Appellants' Authorities.—(*Competency.*)—Galbraith, November 15, 1626, (4430.); Blantyre, Dec. 8. 1626, (4813.); Brog's Heir, March 23. 1639, (4816.); Anderson, July 1747, (4779.); 1. Ersk. 2. 19.; Hist. Law Tracts, 252. *Respondent's Authorities.*—(*Interest.*)—Bodilly *v.* Bellamy (2. Burr. 1094.); Campbell, Feb. 15. 1809, (F. C.)

A. MUNDELL—A. GORDON,—Solicitors.

(Ap. Ca. No. 69.)

June 16. 1824.

Trustees of Sir JOHN L. JOHNSTONE, Appellants.—*Warren*—*Fullerton.* WILLIAM ELLIOT, Respondent.—*Baird.*

No. 54.

Process.—Circumstances under which it was held, (affirming the judgment of the Court of Session), 1. That a party who had been employed to erect buildings, and had rendered an account, and raised a summons for a certain sum as due to him, was entitled to amend his summons, so as to conclude for a larger sum reported by valuators to be due to him; and, 2. That an amendment of the libel, which was lodged after the report of the valuators, had been acquiesced in by the defender, and therefore could not be objected to as incompetent.

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2D DIVISION. Lord Pitmilly.

IN 1808, Sir John Lowther Johnstone employed William Elliot, architect in Kelso, to make certain alterations and additions to his mansion-house at Westerhall. With this view, Elliot furnished to Sir John, plans, specifications, and estimates, but no formal contract was entered into. Besides the operations upon the mansion-house, Elliot was subsequently employed to erect a new kitchen, an ice-house, farm-offices, and many other pieces of work which had not been originally contemplated. In the course of executing the work, a dispute having taken place between them, Elliot, on the 24th July 1810, wrote to Sir John, that 'he had no objection that, instead of the sums charged in my 'estimates, the whole be submitted to the measurement and arbi-'tration of two men of skill, mutually chosen, to settle between us 'for the whole concern from the beginning.' To this Sir John answered on the 27th, that 'I certainly approve highly of your 'proposal for us to have two men mutually chosen, with power, 'if they disagree, to call in a third, and settle the whole concern 'from the beginning.' The operations were continued, but frequent complaints were made by Elliot, that he was not supplied with money to enable him to carry them on. In March 1821, Mr Ure, writer to the signet, Sir John's agent, wrote to Elliot, that it was proposed to grant him a bond of L.1000;

June 22. 1824. and at the same time he stated, that 'I beg you will send me a 'state of your accounts with Sir John Johnstone from the com-'mencement up to the present time, together with copies of any 'agreements you may have had with Sir John on the subject of 'the different buildings at Westerhall.' Elliot accordingly, on the 21st, transmitted an account, shewing that the total amount was L.2633. 4s. 8d., and that, after deducting partial payments, there was a balance in his favour of L.1383. 4s. 8d. independent of a claim which he had for foreign timber. This account, he afterwards alleged, was intended as a mere sketch, to shew that at least the full sum for which it was proposed to grant the bond was owing to him. The bond was accordingly granted, and the works were finished soon thereafter. Sir John died in the course of the year 1812, having appointed the appellants his trustees; and Elliot being unable to get a settlement, raised an action, in which he concluded, that the trustees should be ordained 'to name a sworn measurer to examine and measure 'the buildings and other works executed by the pursuer for the 'said Sir John Lowther Johnstone, and to fix a certain short 'day for such person so to be named by them to meet the pur-'suer, and a measurer to be named by him, to measure the 'whole buildings and other works executed by the pursuer for 'the said deceased Sir John Lowther Johnstone, that the price 'or value thereof may be ascertained and paid to the pursuer,' &c. 'and to make payment to the pursuer of the full price or value 'of said buildings, and other works executed by him as aforesaid, 'as the same shall be ascertained by the measurement of the 'several parts thereof,' &c.; and 'that, if the said defenders shall 'delay or refuse to name a measurer, or to fix a day for the 'measurement to take place as aforesaid, or shall refuse to pay 'the price or value of said works, after the same shall be mea-'sured, and the value thereof ascertained after the measurement 'is completed, the said defenders ought and should be decerned 'and ordained, by decreet foresaid, to make payment to the 'pursuer of the sum of L.3300 sterling,' &c. under deduction of partial payments.

In defence the trustees pleaded, that Elliot was bound to abide by the account which he had rendered, shewing that the total cost, instead of being L.3300, was only L.2633, and that the balance due to him was L.1383, from which there fell to be deducted the bond for L.1000, and certain other partial payments, leaving an ultimate balance of only L.83; and that he

was not entitled to have the value ascertained by a remit to tradesmen. June 22. 1824.

The Lord Ordinary, on advising the case, issued the following note:—'The Lord Ordinary has read the correspondence and whole process, and is of opinion, that a remit must be made to tradesmen to measure and calculate the price of the buildings executed at Westerhall. The remit may be before answer, but the Lord Ordinary thinks, on perusing the whole of the letters, that the pursuer is not bound by the statement of accounts contained in the letter of 21st March 1811. The pursuer had, it appears, given in estimates, but finding Sir John not quite satisfied, he offered, in the letter of 24th July 1810, to submit the work to the measurement and arbitration of neutral persons. This was agreed to by Sir John. The pursuer afterwards, in his letter of 21st March 1811, to Mr Ure, sent an account of what would have been due according to the estimates, (and he could make it out in no other way); but these estimates had been rejected, and a different mode of settlement agreed to. Sir John could not have been compelled by the pursuer to settle by estimates, neither can the pursuer be bound by them. The remit, however, may be made before answer, and the cause may be enrolled for the Lord Ordinary's next hour, in order that the terms of the remit may be adjusted, and the measurers named.' Accordingly, his Lordship afterwards, before answer, remitted to an architect and a sworn measurer, 'to repair to Westerhall, and inspect and measure the work performed there by the pursuer for the late Sir John Lowther Johnstone, Baronet, and to put a value thereon, according to the price of similar works at the period they were executed in that part of the country, and to report.' Against this remit the trustees reclaimed to the Court, but their Lordships adhered. A report was then made by the valuators, that the total charge for the work was L.3913. On considering this report, with objections, the Lord Ordinary issued a note, that it appeared to him that the libel was not sufficiently broad to comprehend two claims made by Elliot,—one of L.114. 12s. 1d. for plans, travelling expenses, and other charges, and another of L.90. 3s. 3d. for foreign wood. Elliot then lodged an amendment of the libel, including these two sums; and after the conclusion for L.3300, he proposed to insert this alternative, 'or such other sum, less or more, as shall be found to be due to the pursuer, including the above-mentioned two sums of L.90. 3s. 3d. and L.114. 12s. 1d.'

June 22. 1824. The Lord Ordinary then pronounced an interlocutor, by which he 'allowed the amendment of the libel now offered on 'the part of the pursuer to be received, and allowed the same to 'be seen till next calling.' No objections were offered, and Elliot having discovered that the claim for L.90. 3s. 3d. was already embraced under the libel, lodged a minute, proposing to withdraw it from the amendment, and craving decree for the sum reported by the valuators, together with the account of L.114. 12s. 1d., under deduction of partial payments amounting to L.2550. This minute was allowed to be seen and answered; but no answers having been lodged, the Lord Ordinary decerned for the above sums, under deduction of the partial payments. Against this judgment the trustees lodged a representation, on advising which his Lordship found, 'that after 'the letters of 24th and 27th July 1810 had been sent and 'received, the pursuer could not have compelled Sir John John-'stone to settle with him according to the estimates which had 'been given in, or on any other principle than that Sir John 'should pay for the actual value of the work done, according 'to the measurement and report of skilful tradesmen: That 'the pursuer's letter to Mr Ure of the 21st of March 1811 could 'not alter the rights of parties as fixed by the previous cor-'respondence above referred to: That no particular objec-'tions have been stated to the report of Messrs Laing and 'Johnstone, from which report it appears accordingly, that the 'representers are only required to pay the actual value of the 'work done, and that a great part of the work besides is not 'included in the estimates;' and therefore refused the represen-tation.

The trustees then presented a petition to the Court, and hitherto no objection had been made to the amendment; but when the case came on for advising, it was objected to as incompetent. The Court adhered, so far as the interlocutor decerned 'for payment to the extent of the sum concluded for in the 'original libel, being L.3300 sterling, under deduction of the 'partial payments;' and 'remitted to the Lord Ordinary to hear 'parties farther as to the respondent's claim under the amend-'ment of the libel, and do as he shall see cause.' The case having returned to the Lord Ordinary, his Lordship pronounced this judgment:—'Finds, that the amendment of the libel, in so 'far as now insisted in by the respondent, relates to a sum of 'L.114. 12s. 1d. as the amount of an account for plans, travel-'ling expenses, and other charges: finds, that no particular

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'objection was stated to this account, or the charges in it, by the 'petitioners; but that the Lord Ordinary having, in his note of 'the 21st December 1816, suggested a doubt whether this ac- 'count, and another small account not now insisted in, were 'comprehended under the conclusions of the original libel, the 'respondent put in an amendment of the libel, concluding for 'payment of these two separate accounts, neither of which had 'any connexion with the work reported on by Messrs Laing and 'Johnstone,* which had previously formed the only subject of 'litigation between the parties: Finds, that the amendment of the 'libel was allowed to be seen by interlocutor of the 22d of 'January 1817; but that the objection now offered to it by the 'petitioners, viz. that it was not competent to give in the amend- 'ment of the libel at the late period of the cause in which the 'amendment was put in, was not stated to the Lord Ordinary, 'either at Bar, or in the representations which followed after the 'amendment was allowed to be seen, nor is any such objection 'stated in the petition to the Court: And in respect it appears 'to the Lord Ordinary, that it was competent to the respondent, 'against whom, as pursuer of the action, the objection, if 'competent and omitted, would not have applied to bring forward 'this new claim, after parties had joined issue on the other 'matters; and also, that the petitioners, who were allowed to 'see the amendment, but did not at that time offer any objection 'in point of form to its being received, cannot now be permitted 'to urge this formal objection—refuses the desire of the petition 'as to the respondent's claim under the amendment of the libel, 'and adheres to the interlocutor reclaimed against.' The trustees then reclaimed to the Court; but their Lordships, on advising the petition with answers, on the 7th June 1821, adhered.

Lord Craigie was of opinion, that under the first conclusion an amendment was not necessary; but the other Judges dissented; and all agreed that, except for the conduct of the trustees, which barred them from objecting to it, the amendment was incompetent, seeing that the report of the valuators was equivalent to a proof.*

The trustees then appealed to the House of Lords, and maintained,—

1. That Elliot was bound to abide by the account which he had originally rendered, shewing that the total charge was only

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* 1. Shaw and Ballantine, No. 63.

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L.2633, and was not entitled to resort to the report of the valuators, which stated that the total charge was L.3913.

2. That at all events the amount of that charge must be limited to the sum of L.3300, which he himself had specified in his summons as the utmost amount of his claim. And,

3. That as the report of the valuators was equivalent to a proof, and so litiscontestation had taken place, it was not competent for Elliot to amend his libel at that stage of the process, so as to make it coincide with the amount reported by the valuators: that although the Lord Ordinary had allowed the amendment to be received, yet it had never been admitted as part of the libel; and therefore they could not be barred from objecting to its being admitted at any time prior to this being actually done.

On the other hand, Elliot contended,—

1. That as the account which he rendered was intended merely as a vidimus, to shew that at least more than L.1000 was due to him, he could not be foreclosed by it.

2. That although it was true he had underrated the value of the work which he had performed in his summons, yet he had an alternative conclusion for payment of such sum as should be ascertained by the report of valuators, (to which mode of proof Sir John Lowther Johnstone had expressly agreed), and therefore he could not be barred from getting what was justly due to him by having made a mistake as to the value of the work. And,

3. That the summons was sufficiently broad without an amendment; but at all events, as a remit to valuators could not be considered as equivalent to a proof, and so litiscontestation had not taken place, the amendment was quite competent; but supposing that it were not so, the trustees must be held to have agreed to its being received, because they allowed the interlocutor permitting it to be received to become final, and stated no objection till after judgment on the merits had been pronounced by the Lord Ordinary, and the Court were about to adhere to that interlocutor.

The House of Lords 'ordered and adjudged, that the appeal 'be dismissed, and the interlocutors complained of affirmed.'

Appellants' Authorities.—4. Stair, 39. 2; 4. Ersk. 1. 69.

Respondent's Authorities.—Douglas, Dec. 23. 1693, (12,148.); Meldrum, July 28. 1716, (12,152.); Kinniburgh *v.* Earl of Morton, June 13. 1820, (not reported).

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(Ap. Ca. No. 77.)