view the terms of the original bequest and the proceedings in this and the former process; and also to suggest for the consideration of the Court the names of any persons, official or otherwise, who in his opinion might fitly be named as trustees for the administration of the fund."

Counsel for Petitioners—Lord Advocate (Watson)—M'Laren. Agents—J. & J. Milligan, W.S.

Counsel for Respondent — Fraser — Rhind. Agents—Rhind & Lindsay, W.S.

Friday, December 7.

SECOND DIVISION.

[Lord Young, Ordinary.

TRANENT COAL COMPANY *v.* POLSON AND ROBERTSON.

Arbitration — Decree-Arbitral — Reduction — Undue Influence—Legal Corruption of Arbiter.

Averments which were *held* relevant to found an action of reduction of a decree-arbitral on the ground of legal corruption on the part of the arbiter, within the meaning of the Act of Regulations 1695, and of undue influence exercised upon him by one of the parties, but the proof of which fell short of what was requisite to success in such an action.

This was an action raised by the Tranent Coal Company against John Polson and James Robertson, both of Tranent, concluding for the reduction of a minute of reference which had been entered into between the pursuers and defenders in a previous litigation between them, and of a decree-arbitral pronounced thereon by Robert Clark, manager of the Arniston Coal Company (Limited), on 27th October 1876.

The present defenders had sometime previously raised against the Tranent Coal Company an action of declarator, interdict, count and reckoning and payment, arising out of various transactions in connection with the working of the coal in certain lands which had previously belonged to a Mr Tennant, but which had been sold by him to Dr Robertson, one of the defenders. Ultimately, by joint-minute, to which the authority of the Court was interponed, a reference in that action was agreed to. Under the reference, amongst other procedure, a proof was taken, and one of the pursuers' witnesses, named Adams, having become, as they alleged, confused and excited, they applied subsequently to the arbiter to see him personally and alone, and also to receive some corroborative evidence of what he really desired to say. These requests the arbiter refused. In September 1876 a draft award was issued, against which the pursuers gave in a representation. This was also met by a refusal on the part of the arbiter to grant the requests made.

The statement in the pursuer's condescendence as to legal corruption and influence was in these terms (cond. xxi.):—"The pursuers believe and aver that from within a short time after the arbiter accepted of the reference down to the close, the said James R. M. Robertson used means to influence the arbiter, and did unduly influence him against the pursuers and in favour of the defenders in reference to the subject-matter of the arbitration. More particularly, in or about the month of June 1875 the said James R. M. Robertson made a journey from Renfrew to the arbiter's residence at Arniston, where he resided with the arbiter over night, and the sole purpose of his visit was with reference to the matters involved in the arbitration, which matters he discussed with the arbiter, and impressed his views upon the arbiter, who improperly listened to him and allowed him to make the arbitration the matter of prolonged conversation, all outwith the presence of and unknown to the pursuers. The pursuers do not impute wilful fault to the arbiter, who is not a man accustomed to the *quasi* legal business of an arbitration, but they believe and aver that in point of fact, although it may be unconsciously, from the date of that meeting the arbiter was biassed by the representation then made by the said James R. M. Robertson, who is the son of one of the defenders, and factor for both. More particularly, they believe and aver that upon that occasion the said James R. M. Robertson took the opportunity of endeavouring to indoctrinate the mind of the arbiter with his false explanations in regard to the true nature, meaning, and purpose of his foresaid letter of 8th October 1872, addressed to the said Thomas Adams (cond. xxii.). Notwithstanding of the foresaid representation lodged by the pursuers on 4th October 1876, the arbiter suddenly, and without any intermediate communication between him and the pursuers, or anyone on their behalf, of this date (October 23, 1876) signed the decree. The pursuers believe and aver that this was done at the instigation of the defenders between the two dates 4th October and 23d October, with a view to prevent the pursuers being heard before the arbiter upon the points in question."

The defenders said the visit was paid by Robertson to the arbiter on totally different business, and generally denied the pursuer's averments.

The other grounds of reduction sufficiently appear from the pleas-in-law and the opinions of the Court.

The pursuers pleaded—"(1) The whole of the proceedings complained of having been unfair and illegal, and the conduct of the defenders and of the arbiter having been unjust and illegal and corrupt, the decree-arbitral, and all that preceded and followed it, ought to be set aside. (2) The decree-arbitral sought to be reduced, with all that preceded and followed it, ought also to be set aside, in respect—1st, That the claim for compensation for damages for coals taken from below the farmhouse and steading of Easter Windygowl was made in pursuance of an illegal and unwarrantable scheme on the part of the defenders to concuss the pursuers in the negotiations between them and the defenders with the view to the defenders getting possession of the colliery. 2d, That the letter by Mr J. R. M. Robertson to Thomas Adams, of 8th October 1872, was either authority to the pursuers to work the coal in the reserved area, or it was a snare to induce the pursuers to do so, with the view to the defenders thereupon pleading that the lease had been contravened and damages incurred. 3d,

That there was such a failure in duty on the part of the arbiter, and injustice to the pursuers in receiving the defenders' factor, and listening to his private representations, in refusing to receive evidence tendered, and to hear the pursuers upon their representation against the draft award, in refusing all explanation of the grounds upon which the award proceeded, in the mode of assessing the money awards, and in the arbiter's declining to take the opinion of counsel upon important points of law, as to amount to legal corruption. 4th, That the question in regard to filling up the waste spaces was not one of the two questions referred, and it was *ultra vires* of the arbiter to pronounce upon it. And, 5th, That the expenses awarded against the pursuers were excessive and extravagant, and they had no opportunity given them of being heard upon the point."

The defenders, *inter alia*, pleaded—"(2) No relevant charge of corruption, in the sense of the Articles of Regulation, 1695, is set forth. (3) The question as to filling up the waste spaces caused by working the coal in the said reserved areas is included in the said reference. (4) At all events, the pursuers are barred by homologation from pleading that the submission does not refer the said question as to filling up the waste spaces. (5) The pursuers having agreed that they should be found liable to the defenders in the expenses caused by the adjournment of the diet for hearing counsel on the proof, they are barred from impugning the arbiter's award thereanent, the said award having been fair and reasonable. (6) The arbiter having acted in all respects within his powers, and the other grounds of reduction libelled being unfounded in fact and untenable in law, the defenders should be assoilzied from the reductive conclusions of the summons."

The Lord Ordinary (Young), on 28th June 1877, pronounced an interlocutor assoilzieing the defenders.

The pursuers reclaimed, and maintained their right to decree of reduction on two main grounds —(1) That there was legal corruption on the part of the arbiter; (2) that there had been irregularity on the part of one of the parties to the reference, biassing the arbiter's mind, and obtaining an advantage thereby.

Authorities referred to—Bell on Arbitration, 23, 24, secs. 16 and 20; *Walker* v. *Frobisher*, 1801, 6 Vesey 69; *Dobson* v. *Grove*, 1844, 6 Adolphus and Ellis, Q.B. 637; *Harvey* v. *Skelton*, 6 Beav. 455; *Mitchell* v. *Cable*, June 17, 1847, 10 D. 1297; *Alexander* v. *Bridge of Allan Water Company*, Feb. 5, 1869, 7 Macph. 492; *Brogden* v. *Llynley Company*, 11 L.R., Eq. 188, 15 L.R., Eq. 46.

At advising—

Lord Ormidale—In this action of reduction of a decreet-arbitral two questions have arisen which have now to be disposed of—Firstly, Is the decree reducible on the ground of what has been termed legal corruption? and Secondly, Is it reducible, in whole or in part, as being *ultra fines compromissi?* The *onus* of establishing their case in regard to both of these grounds of action lies upon the pursuers.

1. There can be no doubt that the decree of an arbiter who irregularly and improperly receives and gives effect to important communications from one of the parties, out of the presence and without the knowledge at the time of the other, is subject to be set aside on the ground that he has acted partially and contrary to the essential principles of justice; or, in other words, that he has so misconducted himself as to expose his award to reduction on the ground of legal corruption. But has any such misconduct or ground of reduction been established in the present case?

I am very clearly of opinion that it has not. It is proved, I think, that Mr J. R. M. Robertson, who is said to have been the medium through whom the arbiter was corruptly influenced, had a quite legitimate object in his communications with the arbiter, independently altogether of the subject of the arbitration. And when this is kept in view, and when it is further seen that while the letters which passed between them make no allusion at all to the arbitration, both of them have deponed that at their personal meetings nothing of the smallest importance passed in reference to the matters submitted, the only conclusion I can come to is that the pursuers have failed in showing that the decreet-arbitral or award in question is exposed to the objection that the arbiter received and was influenced by *ex parte* statements which had been made to him by the defenders or anyone acting for them. Nor have they, in my opinion, succeeded in showing that it is subject to objection on the ground that the arbiter improperly or unjustly refused to hear them. It was for the arbiter to judge when and how the parties should be heard. But in place of stinting them in this respect, he appears to me to have given them every reasonable opportunity of being heard, and only came to a conclusion on the matters submitted after having been fully and ripely advised in regard to them.

2. The question whether the arbiter by dealing with the filling up of the waste spaces in the way he did, and thereby exposing his award to the objection of being *ultra fines compromissi*, is attended with some difficulty, arising, however, more from the somewhat defective and confused manner in which the parties expressed themselves in the arrangements for entering into the submission than anything else. There can be no doubt, I think, (1) that in the proceedings in this Court, which resulted in the submission, the filling up of the wastes formed a substantive ground of action; (2) that that matter was not disposed of judicially in Court; and (3) that it was the object and expressed intention of the parties to submit and refer to the arbiter Mr Clark everything which had not been settled and judicially disposed of in Court by Lord Shand's final interlocutor. It is in these circumstances that the pursuers now maintain that the filling up of the wastes was not submitted, and that in dealing with it as he has done the arbiter has acted beyond his powers. It would certainly be very singular if the parties should have omitted to get so important a question as the filling up of the wastes either disposed of in Court or embraced in the submission, although the minute of reference expressly bears that it embraces everything which had not been previously settled. Keeping in view, therefore, that it is not and could not be said that the filling up of the wastes had been disposed of in Court or otherwise settled before the minute of reference was entered into, it almost necessarily follows that it must have

been one of the questions submitted. And accordingly, this, I think, sufficiently appears from the terms of the minute of reference when closely examined and attended to. After setting out that everything had been settled in Court except two questions, the first being "relative to the reserved coal within the radius of 100 yards from the centre of East Windygowl farm-steading," and the second "relative to the coal under and within a radius of 100 yards from the centre of the dwelling-house of Carlaverock," the minute bears that "therefore the parties hereto have submitted and referred, and do hereby submit and refer all questions between them relative to the two matters above specified." These are very general and comprehensive terms, and I think in the circumstances must be held to embrace the filling up of the wastes, for that was undoubtedly one of the questions relative to the first matter submitted, and it would rather appear that the pursuers so dealt with the matter under the submission. Indeed, it would be difficult, if not impossible, to dispose of the matter "relative to the reserved coal within the radius of 100 yards of the Easter Windygowl farm-steading" without dealing with the filling up of the wastes within that radius. Accordingly, considering the smallness of the price or compensation awarded by the arbiter for the coal wrongously taken away from within the forbidden radius of 100 yards from the centre of Easter Windygowl farm-steading, I cannot doubt that he had regard to the obligation which he held the pursuers to be under to fill up the wastes.

For these reasons, and without entering into further detail, I am of opinion that the Lord Ordinary's interlocutor ought to be adhered to.

Lord Gifford—In this action the pursuers, the Tranent Coal Company, seek to reduce and set aside a minute of reference entered into between them and the defenders, dated in April and May 1875, with prorogation and decree-arbitral following thereon pronounced by Mr Robert Clark, manager of the Arniston Coal Company (Limited), as sole arbiter named in the submission. Although the conclusions of the action embrace not only a reduction of the decree-arbitral, but also a reduction of the minute of reference itself, on the allegation that the reference itself and whole proceedings therein were part of an illegal conspiracy entered into by the defenders with a view to defraud the pursuers of their rights, yet these averments, in so far as the minute of reference itself is concerned, have not been insisted in—indeed I hardly think there are any averments relevantly made impugning or intending to impugn the minute of reference or contract of submission itself. The only questions argued at the bar have related, not to the validity of the submission itself, but to the proceedings which followed thereon, and the only question for decision is, Whether the pursuers have established sufficient grounds for setting aside in whole or in part the decree-arbitral pronounced by Mr Clark on 27th October 1876?

There are two grounds on which the pursuers rely as sufficient for setting aside Mr Clark's decree-arbitral. The first is applicable to the whole award, and is in substance that the arbiter Mr Clark has been guilty of legal corruption, or was tainted with partial counsel, so as to have been disqualified from acting as arbiter at all, or from pronouncing any award under the submission. The second ground of challenge is applicable to only one of the findings pronounced by the arbiter, namely, by the third, or that by which the arbiter ordained the pursuers to stow and fill up securely the waste or spaces caused by their having worked and taken away certain reserved coal therein mentioned; and this finding is said to be incompetent and *ultra vires* of the arbiter, because the pursuers' liability to fill up said wastes and spaces is said not to have been included in the submission, and not to have formed any part of the matters submitted and referred to the arbiter.

I am of opinion that the pursuers have failed to make good and to establish any of the grounds of challenge on which they rely, and I think that the interlocutor of the Lord Ordinary ought to be adhered to.

First, as to the alleged legal corruption or partial counsel on the part of the arbiter. This plea came ultimately to be rested almost exclusively on the alleged interference of Mr James R. M. Robertson, the son of one of the defenders, and a very important witness in reference to the principal point referred, namely, the working out by the pursuers of certain coal which was reserved in the lease. It is said that Mr James R. M. Robertson, at the request or instigation of the defenders or their agents, had meetings with the arbiter outwith the presence of the pursuers; that the arbiter had private communings with him, and listened to his statements regarding the matters referred, and that without the knowledge and in the absence of the pursuers; and that the arbiter was influenced and prejudiced by these *ex parte* statements of Mr James R. M. Robertson, and induced thereby to decide against the pursuers. It appears to me, however, that on the proof the pursuers have entirely failed to make good these averments or any material part thereof. No doubt it is true that Mr Robertson was sent by the defenders or their agents to Mr Clark, the proposed arbiter, to see whether he would accept of the submission or not, and certainly, looking to Mr Robertson's position, it would have been much better if this had not been done, but it is proved both by Mr Robertson and the arbiter—and there is no contrary evidence—that no discussion took place as to the subject-matter of the reference, and that nothing passed excepting a general reference to the dispute which had arisen, and an inquiry as to whether Mr Clark would or would not accept the office of arbiter. There is positively nothing else in the case—nothing of the slightest materiality tending to impugn either the good faith of the parties or to throw the slightest suspicion on the fairness or impartiality of the arbiter. To establish the serious charge of corruption, that is, legal corruption or of partial counsel against an arbiter, far more than this is required. It is not uncommon when a submission to arbitration is proposed, for the parties themselves to ask the proposed arbiter or arbiters if they would be willing to undertake to act as such. Somebody must make this inquiry—either the parties themselves or their agents, or some one acting for them, and if this is done in a fair manner, and no means taken to influence or bias the arbiter, it really does not matter by which of the parties the request is made. In the present case Mr James R. M. Robertson was the son of one of

the defenders. He had been acquainted with Mr Clark, the proposed arbiter, for a number of years, and although it may have been imprudent, I think it was not unnatural that he should be asked to ascertain whether Mr Clark would accept or not. It is proved that Mr James R. M. Robertson had nothing to do with the appointment or suggestion of Mr Clark—indeed he was absent from the country at the time when Mr Clark was suggested, and he did not arrive in London till the 5th May, while the minute of reference was signed on 27th April and on 1st and 4th May. It seems also sufficiently proved that Mr James R. M. Robertson had occasion to see and to write Mr Clark on a totally different and independent matter, namely, a proposal that one of Mr Clark's sons should go out to Borneo, and it was this subject, and not the reference at all, which led to his being in communication with Mr Clark.

But the pursuers have entirely failed to show either that any improper communications were made to Mr Clark by Mr James R. M. Robertson or by anybody else, or that Mr Clark was guilty of any impropriety whatever in receiving or permitting *ex parte* communications. If the pursuers' case had been followed up in evidence on the lines indicated on record, the case might have been different, and the fact that Mr Clark accepted the reference on the request of Mr James R. M. Robertson would have been an important commencement of a chain of proof that the arbiter was corrupt, and tainted with partial counsel. But the pursuers' case commences and ends with the comparatively innocent inquiry in May 1875 whether the arbiter would accept of the office or not? And there the case ends, for there is not a particle of evidence either that the defenders directly or indirectly attempted to influence the arbiter, or that the arbiter received partial counsel, or was guilty of the slightest impropriety in his proceedings. I lay altogether out of view the other averments of unjust or inequitable proceedings on the part of the arbiter, such as the averment that he wrongfully refused to re-examine Thomas Adams, or that he awarded excessive or unreasonable expenses. These objections relate only to the merits of the questions submitted, and they were not and could not be relied upon as grounds for upsetting or reducing the award.

[His Lordship then dealt with the other ground of challenge, and concurred in holding that the matter of stowing the wastes was included in the reference.]

The LORD JUSTICE-CLERK concurred.

The Court adhered.

Counsel for Pursuer (Reclaimers)—Lord Advocate (Watson)—Moncreiff. Agents—Dewar & Deas, W.S.

Counsel for Defenders (Respondents)—Balfour—Low. Agent—D. Lister Shand, W.S.

Friday, December 7.

FIRST DIVISION.

[Sheriff of Lanarkshire.

WALKER *v.* LOUDON BROTHERS.

Bankrupt—Statute 1696, *cap.* 5—*Illegal Preference—Transaction in Ordinary Course of Business.*

An article which had been recently bought, but never used, was returned by the purchaser, who did not now require it, to the seller within sixty days of the bankruptcy of the former. Credit was given for it in the books of the latter. It was proved that the parties acted in perfect *bona fides*, and that there was an absence of all intention to create a preference. *Held* in the circumstances that such a transaction, as it had taken place in "the ordinary course of business," was excepted from the operation of the Statute 1696, cap. 5.

It is an open question whether perfect *bona fides* is of itself sufficient to take a transaction within sixty days of bankruptcy out of the operation of the Act 1696, cap. 5.

The pursuer in this action was trustee on the sequestrated estate of Messrs Reid & Lauder, engineers and rivet makers, Port-Glasgow. The date of the warrant of his confirmation was 19th October 1875. The defenders were Loudon Brothers, engineers, Glasgow, and the summons concluded for delivery of a lathe that had been sold and delivered to the bankrupts on 26th July 1875, "which lathe has been in the defenders' possession without any right or title since 6th September 1875." There was an alternative conclusion for payment of £180, the value of the lathe.

The pursuer pleaded—"The defenders being in possession of property of the bankrupts, the pursuer is entitled to decree therefor." And he afterwards added this additional plea—"The transaction averred by the defenders being a preference struck at by the Act 1696, cap. 5, and the Bankruptcy (Scotland) Act 1856, their defence is irrelevant, and the pursuer is entitled to decree."

The defenders answered that the lathe was their property.

From a proof, in which Mr George Loudon, one of the defenders, was examined for the pursuer, and the bankrupts for the defenders, it appeared that the lathe had been sold and delivered to the bankrupts on the date mentioned in the summons. It was found, however, that they had no use for it, and the place in which they had intended to put it was filled by a rivetting machine which they could not dispose of. They therefore, on 24th August, within sixty days of their bankruptcy, proposed to the defenders that they should take it back. To this the defenders, by letter of 26th August, agreed, on condition of getting 5 per cent. of the price, but the bankrupts objected to the condition, which was then departed from. The lathe was returned on 6 September, and the bankrupts were credited with its value in Loudon Brothers' books. Neither party had any idea at the time of the transaction of the insolvency of Reid & Lauder, and the transaction, it appeared, was carried through in perfect *bona fides*. The nature of the evidence is