Saturday, January 31.

FIRST DIVISION.

[Lord M'Laren, Ordinary.

ROGERSON AND OTHERS *v.* ROGERSON.

Arbiter—Judicial Reference—Objections to Award—Remit to Referee to Assign Reasons.

Objections having been lodged to the report of a judicial referee, the Lord Ordinary remitted to the referee to make a special report of his reasons for his different findings. *Held* that he could not be called on to do so, and that the interlocutor must be recalled.

Alexander Rogerson of Girthhead, Wamphray, Dumfriesshire, and the trustee acting under a trust for his creditors, Thomas Tait, solicitor, raised this action against William Rogerson, farmer at Girthhead, to have him ordained to pay to Tait, as trustee, certain sums of rent beginning at Martinmas 1879.

By lease dated 29th March 1879 the defender took the farm of Girthhead on a nineteen years' lease, from Whitsunday 1879 as to the houses and grass, and from the separating of crop 1879 as to arable land. The rent was £330 per annum. The defender entered upon possession of the farm. The lease contained the following clause—"And the said Alexander Rogerson and John Kirkpatrick Rogerson [son of Alexander Rogerson], and the said Thomas Tait, as trustee foresaid, hereby undertake to borrow, by a rent-charge on the said lands, a sum of £500 for the purposes of the enclosing of the said lands and the improvement of the fences, and the improvement of and additions to the farm dwelling-house and other buildings on the farm."

The pursuers averred that they took steps to carry out the obligation in the above-quoted clause of the lease, but although often called upon, the defender delayed to approve of the plans and specifications which they submitted to him; that he made the non-fulfilment of the obligation a pretext for withholding the whole rents of the farm; that the delay in carrying out the improvement was caused by the defender himself, and that the pursuers were willing on payment of the rent to consign the £500 for improvements, and to refer judicially to Mr Thomas Landale the question of the amount of damages (if any) due to the defender, and thereupon to consign £500 to be expended at the sight of Mr Landale.

The defender averred that by the clause of the lease above quoted the pursuers were bound to expend £500 in enclosing the land and improving the dwelling-house and steadings; that the subjects were not tenantable without these repairs, and that without such an arrangement he would not have entered into the lease; that from want of these repairs he had been deprived of the full use and enjoyment of his farm, and that he had been put to considerable expense in herding his cattle, and in damage done by the cattle to growing crops. He admitted that he had only paid £100 to account of rent, and stated that he only did so on the express representation that the work would be done without delay. The defender also stated that he has always been willing to pay his rent under deduction of his claim for loss, and expressed his willingness to accept the offer made by the pursuers to have the £500 expended by them at the sight of Mr Landale.

The defender pleaded—"(1) The pursuers having failed to give the defender possession and use of the whole subjects alleged to have been let under said lease, are not entitled to enforce any obligation undertaken by the defender on the same contract. (2) The obligation on the pursuers to expend £500 in enclosing the lands and improving the fences, and improving and adding to the farm dwelling-house and other buildings, was an essential part of the contract of lease, and the pursuer having failed to fulfil this obligation, is not entitled to call upon the defender to pay rent. (3) The defender is entitled to set off against the pursuer's claim for rent the loss and damage suffered by him as condescended on."

By interlocutor of 8th June 1883 the Lord Ordinary interponed authority to the pursuers' judicial offer of reference and the defender's acceptance thereof, and remitted to Mr Thomas Landale to inquire into and hear parties on the question of the amount of damage (if any) due by the pursuers to the defender, in consequence of delay in implementing the terms of the lease between the parties; and appointed the judicial referee to report his opinion or award to the Lord Ordinary *quam primum*.

The referee after visiting the ground and hearing the defender's evidence (the pursuer declining to lead evidence), and heard parties, found "that the pursuers failed and delayed, within a reasonable time, to implement the obligation incumbent on them under the lease to borrow by a rent-charge on the lands a sum of £500 for the purpose of the enclosing of the said lands and improvement of the fences, and the improvement of and additions to the farm dwelling-house, and other buildings on the farm, and that they still delay to do so, and that the defender has suffered loss, injury, and damage in consequence of the pursuers' delay to borrow the said sum, and expend the same in a reasonable manner, conform to the lease for which the pursuers are liable: Fixes the term of Whitsunday 1880 as the time by which the obligation upon the pursuers to borrow and expend as aforesaid should have been implemented, so far as regards the enclosing of the said lands and the improvement of the fences; and fixes the term of Martinmas 1880 as the time by which the obligation upon the pursuers to borrow and expend as aforesaid should have been implemented, so far as regards the improvement of and additions to the farm dwelling-house and other buildings on the farm: Finds that the damage due by the pursuers to the defender, in consequence of delay in implementing the obligation as to enclosing and fencing, up to the term of Martinmas 1882, is £212, 10s., being at the rate of £85 per annum for two and a-half years from the term of Whitsunday 1880: Further, that the damage due by the pursuers to the defender, in consequence of delay in implementing the obligation as to the improvement of and additions to the farm dwelling-house up to the term of Martinmas 1882 is £100, being at the rate of £50 per annum for two years from the term of Martinmas 1880; and further, that the damage due by the pursuers to the defender,

in consequence of delay in implementing the obligation as to the improvement of and additions to the other buildings on the farm, up to the term of Martinmas 1882, is £225, being at the rate of £100 per annum for two years from the said term of Martinmas 1880, with £25 for outlays on said buildings: Finds, therefore, that the whole amount of damage due by the pursuers to the defender, in consequence of delay in implementing the terms of the lease between the parties up to the term of Martinmas 1882, is £537, 10s." He found the pursuers liable in the expenses of the judicial reference, and of the clerk's fee, and reported the award to the Lord Ordinary that authority might be thereto interponed.

The pursuers lodged objections to the report, and objected, *inter alia*, that the award of the referee was one of remote and consequential damage, and so *ultra vires* of the referee. Various other objections were taken to the amounts the referee allowed as to dwelling-house, steading, and fences respectively.

The Lord Ordinary, upon the pursuers' motion, remitted to Mr Landale "to make a special report of his reasons for the different findings contained in his award."

He granted the defender leave to reclaim.

"*Opinion.*—In the objections given in by the pursuers to Mr Landale's report it is stated that the referee has made an allowance of damages under certain heads for which damage is not legally due, and that the award is in other respects erroneous.

"The defender objects to all inquiry, and submits that the award of the referee is final, and that the referee is not bound to give his reasons. I am not of opinion that a judicial referee can issue an award for any sum within the conclusions of the action without offering an explanation of the grounds of his decision, nor do I suppose that Mr Landale wishes to take up such a position.

"He is a judicial referee; and while it is not the practice of the Courts of Scotland to refer cases to arbitration except with the consent of the parties, it is not the less true that the authority of a judicial referee is derived from the interlocutor remitting the case to him for inquiry, and defining the question which is remitted to his decision. He is therefore, for the purposes of the action, a member of the judiciary, responsible to the public for the regular performance of the duties of the commission which he accepts, and he is (in my opinion) under the same obligation to communicate to the parties the grounds of his decision, if desired, which attaches to any judicial commissioner, or to the Lord Ordinary or the Court.

"When Mr Landale's special report is before me I will consider to what extent and effect his findings are examinable, keeping in view the general rule that an arbiter's decision is final on the facts. I am not sure whether it was meant to be maintained on behalf of the defender that errors in the award, if such should be found to exist—for example, the awarding of a sum in respect of matters that are *ultra fines compromissi*—cannot be corrected in this process. But I am of opinion that a summons of reduction is not necessary to enable such questions to be raised. Under a judicial reference the decree-arbitral is to be pronounced by the Judge, and it appears to me that until the Judge's authority has been interponed the award is open to correction upon any ground which might be made the foundation of an action of reduction after a final decree."

The defender reclaimed, and argued—There was nothing upon the face of the award to show that the actings of the arbiter were *ultra fines compromissi*. There was no allegation of corruption, and no relevant averment of consequential damage. An arbiter was not bound to give the reasons for his findings. What the Lord Ordinary had done was virtually to allow the parties a proof —*M'Kenzie* v. *Girvan*, December 19, 1840, 3 D. 318.

Argued for pursuers—All that the Lord Ordinary sought to have before him was the grounds of the arbiter's award. In assessing damages the arbiter was bound to proceed upon a legal method. An explanation of an arbiter's award was required in the case of *Anderson* v. *Pott*, June 22, 1853, 11 S. 778. The procedure in the present case should be similar.

At advising—

Lord Mure—This is a judicial reference for the purpose of assessing the amount of damages due to the defender in the circumstances set forth by him in his statement of facts. Shortly put, the damages are due from the insufficiency of the dwelling-house and fences of a farm which the defender leased from the pursuers, and for which the pursuers are suing for rent.

The referee appears, from the terms of his report, to have gone very fully into the matter in dispute, for in order to enable him to prepare his award to assess the damages, he seems not only to have visited the ground but also to have looked into the terms of the lease, and also led evidence. We have the referee's report, and in it he makes various findings under specific heads. When the award was issued the defender moved for its approval, but objections were lodged for the pursuers, and the Lord Ordinary has remitted the report to the referee that he may assign his reasons for the various findings it contains. Now, the question in these circumstances comes to be, whether a judicial referee can be called upon to state specifically the reasons for the various findings in his award? I do not think that under any of the rules which now govern such matters a referee can be called to assign reasons for his findings, nor can the Court competently compel him so to do.

I agree with the opinion expressed by Lord Mackenzie in the case of *Watmore*, in 4 D. 150, where he says—"I think a judicial reference is an arbitration, and that the result of the award of the referee . . . . cannot be opened up upon the ground of error. We cannot inquire into the referee's report as into that of an accountant, which we may correct in so far as it is in any way erroneous. Though the referee have gone wrong on evidence of fact or in law, still his decision is final, provided it be upon the matter referred to him." In that case it was objected that the referee had proceeded upon a wrong method; that may have been so, yet the award was sustained. So in the present case it is the award of a judicial referee that we are dealing with, and the Court has no power to review

such an award on the merits, even though the reasons for it were before us. I think, therefore, that the interlocutor of the Lord Ordinary should be recalled.

Lord Shand concurred.

Lord Adam—I am entirely of the same opinion. In substance the pursuer's objections come to this, that the referee has awarded too much. It is not suggested that he has given damages for anything not included within the scope of the reference, and that being the state of matters, I quite agree with your Lordships that we cannot send the case back to the arbiter upon an alleged error in judgment. That being the true nature of the objections, the reasons for his findings, even if supplied by the arbiter, would not in any way aid the pursuers' case.

The Lord President and Lord Deas were absent.

The Court recalled the interlocutor reclaimed against, repelled the objections, and remitted to the Lord Ordinary to proceed in the cause.

Counsel for Pursuers (Respondents)—R. Johnstone—Darling. Agent—H. W. Cornillon, S.S.C.

Counsel for Defender (Reclaimer)—Trayner—Lang. Agents—Paterson, Cameron, & Co., S.S.C.

Tuesday, February 3.

SECOND DIVISION.

[Sheriff of the Lothians.

GRAHAM *v.* TAIT.

Sale—Principal and Agent—Title to Sue—Agent under General Mandate who has Accounted to the Mandant for Price.

A farm-steward sued for the price of an ox, alleging that he had sold it on behalf of his employer, and that he had accounted to him for the price. He produced no assignation to the debt from the employer. *Held* that he had a title to sue.

Thomas Graham, farm bailiff at Howick, in Northumberland, sued George Tait, butcher at East Linton, in the Sheriff Court at Haddington, for payment of £30, as the price of a bullock which belonged to the Earl of Haddington, and which the pursuer alleged that he, while in the Earl's service as farm-bailiff at Tynninghame, had, on 12th February 1883, sold and delivered to the defender. He alleged that the defender had not paid the price of the bullock, but that he (pursuer) had paid and accounted to the Earl for it.

The defender denied having bought or received delivery of the bullock in question. He averred —"If the pursuer has accounted for and paid the £30 in question to the said Earl, such was a gratuitous act on his part. In any view, he was under no obligation to do so, so far as the defender was concerned. He stood and stands in no relation whatever towards the defender as creditor in said £30 or otherwise."

The pursuer pleaded that the sum sued for was due and resting-owing to him by the defender.

The defender stated the following preliminary pleas:—"(1) No title to sue. (2) The only party who can competently sue the present action is the Earl of Haddington; in any view, his Lordship must be a party thereto, or the pursuer is bound to produce a valid assignation by the former to the alleged debt, and sue thereon. The action ought, therefore, to be dismissed, and the defender found entitled to his expenses."

The Sheriff-Substitute (Shirreff) sustained these pleas and dismissed the action.

"*Note.*—The whole case of the pursuer is founded on the statement that the ox, the price of which is sued for, was sold by him only as the servant of the owner. That he has accounted to the owner for the price does not entitle him to sue the defender unless the owner's right has been assigned, of which there is no averment. The Sheriff-Substitute thinks, therefore, that this petition falls to be dismissed."

The Sheriff (Davidson), on appeal, adhered.

The pursuer appealed to the Court of Session. There was laid before the Court an acknowledgment by Lord Haddington's factor, dated subsequently to the Sheriff's judgment, and stating that on 7th May 1884 the pursuer had accounted for £30 as the price of a bullock sold on 12th February 1883, and alleged to have been bought by and delivered to the defender.

The pursuer argued—He would have averred a title to sue founded on a general authority to sell from the Earl if the Sheriff had given an opportunity of amending his record, which he did not do. He was selling as agent under a general mandate for a disclosed principal, and such agent had a title to sue. The defender could suffer no prejudice in having the question tried with him. He could give a valid discharge.

The defender replied—The relation of creditor and debtor did not exist between him and the pursuer. The proper creditor, on the pursuer's own statement, was the pursuer's employer. Pursuer as bailiff had only a power of management; he had no special mandate conferring power to sue for debts due to his employer. In any case, what mandate he had fell on his leaving the service. The alleged settlement of accounts between the pursuer and his employer conferred no title to sue. A power to sell implied power to receive payment, and a servant selling for his master was bound to account, but should he account without having received payment he did not acquire a right to sue for the price in his own name.

At advising—

Lord Young—I think we should simply recal the Sheriff's interlocutor and remit to him to proceed with the cause, repelling the first and second preliminary pleas for the defender which the Sheriff has sustained.

Lord Craighill and Lord Rutherfurd Clark concurred.

The Lord Justice-Clerk was absent.

The Court recalled the interlocutor, repelled the pleas above stated, and dismissed the action.

Counsel for Pursuer (Appellant)—Darling—W. C. Smith. Agents—Purves & Wakelin, S.S.C.

Counsel for Defender (Respondent)—Rhind—Young. Agents — Charles & George Robb, Solicitors.