July 10, 1817.

ARBITRATION.

to decern and ordain; but that this ought to be held *pro non scripto*, and to be considered as an excess not vitiating the other parts of the decreet arbitral; with this finding the cause was remitted to the Court of Session to vary its judgment, so far as the finding might require it to be varied; and the judgment was in other respects AFFIRMED.

The excess held *pro non scripto*, without vitiating the other parts of the award.

Excess.

In the first cause the Lords found that the arbiter had no authority, according to the terms of the submission, to decern or award that the Appellant should be charged with, or pay the following sums or charges, or any of them, viz. (stating them); but this to be without prejudice to any right of the parties to establish the charges, if they could, against the Appellant in any other mode of proceeding; and, "find that this excess in the de-
"creet arbitral ought not to be taken to affect its
"validity, farther than as it may be necessary to
"rectify the same with respect to the said excess."
The cause remitted to vary the judgment as far as this finding might require; and in other respects the judgment AFFIRMED.

Charges expunged as *ultra vires*, without affecting the validity of the award in other respects.

SCOTLAND.

APPEAL FROM THE COURT OF SESSION.

DIXON and others—*Appellants*.

GRAHAM and others—*Respondents*.

March 12, 24; June 23, 1817.

APPEAL from a judgment in declarator in 1810, suffered to drop, and action of reduction brought in 1812, to re-

duce the judgment in the declarator; and in 1813 one appeal presented from the judgments in both causes, and the general answer put in. Objected, when the appeal came to be heard in 1817, that it was irregular to join both causes in one appeal; and, besides, that the appeal was irregular as to the declarator, the petition not having been presented within the first fourteen days of the session. The House was of opinion that there was an irregularity in the mode of bringing the causes before it; but:—1. The objection ought to have been made in 1813, when the other parties might have put themselves right in point of form:—2. It ought to have been made by petition, to be referred to the appeal committee:—3. When a cause comes on to be heard, it is to be taken as regular: and, therefore, the appeal heard on the merits, and leave given to the parties afterwards to set themselves right in point of form by presenting another petition of appeal in the declarator *nunc pro tunc*, as if it had been done in 1813.

March 12, 24; June 23, 1817.

PRACTICE.—BOUNDARIES.—NOVITER REPERTUM.—PRECEPT OF SEISIN.

Per Lord Redesdale.—In wastes where there are no fences, the boundaries are usually settled in such a manner that the eye may draw the line from a particular spot to some other visible object, that the herds may see when cattle are trespassing. A paper which might, with due diligence, be found at first, is not, in legal meaning, *noviter repertum*. Precept of seisin not to be founded upon in Court, unless it corresponds with the charter.

AN action of declarator having been brought by the proprietors of lands adjoining to Dumbarton Moor, against the Magistrates of Dumbarton, to settle the boundaries of that Moor, to which the Town of Dumbarton derived right by a charter of King James VI.; after proof taken, an interlocutor, dated 16th May, 1810, was pronounced in favour of the pursuers. On 3d July, 1810, the Magistrates reclaimed, but the petition was refused as incompetent, the time within which it was competent

Declarator.

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to reclaim having elapsed. The magistrates then presented another petition, contending that the judgment was not only erroneous on the proof as it stood, but that it could be established to be wrong, *per instrumenta noviter reperta*, and that it was null and void as being *ultra petita*; upon which last grounds it was maintained that the Court was authorized to open up the judgment. It was stated in the Respondents' case, signed John Clerk and John Jardine, that the Court were fully satisfied that there was no ground for holding the decree to be *ultra petita*; and that the pretended *instrumenta noviter reperta* were of no importance to the merits, and had besides been all along in the possession of the Appellants themselves. From these interlocutors in the declarator, the magistrates appealed in 1810.

Appeal in the declarator dropped.

Reduction.

The magistrates having, besides the documents relied on in the petition, afterwards discovered in their own charter chest a precept and seisin which they thought material to the case in 1812, raised an action of reduction of the decree, which had been pronounced in the declarator, upon the allegation that there were *instrumenta noviter reperta*, which showed that it was erroneous. And they suffered the appeal from the judgment in the declarator to drop, by not entering into the usual recognizances. The Lord Ordinary, in November, 1812, pronounced an interlocutor in the reduction, finding, "That before the decreet under reduction was "extracted, the present pursuers gave in a long "petition to the Court, craving, that upon certain "alleged informalities in the proceedings, and in

Interlocutors, Nov. 1813.

" the decreet pronounced by the Court, and also " on the ground of their having recovered certain " documents, as to which they stated the plea of " *noviter veniens ad notitiam*, their Lordships " should open up the judgment they had pro- " nounced, which was then final, but that this pe- " tition was refused by the Court; finds, that in " this petition all the objections as to the informal- " ity of the proceedings, or of the decree now " founded on as reasons for opening up the decree " by reductions, were fully stated; and also all the " documents on which they now found, except two, " viz. the precept and the seisin mentioned in the " condescendence, and in regard to the said precept " and instrument of seisin, the Ordinary is of opi- " nion, that the plea of *noviter veniens ad notitiam* " does in no ways apply to them more strongly than " to the other writs, as to which it has been repelled " by the Court. And on the whole matter, repels " the reasons of reduction."

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To this interlocutor the Court, on the 18th Nov. 1813, adhered.

The magistrates then, in 1813, lodged one appeal from the judgments in both causes. The agent for the Respondents, though aware that the joining the two causes in one appeal would probably be considered as an irregularity, yet as the taking notice of it immediately, when the matter might be amended, would only be attended with the expense of an additional case; he thought it most for the interest of his clients to put in the general answer.

Appeal, 1813, in both causes.

General answer.

The appeal came on for hearing in the House of Lords on the 12th March, 1817, when the preli-

March, 1817. Objections to

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one appeal in both causes.

minary objection was taken by Mr. Leach and Mr. Adam, the Counsel for the Respondents. 1st, These were in form and substance two distinct causes, having no other connexion than that they related to the same subject of property. But the questions were distinct; that in the first cause being whether the interlocutors were right on the evidence there given; that in the second cause being whether the instruments found in the charter chest were, in the sense of the law of Scotland, *noviter reperta*. 2d, The causes were not only distinct, but they could not stand together; the Appellants contending in the original action that the conclusion was wrong; and admitting in the second action that the conclusion in the original action was right. 3d, By the law of Scotland reduction is competent in cases of erroneous judgment. (Ersk. b. 4. t. 3. s. 3. 8.) Then suppose three actions of reduction brought each for a distinct cause, if the reduction is part of the original cause, then one appeal may include all the reductions, though for distinct matters. 4th, Suppose the time for presenting an appeal in the original cause to have elapsed, to evade the order of the House, nothing more would be necessary than to bring a reduction on any ground, and that being part of the original cause, the whole may be brought before the House by appeal. 5th, There is a special objection also, which is this; by order of the House the petition of appeal must be presented within fourteen days from the commencement of the session, except in cases decided below, sitting the parliament, in which petitions may be presented within twenty days after the judgment. If

In 20 days

the petitions are not presented till the following session, they must be presented within the first fourteen days. In this instance the petition, with respect to the original cause, was not regular, not having been presented within the first fourteen days of the session, although, with respect to the reduction, it was regular, having been presented within twenty days from the time of judgment pronounced sitting the parliament. 6th, Another distinction is, that a declarator is an outer House cause; a reduction an inner House cause, in which the Lord Ordinary need not decide on the merits, but may make great *avisandum* to the Court. We submit, therefore, that there can be no proceeding at all on either of the causes, but at any rate none on the declarator.

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from signing the last interlocutor from Scotland, 14 days after decree from the Equity Courts in England (and Wales), 40 days from the Equity Courts in Ireland.

Lord Eldon, (C.) Although an appeal is withdrawn, I take it that it may be presented again if within the five years. The petition in this instance was presented in 1813, before the expiration of the time for appealing from the judgment in the declarator; and you, instead of calling the attention of the House to the alleged irregularity of joining the two causes in one appeal, at a time when the other parties, if wrong, might have set themselves right in point of form, put in the general answer. The objection cannot at any rate be properly made in this way, but must be taken by petition to be referred to the Appeal Committee; and then, if they are wrong in point of form, they may be allowed to set themselves right, by presenting another petition of appeal *nunc pro tunc*, as if it had been

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done in 1813. You may, therefore, proceed on the merits now, and we may afterwards consider whether they are right in point of form; and if not, give them an opportunity of setting themselves right. I take the rule to be, that when a cause comes to a hearing, it must be considered as regular; and that, if there is in reality an irregularity; it may be rectified by petition, to be referred to the Appeal Committee.

Sir S. Romilly. The appeal in the declarator was suffered to drop, as the Court could not otherwise proceed with the reduction.

Lord Redesdale. I rather think they might, on the ground of *instrumenta noviter reperta*, and the course would have been to have presented a petition to stay the hearing of the appeal till that should be decided.

The cause was then heard on the merits; and on the 24th March the Lord Chancellor stated that he

Irregularity.

was of opinion that there was some irregularity in the manner in which the causes had been brought before the House, and leave was given to enter a separate appeal in the declarator *nunc pro tunc.*

Judgment. June 23, 1817.

Lord Eldon, (C.) I think the Court below was right in the conclusion that certain documents relied upon by the Appellants were not, in the sense of the law, *noviter reperta.* As to the allegation that the judgment in the declarator was *ultra petita*, if I were to give an opinion now, I must say that some injustice has been done to the town of Dumbarton. One part of the march, that from the Burn Crooks

to the White Haughs, is clear, and I propose to remit the cause with findings to the effect which I have stated.

June 23, 1817.

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Lord Redesdale. I have looked at the evidence in this case, and bestowed particular attention upon it considered as a question of boundaries.

With respect to the point as to the *instrumenta noviter reperta*, the principal paper is the precept of seisin; and it is clear that if that was in the possession of the party claiming the interest, and might with due diligence have been found by him and produced at first, it can never be used by him on the ground of being *noviter repertum*; and this paper might with due diligence have been found, as it was in the charter chest of the town. But besides that, I have great doubt on another ground whether the paper could be used, because the precept ought to follow the charter; and if it does not it cannot be used, for the Court must go by the charter.

A paper which might with due diligence have been found at first, is not, in the sense of the law, *noviter repertum*.

Court cannot proceed on the precept of seisin unless the precept follow the charter.

With respect to the question of *ultra petita*, it is clear that the Court has gone beyond the claim in the pleadings, &c.

In these wastes where there are no fences the boundaries are usually settled in such a manner that the eye may draw the line from a particular spot to some other visible object, that the herds may see when cattle are trespassing. But in the line drawn by the Court below a different principle is adopted, &c.

Causes REMITTED for review, with findings as above.