Tuesday, July 2.

HILTON *v.* WALKER.

(*Ante* Vol. iii., p. 283.)

Arbitration—Judicial Referee—Award—Expenses—Auditor. Held that a judicial referee, in making an award of expenses, is not bound to take the advice of the auditor or any one else as to the amount. Opinion (*per* Lord President), that if the referee committed a great injustice in the exercise of power in this respect, redress would be had under the head of corruption.

This was an action by a landlord against a tenant for miscropping. The summons concluded for £135 damages. The defence was—(1) Denial of miscropping; (2) Counter claim for non-implement of conditions of lease. The parties having agreed to a reference, Robert Smith, farmer, was appointed judicial referee, with power to award expenses. The referee took proof, and issued notes of what he proposed to find, which was, that there had been miscropping to a certain extent, that otherwise the landlord's claim should be disallowed, and that each party should pay his own expenses. The parties acquiesced. The arbiter then adhered to the proposed findings on the merits, assessing the damages at £20, but finding the landlord liable in £50 of modified expenses, on the ground that the action ought to have been brought in the Sheriff-court, and not in the Court of Session. Objections were lodged for the landlord, which objections the Lord Ordinary repelled. The landlord averring that the sum of expenses awarded by the referee was more than the full taxed amount, the Court remitted to the referee to reconsider his award on the subject of expenses, with power to alter his finding. Parties were heard before the referee, the landlord asking that the account of expenses should be taxed. The referee adhered to his former award. The landlord asked the Court to re-remit to the referee.

YOUNG and GIFFORD, for him, urgued:—

The referee may undoubtedly award expenses, and may modify them, but he cannot award expenses which never were incurred. In modifying the expenses, the question, what expenses have been duly incurred, cannot be determined by him without evidence. As to the merits of the case, he might judge, as a man of skill, without witnesses, but in the matter of expenses, as to which he is not skilled, he must take evidence. A farmer is not a "man of skill" as regards expenses in the Court of Session. If the referee is told that the sum of expenses claimed is too great, and that that will be found to be the case on a remit to the auditor, he is bound to take the proper means of informing himself. He may not, perhaps, be compelled to take the evidence of the auditor as conclusive on the question of expenses, and may, perhaps, allow or disallow differently. But when he determines on expenses without taking the evidence of the auditor, that is just as if he determines a question on the merits, as to which he had no skill, without evidence. The pursuer is willing to deal with the question on the footing that he is found liable for the full expenses. Well, the proper mode of ascertaining the full amount is by a remit to the auditor. In regard to expenses in this Court, the proper rule, in the absence of authority, is that in a judicial reference, because still remaining here, the auditor is the proper party to determine the question of expenses, subject to review in this Court. After report, the referee may award or modify. There may, perhaps, be room to distinguish as to expenses before the referee, but even there, he must take some legitimate mode of informing himself in a matter in which he has no skill.

PATTISON and M'KIE for Respondent.

LORD CURRIEHILL.—This is a question as to the effect of a finding by a judicial referee. The case was before us formerly, when we remitted back to him, to reconsider his award. The amount of the sum in dispute is not great, but, in my view of the case, it involves a principle of very considerable importance.

The parties, instead of going on with the case, entered into a judicial reference, with express power to the referee to dispose of the matter of expenses. That probably would have been included, but it was distinctly expressed. The case went before the referee, and he disposed of the matter in dispute; and, as to the matter of expenses, he found the pursuer liable to the defender in £50 of modified expenses. An objection was taken to that part of the award on this ground, that it had been pronounced without the referee having heard parties, and not only so, but that it was contrary to the opinion which he had indicated in a previous note, and which led the parties to believe that he was to dispose of the question of expenses differently. When the matter came before the Court, we thought the referee had acted irregularly in pronouncing such an award without having heard parties, and we remitted back to him, on 5th March, to reconsider the question of expenses, especially as to the amount; to hear parties, with power to alter his report in regard to expenses; and to report of new. The matter went back to the referee, and on 17th April he ordained parties to be farther heard. And then, on 5th June, he pronounced another interlocutor, in which he states that he had reconsidered the question of expenses, and had heard parties thereon—and it was admitted that parties were heard—and, having carefully considered the whole process, adhered to his former report. The question again comes before us on an objection by the pursuer, against whom the award has been pronounced, not only that the expenses awarded were too great, but that the referee had not taken the usual course of having them audited; and, on that ground, he asked the Court to interfere. The question before us is, Is that a competent motion? And the opinion which I have formed is, that the motion is not competent. The ground of that opinion is, that although this reference is a judicial reference, yet, in this respect, it is the same as if it had been a voluntary extra-judicial submission. There are, no doubt, differences in some respects between a judicial reference and an extra-judicial arbitration. These differences were well pointed out in the case of *Mackenzie*, 19th December 1840 (3 D., 318), by all the judges, and especially by Lord Moncrieff. I think that the law on this matter comes to this, that when there is an irregularity committed by the judicial referee, that irregularity may be rectified at any time before his award is judicially affirmed in this court. It is competent for the Court to remit to him to re-consider his opinion; and that course was followed here. We thought the referee had committed that irregularity of pronouncing an award without hearing parties, and accordingly we remitted to him to re-consider the question. But, with that exception, I hold that the powers of a judicial referee,

under a reference of this kind, are as great, and can as little be interfered with, as the powers of an arbiter under a voluntary arbitration. I therefore think that the referee having now done his duty by hearing parties, we cannot review the award he has pronounced merely on the ground that it was erroneous. The error was said to be that he did not take the asistance of any auditor. I think it was competent for him to decide the matter without taking such assistance. If he finds himself in a position to give an award of expenses, it is not necessary for him to remit either to the Court or to any other person. This Court could do it. They generally take assistance; but they might, if they pleased, award a slump sum of expenses. The Court cannot, on the ground stated, take upon itself to upset the award of the arbiter.

Lord Deas—I am of the same opinion. The judicial reference in this case was a reference of the whole process, with power to award expenses. It is not disputed that the referee was to have power to dispose both of the expenses of process and of the reference before himself. And the objection is not that he had not power to award expenses against the party whom he found in the wrong, but that he did not take the proper means of ascertaining the amount. There was an argument stated, that where there was a judicial reference of a cause, and the whole expenses, it still belonged to the Court to deal with the expenses, and to remit to the auditor, and dispose of objections to his report. There is no authority for that. The idea is quite incongruous. The whole matter goes to the referee. Therefore the objection resolves itself into this, that the referee did not take the assistance of the auditor in disposing of the question of expenses incurred by the parties. I am of the opinion that has been expressed, that there was no necessity for his taking the assistance of the auditor in this matter. He was to judge of that. He need not have given effect to the report of the auditor if he had remitted to him. If the plea stated here could have been carried the length, that in respect of what he had done, or had failed to do, he was guilty of corruption, that might have been a ground for recalling the reference. I give no opinion on that. I see no reason why it should not have been. The difference between a judicial reference and an extra-judicial submission is that in a judicial reference you may come to this Court on points arising in the course of the reference. That was the case here, and we remitted to the referee to hear parties. He has now heard parties. He thinks the sum he gave was not too large a sum under the detailed account before him. There is no averment of any wilful wrong on his part; no averment of any thing that under the statute would constitute corruption. There is no motion before us to recal the reference. The motion is to remit to the referee. We have no power to do that. Supposing the referee had remitted to any other person, as, for example, to the clerk to the reference, to make a report on the expenses, there was nothing to prevent him from giving effect to that. We must presume that he did take the assistance of the clerk to the reference, who was the sheriff-clerk, a person perfectly well qualified to decide. He thinks that £50 is a proper sum. There is nothing on the face of that to find fault with. it might be perfectly right and just, and far better not to put the parties to the expense of a remit to the auditor. It is contrary to all settled procedure that we should interfere. We cannot order the referee to take one report more than another. We may order him to hear parties, but we cannot make him take the assistance of the auditor more than of counsel, or any one else. What he has done was within his power.

Lord Ardmillan—This is a question of great importance, and I have had some difficulty in coming to a conclusion on the matter. I concur in the general principle announced by Lord Curriehill and Lord Deas, that where we are called on to deal with an award by a judicial referee we cannot touch it, because we think the referee might have been better advised. The aspect of difficulty which the case presents is this:—Is it competent for a judicial referee practically to audit the account of expenses himself? Here the referee does not remit to an auditor. He awards a sum which he calls modified expenses. The pursuer says that that is more than the actual expenses of the whole suit, and that this would be seen by the auditor. That is startling; but after consideration I have come to the conclusion that where a judicial referee has, as here, a distinct power to deal with the question of expenses, and deals with it as the referee has done, we cannot touch his award. This was a reference of an existing cause, with expenses at that date. It will not do for us to refuse to recognise his award of expenses because he audits the account himself, and is so satisfied with the justness of it that he does not get it taxed. Though it is to be regretted that the referee did not take some means of ascertaining the proper amount of the account, the Court must not interfere.

Lord President—I have some difficulty in this case, but I have come to agree with the view stated by your Lordships. I thought that making a judicial referee the complete master of the question of expenses—so that he might give any sum he thought fit in name of expenses, however much it might exceed the actual amount incurred—was a very dangerous power to give to any man. But I am satisfied that the true limit of that power is, that if any great injustice was done by the referee, redress would be had on the ground of corruption.

Agent for Pursuer—W. S. Stuart, S.S.C.
Agent for Defender—J. Somerville, S.S.C.

Thursday, July 4.

ASHBURY RAILWAY CARRIAGE CO. *v.* NORTH BRITISH RAILWAY CO.

Issues—Adjustment—Report to Inner-House. Held competent for a Lord Ordinary to report a case on issues verbally to the Inner House at the first meeting for adjustment.

At the first meeting for the adjustment of issues in this case, the parties not agreeing on the terms of the issue, the Lord Ordinary (Jerviswoode), on the motion of the pursuers, reported the case verbally to the Court. The object of the pursuers was to get the issue adjusted so as to go to trial at the next jury sittings, this being the last day for giving notice of trial. The defenders objected, on the ground that by the invariable practice of the last seventeen years the statute (13 and 14 Vict., c. 36, § 38) had been so construed that a case could only be reported on issues after a second meeting for adjustment had been held. A first meeting was appointed. That was for the purpose of hearing the views of parties and of the Lord Ordinary. If parties did not agree, then a second meeting was