first party. Now undoubtedly that contract makes the engineer of the first party the final judge of the amount, but it does not seem to me to absolve the North British Railway Co. from doing what everybody else has to do when he tenders a bill, namely, from giving particulars, and I think therefore the bill as rendered is quite wrong. They have no right, I think, to put down an absolute slump sum of £187, 9s. 1d. They were bound to say what the labour was, so many men for so many hours, giving an indication so that the other parties are at least enabled from their point of view to check it. I quite concede and understand that if they did not agree to the bill as rendered they must go before the engineer, and the engineer upon that matter would be supreme, but as it is they have not got a chance of bringing before the engineer the possibility of mistakes even of the grossest sort. In the same way when you come to this sum of £1107, 15s. 1d., it is absolutely slumped without any distinction between how much of it is due to the red works and how much is due to the green, and there again no materials are given. I think therefore the North British Railway Co. were not in a position to raise an action when they raised this action, and what I propose should be done is that the interlocutor should be recalled and the action dismissed. Of course there cannot be absolvitor, because the money is still due, and the North British Railway Co. can render a proper bill to the defenders, and if they do not pay and dispute the matters the parties must go before the engineer.

LORD JOHNSTON—I agree

LORD SKERRINGTON—I concur.

LORD MACKENZIE did not hear the case.

LORD KINNEAR was absent.

The Court sustained the appeal, recalled the interlocutors of the Sheriff and Sheriff-Substitute dated respectively 15th July 1910 and 24th March 1910, and dismissed the action.

Counsel for Pursuers (Respondents)—Constable, K.C.—A. O. Inglis. Agent—James Watson, S.S.C.

Counsel for Defender (Appellant)—Sandeman, K.C.—Fenton. Agents—Simpson & Marwick, W.S.

Friday, March 17.

FIRST DIVISION.

[Lord Johnston, Ordinary.

LEITH AND EAST COAST STEAM SHIPPING COMPANY, LIMITED, IN LIQUIDATION.

Company — Winding-up — Liquidation — Accounts of Law Agent in Liquidation —Observations as to the Respective Duties of Liquidators and their Agents.

Where a liquidator applies to the Court for approval of his accounts, his law agent's whole business accounts in connection with the liquidation must