

[15th May 1835.]

FREDERICK GYE and COMPANY, Appellants.—
Sir William Follett.

SAMUEL JAMES HALLAM, Respondent.—*Blackburne —
Bailey.*

Arbitration — Clause — Expenses. An action of count and reckoning, concluding for 500*l.*, or such other sum as should be found to be the balance due, was judicially referred, with a declaration that the referee should ordain the losing party to pay all costs; and the referee found the pursuers entitled to 4*l.* 3*s.* 11½*d.* as the balance unaccounted for on transactions to the amount of 45,542*l.*, but declared the pursuers to be the losing parties, and liable in expenses. Held (affirming the judgment of the Court of Session) that the award was not ultra vires; but declaration added (by the House of Lords), that the judgment should not be drawn into a precedent on the general meaning of the words “losing party.”

IN April 1821 the respondent Hallam was engaged as a shopman to Messrs. Bish and Gye, tea-dealers in London, in whose employment he remained till June 1825. The present firm of Frederick Gye and Company having resolved to open some branch establishments, a proposal was made to the respondent of appointing him to be manager of one of them.

The respondent was in July 1827 sent to Edinburgh to take the management of a shop in Waterloo Place,

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which was opened by the appellants under the name of "The London Genuine Tea Company." No specific agreement was made as to salary, although the respondent was led to believe that it would be fixed at about 70*l.* a year. In consequence, however, of the confidence reposed in his integrity and abilities, as well as in consequence of the success of his exertions, it was agreed, in the course of the year 1828, that he should receive a salary at the rate of 80*l.* a year till October 1827, and that from that period it should be increased to 100*l.* a year, in addition to board and lodging.

Gye and Co. also sent from London three or four shopmen, in whose appointment the respondent had no voice. Early in the year 1829, a misunderstanding took place between him and one of these young men, in consequence of which the respondent wrote to Mr. Gye stating the circumstances, and mentioning that if this young man should not be removed, he would be obliged to leave his situation, as he could not remain with him. Mr. Gye removed this young man; but at the same time hinted that the respondent was taking too much upon him, and that he ought to consider all the shopmen as upon an equal footing with himself.

While matters remained on this footing, the establishment in Edinburgh more than realized the expectations of the appellants. It was more prosperous than any of their other branch establishments throughout Scotland, and they addressed many letters to the respondent, expressing their satisfaction with his conduct and success.

About the end of September 1829 Mr. Gye came to Scotland for the avowed purpose of making a general

visitation, and examining the stocks of the different establishments. On his arrival in Edinburgh, the whole books were carried from the shop to his apartments; a balance of the cash was struck, and the stock on hand was taken, and compared with the invoices. It appeared that no deficiency in cash was discovered, and Mr. Gye expressed his satisfaction with the manner in which the business had been conducted.

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In consequence of the control which the respondent had assumed over the other shopmen, complaints were made to Mr. Gye, who drew out a paper of instructions, the object of which was to put all the shopmen upon an equality; to deprive the respondent of the authority which he had previously exercised; and by dividing the responsibility among all, to make them a check upon each other.

These instructions set forth—“ That it does not
“ appear that the management of the concern was by
“ any means placed on a proper foundation at the
“ commencement, either as regards that satisfactory
“ account which the principals ought to command at
“ any moment, and to obtain without difficulty, or in
“ respect to the internal arrangements with all those
“ employed.” It was also directed that the books, invoices, and papers should be open to all; that the invoices should be examined by any two of them; that the chests, when wanted, should be moved to the counter and marked off as such in the invoice; that the letters from London should be opened by any one who might happen to be in the way; and that the invoices and all letters, except such as were marked “private,” should be accessible to all. And finally, “ the term ‘ manager ’ not to be used
“ by any person in the establishment, and to be not in

GYE & Co. “ future printed in any bill, card, directory, &c. All
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 “ welfare of the establishment.”

The proper duty assigned to the respondent was that of book-keeper or cashier. The sales were conducted by the other shopmen, who put the money received at the counter into the till; it was then taken out by the respondent in presence of one or more of them, and its amount was entered by him in the books of the company, after which he became answerable for it. The whole goods in the shop were open to all the shopmen alike. Each of them acted on the principle of the instructions, that he was a manager in his own department.

This led to misunderstandings; and a quarrel having taken place between one of these young men and the respondent, a letter seems to have been written to Mr. Gye on the subject, in which the respondent was charged with having violated the rules which Mr. Gye had prescribed. Mr. Gye wrote to the respondent on the 26th November 1829, intimating that a Mr. Tress was sent down to “ take the command ” from him, and requiring him immediately to deliver to Mr. Tress the keys of his desk and iron safe, with all their contents. He was farther required to take the stock with Mr. Tress, and to employ, at least, one of the young men to check it. Mr. Gye added, in his letter, “ if you can point out
 “ any situation in our establishments likely to suit you,
 “ we shall be happy to hear from you, and to promote
 “ your interest in any shape in our power, except at
 “ Waterloo Place.”

The respondent conformed at once to all the par-

particulars required by Mr. Gye, by delivering to Mr. Tress the keys of the desk and safe, with their contents, and by taking the stock. He was then discharged.

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It appeared that the amount of goods which passed through the hands of the establishment since its commencement in 1827 was 45,500*l*.

The appellants then raised an action of count and reckoning against the respondent, embracing a general accounting for his whole transactions from August 1827 till November 1829.

After the usual procedure an issue was directed in the following terms:—

“ It being admitted that during the years 1827, 1828,
“ and 1829, the pursuers, Gye and Company, tea
“ merchants in London, transmitted to Edinburgh
“ certain quantities of tea, and employed the defender,
“ along with certain other persons, to sell the same;
“ and that the defender was employed to keep and did
“ keep books, and did receive certain sums of money
“ for the pursuers.

“ Whether the defender is indebted and resting
“ owing to the pursuers in the sum of 120*l*., or any
“ part thereof, as the value of stock not accounted for
“ by him, or of monies received by him on account of
“ the pursuers, and not accounted for ? ”

This issue was tried by a jury on the 24th March 1832, and the following verdict returned:—

“ Find for the pursuers to the extent of 84*l*. 19*s*. 3*d*.,
“ being the amount of errors or omissions up to
“ 30th September 1829.”¹

¹ 10 S., D., & B. p. 512.

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The respondent being dissatisfied with this verdict, made an application to the Court of Session to set aside the verdict: and on the 26th June a new trial was granted.¹ Soon after it had commenced, upon the suggestion of the Court, a minute of reference was entered into by the parties, in these terms: “ Gye v. Hallam.—The parties agree to withdraw a juror, and to refer the case to Mr. James Brown, accountant, whom failing, to Mr. Thomas Robertson, accountant; it being understood that the referee is not only to ascertain the balance due by the defender to the pursuers, if any, but also to settle all questions of liability; and that the losing party is to be ordered by the referee to pay all the costs.”

The referee, on the 17th January 1834, pronounced the following award:—

“ I, James Brown, accountant in Edinburgh, having accepted of the foregoing judicial reference, and having heard counsel for the parties at different times, and considered the parole proof adduced on behalf of the pursuers, with the whole written evidence for both parties, the account-books, and whole process, and having at different times issued notes and additional notes, and minutes containing my views on the various points brought under discussion, and having also considered the various pleadings, statements, and explanations given in for the parties respectively, and in answer to each other in the course of the reference, with the relative documents, am of opinion that the defender is liable to the pursuers for certain immaterial errors or omissions in the books which were

¹ 19 S., D., B. & p. 710.

“ under his charge, and which he has failed to explain
 “ to my satisfaction, amounting the said articles to
 “ 4*l.* 3*s.* 11½*d.* sterling, on which sum I consider
 “ interest to be due since the 30th day of November,
 “ 1829 years. I think it fair to add that, keeping in
 “ view the extent and magnitude of the business under
 “ the defender’s charge, the errors and omissions above
 “ alluded to are less in my opinion than might reason-
 “ ably have been anticipated; and considering on the
 “ whole matter the pursuers to be the losing party, I
 “ order them to pay all the costs.”

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The respondent having moved the Court to interpose their authority to the award, (which was opposed by the appellants in so far as related to the finding them liable in costs,) the Court (Second Division) pronounced this judgment:—“ 18th January 1834.—
 “ The Lords interpose their authority to the award pro-
 “ nounced by James Brown, accountant in Edinburgh,
 “ the judicial referee in this case, and decern in terms
 “ thereof, and appoint the defender to lodge an account
 “ of expenses, and remit to the auditor to tax the
 “ same, and report.”¹ Thereafter, the 15th February 1834, the expenses were reported to amount to 693*l.* 16*s.* 8*d.*, for which, with the expense of extracting the decree, their Lordships decerned.

Against these interlocutors Gye and Co. appealed.

Appellants.—The parties are at issue upon a question as to the meaning of the reference in regard to ex-

¹ 12 S., D., & B. p. 311.

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penses, and the competency of the award on that point. This question arises upon the part of the award, which closes in these terms “and considering on the whole matter the pursuers (appellants) to be the losing party, I order them to pay all the costs.” It is manifest from this, that he considered the decision of the point of expenses to be left to his discretion; and accordingly it is not upon the ultimate result, but on a view of the whole matter, that he decides it against the appellants. He appears to have been influenced by equitable considerations, the operation of which, as a ground of decision, it was a leading object of the reference altogether to exclude.

But the minute of reference clearly constitutes the measure of the referee’s powers. It is a judicial contract between the parties, and it was ultra vires of the referee to exercise any power not specially conferred on him by that contract.

The question of accounting is referred generally; but that of expenses is not so. The minute expressly bears “that the losing party is to be ordered by the referee to pay all the costs.” Thus nothing is left to the discretion of the referee. Expenses are to follow his judgment on the merits, and the party against whom that judgment goes forth is to be ordered to pay expenses. Whether this was a wise or a prudent arrangement is not the question, but whether such an agreement was truly entered into by the parties. They were at issue upon a matter of accounting, which might afford ground for protracted litigation. To prevent this, the parties agreed to take away all discretion from the referee upon the subject of expenses; and this was done by intro-

ducing into the reference a substantive declaration that
 “ the losing party should be ordered by the referee to
 “ pay all the costs.”

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But while the referee has, upon the question of accounting, or, more properly, the issue of resting owing, returned a verdict for the appellants, finding that the respondent is indebted to them in the sum of 4*l.* 3*s.* 11½*d.* with interest from the 30th November 1829, he has found the party against whom the issue of resting owing has been decided, and who consequently is the losing party, entitled to full expenses. The referee assumes that he had power to decide who was to be considered the losing party, without regard to the fact that decree has been issued against the respondent for a particular sum, with interest, as due to the appellants. Accordingly the ratio of the judgment appears to be, that, as upon the whole the appellants will gain so little by their decree, they must be held substantially to have lost their cause. On the same principle the referee might have held that where 120*l.* was demanded, an award for 30*l.* or 40*l.* was not sufficient to make the appellants the gaining party, to the effect of entitling them, under the reference, to an order upon the respondent to pay costs. But this would be an exercise of that discretion on the part of the referee which it was the purpose of the reference to take away. The parties agreed that expenses should follow a judgment in favour of either of them, without regard to the amount to be recovered by the appellants, and in order to give effect to this agreement the condition was inserted in the reference requiring the referee to order the losing party to pay all the costs.

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If, then, the referee has exceeded his powers in ordering the appellants to pay costs, it follows necessarily that the judgments appealed from, interponing the authority of the Court to the award, and decerning for a large sum of expenses against the appellants, must be reversed.

Respondent. —It was not only the object of the reference that the whole points on the merits in dispute between the parties should be exhausted, but that the question of expenses should be disposed of by him. He was “to settle all questions of liability;” after which there follows the provision, “that the losing party is to be ordered by the referee to pay all the costs.” It is therefore undoubted that the question as to liability for expenses was embraced by the reference, and consequently it cannot be maintained that the referee has exceeded his powers in disposing of that question.

Assuming this to be clear, it necessarily follows that the referee was fully empowered to determine who should be considered the “losing party.” To maintain that this power was not vested in him is to maintain the absurdity that the referee should order the party to pay the costs, not whom he himself, after a due investigation of the claims should hold to be the losing party, but whom the Court of Session or this House should ultimately determine to be so.

The present discussion thus resolves itself simply into a question as to his power to say who was the losing party. If it was within his power to fix who was the losing party, the mode in which he has exercised that

power is foreign to the inquiry. Now, it was either within his power, or it was not. If it was, then the discussion is at an end, for he has said that the appellants were the losing party. But if it was not within his power, then it must be held to have been vested in some other tribunal, and consequently it was not competent for the referee to pronounce any award in favour either of the respondent or of the appellants, without obtaining, in the first instance, from such tribunal the warrant for his award. It cannot be said that he was only entitled to award costs against the losing party, so long as his opinion coincided with what might be formed by the Court of Session, for this would virtually be holding that he had no power in the matter. Unless, therefore, the appellants are prepared to concede the question of power, they are driven to the absurdity of maintaining that the question of liability was reserved by the Court, while merely the duty of embodying the finding of the Court in his award was entrusted to the referee.

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Indeed, if the construction attempted to be put on the minute by the appellants is well founded, it would not have been competent for the referee to award expenses against the respondent, even if he had seen cause to do so. In that case the respondent would have been entitled to contend that he was not the losing party, and that the referee had arrogated a jurisdiction to himself which the parties had never conferred on him. Such a plea, if sound, would be just as available to the one party as to the other. Yet it cannot be available to both, except on the notion that the jurisdiction of the referee was absolutely and intentionally excluded, a proposition which cannot be maintained.

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No doubt the terms “ the losing party,” are vague and general, but they are sufficiently explicit to express the meaning of the parties. The referee was not entitled to take an intermediate course, by finding neither party liable in expenses to the other. He was bound to consider who was to be held the losing party, with reference to the whole proceedings from their commencement to their close. Let, then, the relative claims of the parties be looked at in this light. The appellants raised a general action of count and reckoning—they condescended on certain large claims against the respondent, which they altered at the different stages of the proceedings; and, finally, they obtained a decree for a sum which, comparatively speaking, is trifling and insignificant; and which was even below what was originally offered to them for a compromise. Their action therefore was, in the first place, unnecessary and uncalled for; and, in the next, they have failed to establish the leading points of their claim.

LORD BROUGHAM:—My Lords, it will be a most unfortunate thing indeed, if, upon further considering the proceedings in this case, which took place in the Court below, I should be of opinion that I ought to advise your lordships to send this case back to the Court below,—that is, that the judgment of that Court should be reversed, which interposes the authority of the Court, in order to give validity to the decision of the arbitrator, because it cannot end here, but the dispute will continue between the parties, and the inevitable result must be that which I will point out (it is impossible to be otherwise). The argument of the appellant here is, that the arbitrator had not the power

to exercise any discretion upon the costs, and that he had no right to order the costs of the defender to be paid by the pursuers. They who are counsel for the appellants say it is quite unnecessary for them to contend on their behalf any thing further than that, for that is sufficient, they say, to set aside the judgment of the Court, which validates the award of the arbitrator, and confirms it. For, say they, it is unnecessary for us to go further than to show that the arbitrator exceeded the bounds of his authority, by directing us, the appellants, to pay the costs. But, nevertheless, it is perfectly clear, that though that may be sufficient to carry them through, and enable them to obtain a reversal of this judgment, they have no ground upon which to prevail, by the force of their argument, on the construction of the reference of the award, without prevailing a great deal further. They have just as good a right to take the second step, which they do not now take, as to take the first step which they are now taking. They have as good a title to have the arbitrator's hands tied up, and the Court to say the arbitrator ought to have directed the costs to be paid by the defender to the pursuers, as to say that he had no authority, inasmuch as his hands were tied up, and he ought not to have ordered the costs to be paid by the pursuers. No distinction can be taken between the two parts of the argument, and what is good for the argument upon the one case is as good upon the other. Now, my lords, of this I am quite clear, that if this case goes back to the Court of Session, unless their lordships shall have changed their opinion, they have but one course to take. The Court below distinctly state, and all the judges in one voice say, (the arbitrator, indeed, may be a different man, if it goes to

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arbitration again, and that therefore signifies less, but all the learned judges say,) not only that the costs must not be paid by the defender to the pursuers, but that the defender has a right to be paid the costs by the pursuers; and they have the discretion in their breasts, and they alone have the discretion, whether it goes to a jury or to an arbitrator, upon the question of costs, unless the hands of the arbitrator be voluntarily tied up by the terms of this submission; that is clear. Now, is there any likelihood that the learned judges will alter that clear opinion which they have arrived at? No; because nothing that has been said here will make them alter that opinion; for nothing can be said here to indicate that they were wrong upon the subject. On the contrary, if I look into this case, I am of opinion that their lordships are perfectly right in determining, that if the arbitrator's hands were not tied up by the terms of this submission, the costs ought to be paid by the pursuers to Mr. Hallam. Therefore, as far as any thing here takes place, whatever opinion may be arrived at, the opinion of the Court taken will be further confirmed, rather than altered, by any thing that passes here. What, my lords, is the consequence? This that has been done may be set aside; but Mr. Hallam, the respondent, if this case is to go back, will find (what any man of common sense will find necessarily) that he must not make any more slovenly references; perhaps he will find it better not to make a reference to any unlearned tribunal, and that the case will go to be tried before a new jury, and the probability is, that it will be attended with the same result; but he will take care not to tie up the hands of the arbitrator, and to make the costs abide the event, because he knows that if he refuses

to make that a part of the submission (and no man can compel him to do it), he will leave the costs in the discretion of the Court, which has expressed its opinion (and is still further confirmed in its opinion by what has passed here) that he has the right to his costs, whatever be the event of his reference. Therefore, if there be, as we must suppose there is, any sense left in him, and the reference has not confused his senses, he will not tie up the hands of any new arbitrator; consequently, it must in the end come to this, that in all probability the same sum will be found due, and the same result will take place, after the arbitration which has taken place already. This, my lords, is what makes me consider that it would be an unfortunate thing if, upon the construction of this slovenly instrument, I were to say, that I differ from the Court below, and were to recommend your lordships to reverse the decision. Nevertheless, we must do what the law requires; and I am by no means prepared to say, that I can agree with that construction (I will not say extraordinary construction), as at present advised, of this instrument. It certainly does seem very strong to say, that this is other than referring it, with the costs to abide the event. They refer it to the arbitrator, to ascertain, first, whether any balance is due? secondly, if any, what is due? and, thirdly, they agree that he shall order that he who is found against shall pay the costs of the whole proceeding. That is *primâ facie* the construction of this instrument; but if I can find any means, under the peculiar circumstances of this case, of getting out of this construction, I confess that I shall most readily adopt that course. I shall upon no account advise your lordships to make these appellants pay the costs of this appeal; on that the respondent must lay his

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account, because, though he may say that he has suffered by this litigation in the Court below, and that it is a great hardship upon him to have to pay his costs in this appeal if your lordships affirm the decision of the Court below, yet whose fault is that? It is his own fault, and he has himself or his adviser in Scotland to blame for choosing to do that which has led to this appeal; for choosing to put those words upon the face of this submission, which seem to be liable to one construction when they are liable to another. He cannot expect, therefore, to get the costs in this appeal, whatever be the result; but my endeavour will be, for the reasons I have given, if I possibly can, to recommend your lordships to affirm the decision, which, if it be reversed, will only lead (that is a matter mathematically demonstrable), and can only lead to precisely the event which has already been arrived at, namely, the balance of 4*l.*; the Court will find against Mr. Hallam, and direct the costs to be paid to Mr. Hallam, in reference to the circumstances of this vexatious litigation. When I say that I have great difficulty in following the construction taken by the Court below, my difficulty arises from this: at first I was apt to think that "liabilities" would have carried us through, and if I thought that that argument was quite conclusive, and was capable of no answer, I think it would carry us through, because the items upon which this decision has gone against Mr. Hallam not appearing, the 500*l.* being a general sum, and its being possible that those items, though they might be parcel of the 500*l.*, yet might not be parcel of the 500*l.*, I think that possibility would have been a sufficient ground upon which to hang this decision of the Court below confirming the award in

respect of this construction; that is, suppose I could arrive at the construction of the liabilities being referred; but I am afraid that is not the case, because there are two things referred: first, was any thing received which has not been accounted for by Mr. Hallam? and if any thing was received, was he liable to account for that, though he may not have accounted for it? And I am not left to conjecture that that may have been the case in the minds of the parties, because the pleadings show that those points were both raised, and severally raised, and that he defended himself in two ways: first, by proving receipt and proving the discharge to be one and the same thing; and, secondly, admitting that there is a receipt, and no discharge for that receipt, by contending I am not liable. That, my lords, is my present impression. I wish, however, for time to consider that, as well as other matters; among others the 6*l.*, which at present I think is displaced; but I shall look into that matter with the disposition that I have stated, to strain a point, if I can, in favour of the decision of the Court below.

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LORD BROUGHAM on a subsequent day said:—My lords, I would call the attention of your lordships to the case of Gye v. Hallam; one of as great perplexity in one respect, and of as much hardship on the part of the respondent, if your lordships should be under the necessity of reversing the judgment, as I think I have ever seen in this House; because it is perfectly clear that there was an oversight in the submission or reference. It is quite clear that the arbitrator intended to find that Hallam was the winning party, and that Gye was the losing party; and it is equally clear that the Court

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below, in whose breasts the whole consideration of costs rests, intended that Gye should not have his costs paid by Hallam, but that Hallam should have his costs paid to him by Gye, though a small sum of money was awarded by the arbitrator to be paid by Hallam to Gye; but it is unfortunately the case, that, according to the strict use of the words, "the losing party" must be the man who has the sum of 4*l.* 11*s.* 3*d.*, or some such sum of money, awarded against him. But then, my lords, we ought to consider what will be the consequence if you reverse this judgment, and send the case back: the litigation will be endless. This arises out of the reference of the costs to the arbitrator. Supposing a reference to be made again, more care may be taken in getting the terms of the reference, but still the result will most probably be the same,—that Hallam shall not pay Gye's costs, but the contrary. It is clear that Gye is at Hallam's mercy as to the terms of submission, and if he will not submit to refer on Hallam's terms, as regards the costs, he goes before a jury. Suppose the jury find a verdict for the same amount for which the arbitrator made his award, the jury will have no discretion as to costs, any more than the arbitrator. Then it comes back to the Court of Session; the Court of Session alone has dominion over the costs. Now the Court of Session has already given their opinion, that the award was right; and that is known. The case would not go to the other Division of the Court; it must go back to the same Division, where at once the same opinion will of course be given. So that if the appellants recovered by the verdict, because the respondent would not agree to submission, without leaving the costs to abide the event, though they got a verdict for the

same sum for which they had an award before, that would not give them one farthing of costs ; and one should regret if it did, in a case where, on a minute investigation into transactions to the amount of 40,000*l.*, there has been an error to the extent only of 4*l.* This, my lords, being the case, though I am perfectly clear that, in the construction of those words, “ the losing party ” was the party against whom the sum was awarded, I am of opinion that I ought to advise your lordships to affirm this interlocutor, with a declaration ; that declaration being, that, in the peculiar circumstances of this case, your lordships felt it to be right that it should be affirmed, but that it should not be drawn into a precedent, as to the import of the words “ the losing party,” in other cases of a dissimilar description in point of circumstances, lest a reference to this case, without attention to its peculiar circumstances, should lead to an incorrect result. With that guard, and with the security arising from that guard, so that there can be no false construction put upon this decree, I am of opinion your lordships will do well to affirm it. I shall prepare myself the words of that declaration ; for it is highly necessary to show that these slovenly references are exceedingly injurious to the parties, as they lead to excessive litigation, interminable expense, and that they are very hard upon the Court as well as upon the parties. Of course there must be no costs here.

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The House of Lords ordered and adjudged, That the said petition and appeal be, and is hereby dismissed this House, and that the interlocutors therein complained of be, and the same are hereby affirmed : But this House thinks fit to declare, That this order is made upon consideration

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of all the peculiar circumstances of this particular case, and that it is not to be drawn into a precedent as authorizing the inference that a submission to arbitration, where the parties agree that the arbiter shall order the losing party to pay the expenses, either leaves the quantum of expenses in his discretion, or leaves it to him to determine that any one is the losing party other than the party against whom he makes his decret arbitral upon the merits of the case, to any amount.

TILSONS, SQUANCE, and TILSONS — JAMES PATTEN —
Solicitors.