[*9th March*, 1843.]

MURDO MACKENZIE, ESQ., of Dundonell, *Appellant.*

ANDREW GIRVAN, Accountant in Edinburgh, *Respondent.*

Arbitration — Judicial Reference. — An award under a judicial reference, equally with a decree under an ordinary submission, is challengeable only upon the grounds allowed by the 25th article of the Act of Regulations, 1695, viz. corruption — bribery — or falsehood.

Ibid — Ibid. — The notes of a judicial referee being referred to in his award, are to be read as part of the award.

GIRVAN, the respondent, exposed lands to sale, under articles of roup, which provided, that in case any difference should arise between the parties, in regard to the import of the articles, the same was thereby submitted to the determination of the Dean of the Faculty of Advocates.

The appellant became the purchaser, but subsequently differed with the respondent in regard to the construction of one of the articles of roup, which was in these terms,—"The entry of the "purchaser shall be at Whitsunday, 1834, and he shall have "right to the year's rents, which are payable, the greater part, "at Martinmas, 1834; but, in consideration thereof, the price "shall bear interest, at the rate of four per cent, from Martin-"mas, 1833, the same being payable at Whitsunday, 1834, with "one-fifth part more of penalty in case of failure."

The entry of the tenants in the lands was a Whitsunday entry, a year's rent being payable at the Martinmas following.

The appellant insisted, that under a correct construction of the articles of roup he was not bound to pay interest on his purchase money until Whitsunday, 1834, or, at all events, that he was entitled to so much of the rent which had been paid at Martin-

mas, 1833, as corresponded to the period between that term and Whitsunday, 1834, and that if this were not so, the articles had been falsely and fraudulently framed, with the view to impose on purchasers a belief that they would receive the rents for crop 1834, whereas, in truth, the respondent had, at Martinmas, 1833, drawn part of the rents for crop 1834; that payable at Martinmas, 1834, being, in truth, for part of crop 1835.

These questions were referred to the decision of the Dean of the Faculty of Advocates. The Dean issued notes expressing his opinion on the construction of the article in question, as adverse to the claim made by the appellant, and his readiness to sign a decree arbitral; but stating, that he would defer doing so, that the appellant might have an opportunity of Reducing the articles of roup, on the ground of fraud and misrepresentation alleged by him.

The appellant availed himself of the opportunity thus given, and brought an action against the respondent, which set forth that the articles of roup had been falsely and fraudulently framed, with a view to deceive purchasers into the belief, that at Martinmas, 1834, they would receive the rent for the crop of that year, as an equivalent for paying interest from Martinmas, 1833, whereas that rent had been paid to the exposer at Martinmas, 1833. The summons, therefore, concluded to have it declared, that the rents paid at Martinmas, 1833, were for crop 1834, and to have the articles of roup reduced, and the respondent decerned to pay to the appellant the rents which had been drawn by the respondent at Martinmas, 1833, or, otherwise, to give up the claim for interest on the purchase money.

After the record had been prepared in this action, and an issue adjusted for trial by jury, the counsel for the parties agreed to a judicial reference in these terms:—"Instead of proceeding to "have the said cause tried by a jury, the parties have agreed, "and now hereby judicially agree, to refer the said issue, and

" the whole conclusions of the action, to Richard M'Kenzie,
" Esq., writer to the signet, with power to him to hear parties
" thereon, to take all manner of probation he may consider
" necessary, or which would have been competent if the said
" issue had been tried by a jury, and thereafter to bring the said
" action to a conclusion; as also to determine all questions of
" expenses in the same manner, and as freely, in every respect,
" as if the same had been left to the determination of the Court.
" It was therefore craved that their Lordships would interpone
" their authority to this minute."

The judicial referee allowed the parties to lead evidence, and after the proof was concluded, issued notes of his opinion, in which occurred the following passages:—" The Dean of
" Faculty, to whom all questions 'regarding the import of
" 'these articles, or any matter connected with the sale and
" 'final completion of the bargain' was referred, appears to
" have been very decided in his opinion that there was no
" ambiguity in the articles of sale;" and again, " The arbiter
" holds himself to be bound by the opinion of the Dean of
" Faculty upon the articles of roup, and the arbiter may at
" the same time state, that although he might have felt some
" difficulty as to the construction of the original articles, he
" conceives, that the only construction to be put upon the
" additional articles, which, in so far as regarded the term of
" entry, superseded the original articles, is that contended for
" by the defender, (*respondent*,) and upon which he has obtained
" a favourable opinion from the Dean of Faculty."

After issuing these notes, the referee delivered the following award:—" In consequence of the foregoing minute of reference,
" and of the interlocutor of the Second Division of the Court,
" the referee has repeatedly considered the proceedings and
" productions in the process; and having subsequently heard the
" examination of witnesses for the parties in support of their

" respective pleas, and thereafter heard their counsel at full " length on the proof and on the whole cause; having issued full " notes of his opinion to the parties, and put it in their power " to be heard by their counsel relative to those notes; and " having now farther considered a protest and note for the pur- " suer, and advised the whole proceedings in the reference, and " had many meetings with the agents for the parties, the referee " finds that the pursuer has altogether failed to establish any " thing approaching to falsehood or fraud against the defender, " and therefore sustains the defences, assoilzies the defender " from the conclusions of the action, and finds him entitled to " expenses both in the proceedings before the Court and in the " reference, and approves of the auditor's report, whereby the " account of the defender's expenses is taxed to the sum of " L.453, 0s. 5d.; also finds the defender entitled to the expenses " of the present discussion, modifies the same to L.10, 10s.; " allows decree to go out and be extracted in name of " William Alexander, W.S., the defender's agent, for both " sums of expenses, and decerns."

On the 19th December, 1840, the respondent moved the Court to pronounce an interlocutor in conformity with the award. The appellant unsuccessfully opposed this motion on the grounds upon which he argued the appeal, but the Court refused to disturb the award, and pronounced an interlocutor in exact conformity with it, *mutatis mutandis*.

The appeal was taken against this interlocutor.

Mr Pemberton Leigh and Mr Gordon for the appellant.—I. The notes of the referee being specially referred to in his award, they form part of, and are to be read along with it, Keith *v.* Elstob, 3 *East*, 13.

II. It was the object of the parties by the reference, to obtain the opinion of the referee in regard to all the matters referred. The reference embraced, among other things, the construction of the articles of roup. But the award is confined to fraud and misrepresentation alone, and the notes issued by the referee shew, that on the question of construction the referee held himself to be bound by the opinion which the Dean of Faculty had delivered. The parties, therefore, had only the opinion of the Dean, not of the referee. It may be said, that the referee has in some sort expressed his own opinion on the construction, but it is evident, that so far as he formed such opinion, it was not the result of his own unbiassed judgment, but was influenced and directed by that given by the Dean. The parties had not then what they bargained for in the reference, the unfettered opinion of the referee. This is an objection sufficient for setting aside the award, upon the principles which were recognized in Sharpe *v.* Bickerdyke, 3 *Dow*, 102; Bailie *v.* Gas Light Company, 2 *Sh.* and *M'L.* 243; Heggie *v.* Stark, 3 *Sh.* and *D.* 488; Glennie *v.* M'Phail, 3 *S.* and *D.* 574; M'Pherson *v.* Ross, 9 *S.* and *D.* 797; Langmuir *v.* Sloan, 2 *D. B.* and *M.* 877; *Ersk.* IV. 3. 35, *note* 192. These authorities establish that reduction of decrees arbitral is not confined to the grounds specified in the act of regulations, 2d November, 1695, c. 25, but will be given where justice palpably has not been done, or has not been done in the way contemplated by the reference.

III. The Act of Regulations applies in terms only to "signed "submissions," but a judicial reference is not such. A submission, unless it expressly bind the heir, falls by the death of the party; whereas a judicial reference still subsists. Upon the decree under a submission, diligence can at once be done by the mere operation of registering the submission and decree; whereas no force can be given to an award under a judicial reference, but

by the decree of the Court. The counsel in the cause may have an implied mandate to sign the reference, and so to bind his client, but the matter is not thereby withdrawn from the control of the Court, otherwise the counsel would exceed his mandate, as it is to obtain the opinion of the Court alone that he holds his mandate. The finding of the referee, therefore, is no more than a judicial report on which the Court may exercise its judgment as to whether the conclusions it comes to have been properly arrived at, and this irrespective of the Act of Regulations; Glennie *v.* M'Phail, *ut supra*; Clyne's Trustees *v.* Gas Light Company, *ut supra*; Baxter *v.* M'Arthur, 14 *D. B.* and *M.* 549; Taylor *v.* Burns, 1 *D. B.* and *M.* 743.

Mr Rutherfurd and Mr Forbes were of counsel for the respondent.

The answer of the respondent to the case made by the appellant is so fully met in what fell from the Peers who delivered judgment, that it is not necessary to repeat it here. The authorities relied on were, act 1672, cap. 16; act 1693, cap. act of sederunt, April 29th, 1695, art. 25th; *Ersk.* IV. 3. 35; Morison *v.* Robertson, 1 *Wil.* and *Sh.* 143; Anderson *v.* Kinloch, 14 *D. B.* and *M.* 447; Alston *v.* Chappel, 2 *D. B.* and *M.* (*N. S.*) 248.

LORD BROUGHAM.—My Lords, if your Lordships should come to the same conclusion, as that to which I have arrived upon this case, you will have very little doubt upon either of the two main points that have been made; perhaps it is unnecessary, and my noble and learned friends near me take that view of it, to enter into the discussion of the very important point respecting the application of the 25th article of the Act of Sederunt 1695, which we are clearly of opinion has statutory force, and is as binding as a statute; power having been delegated to

the Court by the legislature to make the Act of Sederunt, and the act having afterwards been adopted by the legislature. With respect to that, perhaps it was not necessary to enter into that question; but I should be very unwilling to have it doubted, because it is a most important branch of the law; and my noble and learned friends near me, and myself have felt, from the moment that we rightly apprehended the merits of the argument, we really had no doubt about it, that the law is as it is contended for on the part of the respondent, that in an action to reduce a decreet-arbitral, or in an action to suspend a charge given upon a decreet-arbitral, the extrajudicial decreet-arbitral most undoubtedly is binding by the express terms of the Act, unless in the excepted cases.

Then, my Lords, I can see no difference between an award and a decreet-arbitral, that is to say, between that which takes place upon a voluntary or extrajudicial submission, and that which takes place upon a judicial reference. I can see no difference between the two, in point of principle; the only difference is in the modes of proceeding. In the one case, it is not necessary for the party in favour of whom the award is pronounced, to proceed at all, he waits till the other party against whom the award is pronounced, proceeds. I cannot draw any distinction between an award and a decreet-arbitral, they are convertible terms. In the case of an extrajudicial award, it is not necessary for the party in favour of whom it is made to proceed at all — it is for the other party against whom it is made to reduce it, or to suspend any charge given upon it — that is to say, any step taken for obtaining execution upon it. But in the other case, (and that is the only difference that I can perceive in the law,) where it is a judicial reference, something must be done by the party in favour of whom the award is made, in order to obtain the fruits of that award. And he applies to the Court to do what? To interpose its authority.

I think therefore, my Lords, that it would be one of the greatest departures from all principle, in the construction of that Act, a construction having been given in Scotland, totally different from the construction here given in England to a similar statute passed about the same time, the act of King William, if the award could be impreached. Ever since the passing of those nearly contemporaneous Acts, the Act of King William, and the Act of Sederunt, which has the force of a statute in Scotland, which is in the same reign, and nearly about the same time, the laws of the two countries may be said to have diverged. The laws being very different in point of language, as very often happens, different views have been taken by the Courts in applying and construing them, and accordingly in Scotland, with respect to what they call a voluntary submission, or an extrajudicial submission, they have taken a view most clearly different from the view taken by the English Courts. And why, I may ask, should they not have had the same difference in their view of a judicial submission? I see no reason for supposing that they should not. No authority has been cited at all sufficient to shake my opinion upon that. On the contrary, I should say, that the current of authority and the practice are consistent with the reason of the thing, and, therefore, I, for my own part, do really entertain no doubt upon it, and I should think it very unfortunate, if, in the discussion of this case, much more important than the value of the case twenty times over, this should be drawn into question. My noble and learned friends entertain no doubt whatever upon the subject.

Now, my Lords, the other point is with respect to the reference; but upon the whole, I really do not see any reason to quarrel with that reference. The first point will put an end to the case; but construing the additional article with reference to the first, I can see no reason for quarrelling with the judgment, I think that it has not miscarried, I think that it is right, and,

therefore, I now am prepared to move your Lordships upon these grounds, and there is no doubt upon the first point, that the interlocutor complained of be affirmed, and the appeal dismissed with costs.

Lord Cottenham. — My Lords, I am entirely of the same opinion with my noble and learned friend. Considering this case with reference to the distinction taken between a decreet-arbitral, and a minute of reference, if it were necessary to give an opinion upon that subject, I certainly should say that I have heard nothing which raised any reason to suppose, that the courts in Scotland have made any distinction between the one proceeding and the other for this purpose, as to the right of the Court to review the proceedings of the referee. But it appears to me, that the facts of this case having been entered into, it is not necessary to give any farther opinion upon that subject; it must be more satisfactory to the party, that the opinion of any Court, and particularly of this House, should be exercised upon the merits of the case, rather than upon a mere matter of form which may go to exclude the discussion of those merits.

Now, if we are at liberty to look into the case as it was before the referee, the question turned upon the construction put by him upon the articles, the last article being the one on which the question arises. That "he or they shall have right to the year's rents which are payable, the greater part at Martinmas, 1834, but in consideration thereof, the price or prices shall bear interest from Martinmas, 1833." The party says, this was the representation, that I should have the whole of the rents during the year 1834; because I am called upon to pay interest from the preceding Martinmas, therefore I ought to have, and it is contained in the articles that I should have, the rents in the same period. And no doubt the language is not very happily selected to exclude doubt or uncertainty; but the only way in which I can construe these words, consistent with grammar, is,

that you are to have the rents which are payable at Martinmas, 1834, which is a great part of the rent, and which is consistent with the facts. It is impossible to make sense of the terms used in any other manner, there being no question as to setting aside the sale on the ground of these rents not having been received, but merely on the question of the construction of the articles. If I am to put a construction upon those articles, that appears to me to be the most reasonable, proper regard being had to the expressions used.

But then, it is said, that the referee did not exercise his judgment upon it, because of the Dean of Faculty having previously given an opinion upon the construction of the articles, and that he considered that he was bound by that opinion. There are such expressions to be found in the notes, but the notes go on to say, that upon his view of the articles, he could not put any other construction upon them.

If it had rested upon the award itself, without reference to the notes, another objection would have arisen, namely, that the award professes to proceed entirely upon the submission of the law, and that being negatived, he was wrong in the conclusion he has come to as expressed upon the award. That at one time struck me, because, upon the face of the award itself, the case seems to be put entirely as a matter of law, whereas that was not the whole matter in the suit, and therefore not the whole matter submitted to the referee. But the notes are very properly referred to here, because they are referred to by the award itself, and when you refer to the notes, you find that that is not the whole case upon which the referee exercised his judgment,—that he had also taken into consideration the construction of the articles upon which the question of the amount of the rent would depend. And therefore, my Lords, I am of opinion that that objection, which at first appeared strong upon the face of the award itself, cannot interfere with the judgment of the Court below.

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For these reasons, I am of opinion that the judgment of the Court below is right, and ought to be affirmed.

Lord Campbell. — My Lords, I am extremely glad to find, that according to the opinion of my noble and learned friend, who has last addressed you, in which I concur, justice has been done between these parties by the arbitrator: but I must confess, my Lords, that I should be without any difficulty prepared to affirm this interlocutor, without at all looking to the merits of the case, because it seems to me, that neither the Court of Session, nor this House, can look to see whether the arbitrator came to a right conclusion in point of law, as both the law and the fact were referred to him by both parties; and if he has acted within his jurisdiction, has not exceeded his jurisdiction, and has exhausted all that was submitted to him, and has not been guilty of any misconduct, the award that he has pronounced is binding, both in point of law and in point of fact, by the Act of Sederunt referred to, which clearly has the force of an Act of Parliament.

Now, my Lords, let us see what the submission really is, and whether it is such a submission as is referred to in the Act of Sederunt. We have the submission subscribed by the advocates on each side according to their mandate, which, I apprehend, clearly, authorizes them to agree to such a submission. It has often been decided in England, that parties are bound by a reference signed by their counsel, or by their attornies, and I apprehend that there can be no doubt, that counsel, by the law of Scotland, have the same power. Now here is a contract which amounts to a submission, a contract subscribed by the counsel on both sides. (His Lordship here read the terms of the reference.) Therefore, my Lords, it is not to be left to the determination of the Court, — it is to be left to the determination of the arbitrator, — he is to make a final end of all the controversies which are submitted to him.

Then, when he makes his report, is not that a decreet-arbi-

tral? That is the decree which he pronounces as arbitrator, and which was intended to be final between the parties, and to make an end of all disputes. I humbly apprehend, therefore, my Lords, that this is a submission within the meaning of the Act of Sederunt.

If that be so, it can only be impeached upon the ground of corruption, bribery, or falsehood. Well, now, what is there to impeach this award? There is no misconduct imputed to the arbitrator, — there is no bribery, — there is no falsehood, — and the only ground upon which the award is sought to be impeached is this, that the arbitrator, first, has not exhausted all which was submitted to him, and, secondly, that he has misconstrued the law. Now, looking merely to the report dated 7th December, 1840, I should say, that that was liable to the objection which so much in the first instance, struck my noble and learned friend who sits near to me, (*Lord Cottenham.*) If the arbitrator had said, he "finds that the pursuer has altogether failed to establish any thing approaching to falsehood or fraud against the defender, and therefore sustains the defences, and assoilzes the defender from the conclusion of the action," it would appear that he had not exhausted all, that he had not looked at all the conclusions of the summons. But, my Lords, he refers to those notes: he says, "having issued full notes of his opinion to the "parties," therefore the notes form part of the award, and coupling the notes with the award, it seems to me that he has fully exhausted all the conclusions of the summons, and that there is no part of the matter which was submitted to him, upon which he has not deliberately adjudicated.

Then, if that be so, the question arises whether you can impeach his award because he has fallen into a mistake in point of law, and put a wrong construction upon the articles. I am of opinion, my Lords, that if it were proved that he had made a mistake in law, it would be no ground at all for impeaching his

award. It seems to me, my Lords, that the practice of Scotland is much more convenient than the practice here, and that we ought by no means to disturb it. The parties select a judge on whom they place confidence as to his legal qualifications, and as to his capacity to decide facts, and they think that he will dispose of the matter more satisfactorily than the regular tribunals of the country, more economically perhaps, and more expeditiously, — and that there may be no appeal to the Inner House, or to the House of Lords, they therefore select him as their judge, and his judgment is to be final.

My Lords, the practice which has prevailed in England, has produced very great inconvenience. The construction put upon the Act of Parliament in this country certainly is, that if it appears upon the face of the award, or in the papers referred to in the award, that the arbitrator has mistaken the law, the Court has jurisdiction over the award, and will set it aside. That has produced so much inconvenience in this country, that for a number of years past in Westminster Hall, they have said that they would not at all review what the arbitrator had done, if it was referred to a barrister-at-law — a gentleman in the law; but that whatever he decided, whether right or wrong, should be final between the parties.

Lord Brougham. — That was upon the ground, they always said, that the law was referred to him.

Lord Campbell. — It does not, I think, rest upon that principle. The practice that has prevailed in Scotland, of considering a decreet-arbrital, or an award as conclusive, both as to law and fact, seems to me to be much more reasonable, and I should be very sorry if any thing occurred in this case at all to shake the principles upon which those cases are decided.

Now, my Lords, I believe no case has occurred, either in the Court of Session, or in this House, which has proceeded upon different principles; they will all be found, when examined, to

resolve themselves into this, either that there has been misconduct in the arbitrator, or that the arbitrator has exceeded his jurisdiction, or that he has not exhausted all that was referred to him. That case of Clyne, which was decided by my noble and learned friend who is now on the woolsack, (*Lord Brougham,*) certainly proceeded on the ground, not of mere mistake in point of law, but that there was a clear excess of jurisdiction.

Lord Brougham. — He mistook his jurisdiction, — that is a mistake in point of law which is fatal.

Lord Campbell. — Where there is an excess of the jurisdiction confided to the arbiter, then the award is bad, and may be set aside; but if he acts within his jurisdiction, and exhausts all that is referred to him, then I think the Court has no power to correct what he has decided according to law and justice.

For these reasons, my Lords, I am of opinion that the interlocutor appealed against ought to be affirmed with costs.

Ordered and Adjudged, that the petition and appeal be dismissed this House, and that the interlocutor therein complained of be affirmed with costs.

RICHARDSON and CONNELL — HAY and LAW, Agents.