tice. Indeed, he would not have properly discharged his duty if he had not done so. The trustee was found liable in expenses.

OUTER HOUSE.

(Before Lord Barcaple.)

GUNN *v.* BREMNER.

Process—Default in Reporting Proof. Held (per Lord Barcaple) that after an interlocutor circumducing the time for reporting a proof had become final, the report of the proof could not be received—the opposite party not consenting.

Counsel for Pursuer—Mr J. M. Duncan.
Counsel for Defender—Mr W. A. Brown.

In this case parties were appointed to report a joint commission by the third sederunt day. The pursuer failed to lodge his proof by this date, and after the case had been several times on the roll, and dropped with the view of enabling the pursuer to proceed in the matter, the case was put to the roll by the defender, and, on his motion, decree of circumduction of the period for reporting the proof was pronounced by the Lord Ordinary. After expiry of the reclaiming days, within which a note might be boxed to the Inner House for reponement, the case was put to the roll by the pursuer, and the Lord Ordinary was moved to allow him to lodge proof which he had led in the cause. It was maintained for the pursuer that the interlocutor pronouncing circumduction of the period of reporting had been pronounced *per incuriam;* that the notice of motion sent to the agent, upon which it followed, was a notice of a motion to circumduce the term of proof; and that until the terms of the interlocutor were read by the clerk, his impression was that no other order had been taken. The defender refused to give his consent to the proof being received, and, the Lord Ordinary holding that he had no power to do otherwise, refused a motion for the pursuer, asking leave to lodge the proof within a week.

(Before Lord Kinloch.)

ANDERSON *v.* GLASGOW AND SOUTH-WESTERN RAILWAY COMPANY.

Process—Default in Lodging Issue—Act of Sederunt, July 12, 1865. Held (per Lord Kinloch) that an issue not having been lodged within the time appointed, it could not be received even of consent.

Counsel for Pursuer—Mr J. T. Anderson.
Counsel for Defender—Mr Donald Mackenzie.

The 12th section of the recent Act of Sederunt, July 12, 1865, enacts that all appointments for the lodging or adjustment of issues shall be peremptory. This case was on the motion roll of Thursday, for the purpose of moving his Lordship either to receive the pursuer's issue or to prorogate the time for lodging it. Although this had how expired, it had not done so at the date when the case was enrolled for prorogation, and both parties were willing to consent to the prorogation asked, or to the issues being lodged. But notwithstanding section 4 of the Court of Session Act (1850), which allows prorogation of the "time for lodging any paper by written consent of parties," his Lordship refused the motion, holding that the terms of the recent Act of Sederunt, were imperative.

Tuesday, Dec. 5.

(Before Lord Barcaple.)

MITCHELL *v.* BRAND AND DEAN.

Arbitration — Decreet-Arbitral — Reduction. Held (per Lord Barcaple) that an arbiter had not disposed of the subject-matter submitted to him, and had irregularly issued decrees-arbitral disposing of the claims of two of the parties without disposing of the claim of a third — Decrees therefore reduced.

Counsel for Pursuer—The Solicitor-General and Mr Burnet. Agent—Mr John Thomson, S.S.C.

Counsel for the Defender Brand—Mr Patton and Mr W. M. Thomson. Agent—Mr Alex. Morrison, S.S.C.

Counsel for the Defender Dean—Mr Adam. Agent—Mr J. C. Baxter, S.S.C.

The pursuer and defenders, and the late John Brebner, under the firm of Mitchell, Brebner, & Company, entered into a contract in 1855 with the Inverness and Aberdeen Junction Railway Company for the formation of a portion of their line of railway. The partners agreed among themselves that the work should be divided into four sections, of which each partner should execute one. The work was performed under this arrangement, the pursuer executing not only his own section but also, by arrangement, that of Mr Brebner, who died shortly after the contract was entered into. After the work was completed, the parties differed as to the true meaning of an agreement which they had made as to the payment of the expense of extra works. They accordingly entered into a submission to Mr Alexander Gibb, C.E., Aberdeen, and he issued an award in 1860, in which he decided what was the meaning of the agreement. After this they still differed as to the division of a sum of upwards of £5000, which remained over after dividing the greater part of the contract price which had been received from the railway company. The difference arose in consequence of disputes as to claims advanced by each partner for extra works. A second submission was accordingly entered into to Mr Gibb for the purpose of fixing the amounts of these claims. This submission fell by lapse of time, and in 1863 a third submission was entered into. Under it Mr Gibb issued one decreet-arbitral awarding a certain portion of the balance to the defender Brand, and another awarding a certain portion to the defender Dean. No decreet-arbitral was issued in favour of the pursuer, because, as the defenders explained, he had never called on the arbiter to pronounce such a decree. There had been a draft decreet-arbitral, in which a sum was proposed to be found due to all the parties; but this draft was admittedly never extended or executed.

The pursuer brought a reduction of the decrees pronounced in favour of the two defenders; and after a debate, the Lord Ordinary has pronounced an interlocutor, in which he "finds that the decreets-arbitral sought to be reduced are inconsistent with the terms of the submission and *ultra vires* of the arbiter, and ought to be set aside in respect that the arbiter has not disposed of the subject-matter referred to him, in so far as he has not by said decreets-arbitral, or by any previous award or finding in the submission, substantially fixed and determined the extent and amount of the claims of the parties to the submission respectively as individuals, and not as partners, for their shares of the company assets against the balance of money received by Messrs Mitchell, Brebner, & Company, from the Inverness and Aberdeen Junction Railway Company; and also in so far as the said decreets-arbitral only dispose of the interest of the defenders respectively in the said balance of money, while the arbiter has not pronounced any judgment upon the interests of the pursuer therein." His Lordship therefore reduces the said decreets-arbitral, and finds the defenders liable in expenses.

A note is appended to the interlocutor, from which we make the following extracts:—"Reduction of the decreets-arbitral is sought for on various grounds, some of which the Lord Ordinary thinks are not well founded. But he is of opinion that the arbiter has committed two fatal errors in the manner in which he has professed to give forth his award. It may be that these errors arose from ignorance as to the proper forms of procedure; but the Lord Ordinary is of opinion that the first of them, at least, essentially affects the justice of the case, as well as the validity of the alleged decrees.

"The pursuer and the two defenders are the surviving partners of Messrs Mitchell, Brebner, & Co.

The pursuer, in addition to his own interest, represents that of Mr Brebner, a deceased partner. The partners are thus entitled to the free balance of the assets of the company in the proportion of two shares to the pursuer and one share to each of the defenders. Each of the three parties had claims against the company and its assets as individuals for work performed by them respectively and otherwise. Having differed as to these claims, they entered into the submission which is the subject of this action for the purpose of having them adjusted. Some relative points had been previously adjusted between them by the same arbiter, and another submission to determine the amount of their respective claims had accidentally fallen.

"The submission now entered into sets forth that the parties differ as to the division of the balance of money received from the Inverness and Aberdeen Junction Railway Company, which constitutes the remaining assets of Mitchell, Brebner, & Company. They refer to the arbiter their differences as to the division of the remainder of the foresaid balance of money, with power to him to hear us thereon, and finally to decide the said differences, and with special power to the said Alexander Gibb to receive all claims which may be given in to him against the said balance of money, whether in the shape of claims for extra work on the said railway by each or any of us, or in the shape of debts due by the said firm of Mitchell, Brebner, & Co., or in any other shape or upon any ground whatever, with power to the said arbiter to hear us thereon; to take all manner of probation which he may consider necessary; and, finally, to fix and determine the extent and amount of all such claims; and whatever the said arbiter shall fix or determine in the premises by any final award to be pronounced by him, whether formal or not, we bind and oblige ourselves, and our respective heirs, executors, and successors, to give full effect to, in the division of the remainder of the foresaid balance of money received from the said railway company, and to abide by, implement, and fulfil the same to each other in good faith."

"There was no difference between the parties as to their respective shares in the free assets of the company when the amount of these should be ascertained. Their differences had reference entirely to claims upon these assets before they could fall to be divided. The pursuer accordingly alleges that there was no power given to the arbiter in regard to the ultimate division of the company funds; and on that ground he maintains that the arbiter has gone *ultra fines compromissi* in so far as he has proceeded to divide the funds of the company. The terms of the submission are not quite clear or consistent on this point, but the Lord Ordinary does not think that it would have been a great objection to the decrees that they did not stop short on ascertaining the amount of the individual claims, but proceeded also to divide the remaining balance of the assets after deducting these claims among the partners according to their respective shares. He rather thinks that this was within the power of the arbiter, and it would have been a merely formal proceeding.

"The important objection to the proceeding of the arbiter in this matter is that their individual claims being the real matter in dispute between the parties, he has so framed his award (assuming him to have pronounced an award at all) that it is impossible to discover what he holds to be the amounts of these individual claims. He has only fixed *in cumulo* the amount which each partner is to receive of the assets, on account both of his individual claims and his share of the balance. The parties are thus left ignorant as to what judgment the arbiter has formed upon the only point on which they differed and required his decision. The Lord Ordinary is of opinion that he was expressly required by the submission to fix and determine the extent and amount of the individual claims, and that not having done so upon the face of his award, it cannot be sustained.

"There is another objection of a more formal kind, but which the Lord Ordinary has also felt himself bound to sustain. It is stated (Cond. XV.) that the arbiter issued to the parties a draft of the decreet-arbitral which he proposes to pronounce. In that document he proposes to find the parties each entitled to a *cumulo* proportion of the entire assets. It is not alleged that any award in terms of that draft, and dealing with the interests of the whole three parties as it did, was ever signed by the arbiter; but he subsequently issued at different times the two decrees under reduction in favour of the two defenders. By these he found each of them entitled to the sum which by the draft-award he had proposed to give them. But each decree deals only with the interests of the party in whose favour it is conceived, and neither of them takes any account of the interest of the pursuer. It is said that it necessarily follows that the pursuer is entitled to the whole balance after payment of what has thus been awarded to the other parties. It was only after both the existing decrees were issued that this inference could be drawn, and the argument would not have applied to the first decree while it stood alone. But the Lord Ordinary is not inclined to think that it is competent for the arbiter to pronounce a final decree, which leaves his award upon an important part of the case to stand upon mere inference. The defenders must maintain that the submission is exhausted, except to the effect of still giving a formal decree in favour of the pursuer, and they can only do so by holding that there is no complete award upon the whole subject-matter of the reference, while no deliverance has been made upon the claims of the pursuer."

Tuesday, Dec. 12.

HEARING BEFORE THE WHOLE COURT.

GORDON *v.* GORDON'S TRUSTEES.

Trust—Entail. Effect of direction in a trust-deed to purchase lands and execute a deed of entail thereof in favour of a person and his heirs whatsoever.

Counsel for the Pursuer—The Solicitor-General, Mr Gifford, and Mr Crawford. Agent—Mr Peacock, S.S.C.

Counsel for the Defenders—Mr Patton, Mr Clark, and Mr Lee. Agent—Mr Gentle, W.S.

This is a question between Mr Gordon of Cluny and the trustees of his father, the late Colonel Gordon, and it arises out of the two following clauses in a disposition and deed of trust-settlement, executed by Colonel Gordon on the 28th of May 1853.

The third purpose of that deed is expressed as follows:—"After the said trustees shall have completed a title in their persons to the whole lands and estates belonging to me in Scotland, I hereby direct and appoint them to execute a deed or deeds of strict entail, in terms of the Act of Parliament of Scotland passed in the year 1865, intituled 'Act concerning tailzies,' of the whole lands and estates situated in Scotland, now belonging, or which shall belong to me at the time of my death (with the exceptions of the estates of South Uist, Benbecula, and Barra, and other lands now belonging to me in the county of Inverness, hereafter specially destined), and that to and in favour of my eldest son, the said John Gordon, now Captain John Gordon, and his heirs whatsoever: whom failing, to and in favour of my youngest son, the said Charles Gordon, and his heirs whatsoever: whom failing, to any persons to be named in any deed of nomination to be afterwards executed by me at any time of my life; the eldest heir-female, and the descendants of her body, excluding heirs portioners, and succeeding always without division through the whole course of the female succession, and failing such nomination, or of the persons so to be named, and their heirs whatsoever, then to my own heirs whatsoever and their assignees," &c., &c. The sixth purpose of the trust-deed disposes of the