[Heard 18*th April*, 1845.]

Charles Ferrier, Accountant, Edinburgh, *Appellant*.

Dr. William P. Alison, and others, Trustees of Elizabeth Hood, Deceased, *Respondents*.

Arbitration.—Expenses.—An arbiter, in an extrajudicial submission, has power to award expenses, without any express power to that effect being inserted in the deed of submission.

THE parties in this case entered into a deed of submission limited to matters which were specially recited in the deed, and in which no mention was made in any way as to the costs of the reference. The arbiter, in making his decree, included an award against the appellant for the expenses of the reference, and of recording the submission and the decree.

The appellant brought a reduction of the decree upon this among other grounds, that the arbiter had no power to award expenses, as no such power was given him by the deed of submission.

The respondent pleaded in defence that an arbiter could award expenses without any special power to that effect.

The Lord Ordinary, on the 22nd November, 1842, repelled the reasons of reduction, and the Court, on the 28th January, 1843, adhered to his interlocutor.

The appeal, which was against these interlocutors, embraced the whole grounds of reduction, but the question, as to the power of the arbiter to award expenses, was the only point which requires notice.

Mr. Turner and *Mr. Anderson* for the Appellant.—An arbiter's power is to be found within the deed of submission, and

cannot go beyond it. The power to award expenses is not incidental to the office, and is no exception. In Robertson *v.* Brown, 15 *Sh.* & *D.* 199, the only case upon the subject, the question was raised and decided certainly in favour of the power being incidental, but the judgment there went upon the authority of Berry *v.* Watson, 6 *Sh.* & *D.*, and Fairley *v.* Mc Gowan, 14 *S.* & *D.* 470, cases of judicial reference, which rest upon a totally different principle. In these an action is referred, and the arbiter comes in place of the Court to the effect only of ascertaining the rights of the parties. His decree requires in order to make it effectual to have the authority of the Court interponed to it. He acts by the delegated authority of the Court, which may be said never to part with its jurisdiction over the case. The powers which the Court has may well be supposed to be transferred to the arbiter, without its being a necessary consequence that such power exists in him independently of the Court, as incidentally inherent to his office. The Court below seems, in the case of Robertson, to have proceeded on the idea that, as Courts possessed the power, therefore an arbiter must posess it; but in this they forget that Courts, even, possess it only by virtue of express statute, and that an arbitration is not only not similar to an action, which is always hostile in its nature, but is a friendly contract, entered into expressly for the avoidance of the charges and delay of a judicial proceeding. If the law were as supposed, the Books of Style would contain the forms of a clause for excluding the power of the arbiter to award expenses, where it is not intended that he shall possess it; but no such clause is to be found in the Juridical Styles, on the contrary, it is there stated, (vol. ii.,) that where it is intended to give the arbiter this power, a clause is inserted for the purpose, and the form of such a clause is given. And *Parker*, in his work on arbitration, p. 131, a work which may be referred to as evidence of the practice, says, it is the general understanding in Scotland, that such a clause is necessary.

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The *Lord Advocate* and *Mr. Burge*.—The Juridical Styles, if they can be looked to as an authority at all, prove too much; for they lay down, that in submissions of depending actions, if it is intended to give the arbiter power to award expenses, a clause to that effect should be inserted in the deed of submission, and the form of clause is accordingly given; but indisputably, by the law of Scotland, arbiters in judicial references have power to award expenses without any express power to that effect. This was found in Berry *v.* Watson, 6 *Sh.* & *D.* 256, and 9 *Sh.* & *D.* 337; in Smith *v.* Banks, 8 *Sh.* & *D.* 920, and in Fairly *v.* Mc Gowan, 14 *Sh.* & *D.* 470. And the doctrine was laid down in these cases in sufficiently broad terms to embrace cases of extra-judicial reference. That the Court so intended to deliver itself is shewn by its judgment in Robertson *v.* Brown, 15 *Sh.* & *D.* 199, which was a case of extra-judicial reference, where the question as to this power was expressly raised and decided. There the Court proceeded, not only on the authority of the cases which have been referred to, but of the civil law, which generally, where municipal precedent is awanting, is good authority, and was specially relied upon as to the matter of costs in those cases which raised the question as to the power of the Court to award expenses where none were concluded for by the summons. The Court sustained its power in that respect, not only upon the statute 1652, but upon the civil law which is express upon the subject, and is equally so as to the power of arbiters. *Voet.* iv. 8, in the title "De receptis," intimating what arbiters may do without express authority, says, "Non tamen adeo angustis cancellis concludenda fuit arbitri "auctoritas, quin condemnationem faciens diem solutioni pera- "gendæ possit statuere in expensas temerarium litigatorem, "damnare ac contumaciam ejus pecuniaria punire pœna:" and *Lauterbach*, in Disputation 10, says, "et de accessoriis, v. gr. "fructibus usuris et expensis licet illorum in compromissio nulla "facta sit mentio arbitri sententiam valide dicere possunt:" and in the *Dig.* iv. 8, 39, in the law beginning "non ex omnibus

" causis," it is laid down, " Idem contumaciam litigatoris arbiter " punire poterit pecuniam eum adversario dari jubendo."

Mr. Turner in reply.—The civil law, no doubt, is of a certain authority in the law of Scotland, but only in so far as it has been adopted and recognised, for the two laws are not identical, nor in every respect corresponding, of which this matter of costs is an instance.

[*Lord Brougham.*—I won't say what might have been the authority of the civil law had there been no decision, but it is very important as throwing light on Robertson's case.]

By the civil law, Courts had inherently a power to award costs, whereas in Scotland they had no such power until the Act 1652 gave it to them. And in arbitration, arbiters, by the very passages cited by the respondent, had power from time to time to impose fines upon the parties; but it is not pretended that such a power has been adopted into the law of Scotland. By the civil law, decrees arbitral could not be opened up for injustice or iniquity, whereas, by the Act of Regulations, sec. 25, they may be challenged for corruption, bribery, or falsehood.

LORD CAMPBELL.—My Lords, in this case, with respect to the question of costs, I confess that I have entertained some doubt. According to the law of England it is quite clear that an arbitrator has no power to award costs, unless that power be expressly given him by the submission; he has no such power incidentally as arbitrator, and I confess, my Lords, that this seems to be the more reasonable rule. There are many cases in which it may be fit to refer disputes to arbitration, in which the parties would not render themselves liable to costs to be meted out by the arbitrator. There are many others in which it is very fit that that power should be enjoyed by an arbitrator. But then it seems to me, my Lords, to be more expedient that the submission, which is the contract between the parties who submit their disputes to a Judge constituted by themselves,

should state that their Judge shall have this power if they mean that he shall enjoy it, and to say that he shall not have that power, if from the nature of the dispute between them it is not wished that he should exercise it. It is very easy in a submission to introduce a clause giving a power to the arbitrator to award costs, if it is wished that that power should belong to him, and it admits of great modification, where there are several parties, as to the manner in which he is to exercise that power; and I should think that, generally speaking, it is better that that power should be expressly given in the authority by which he is to exercise his judicial office.

My Lords, we have, however, to consider what is the law of Scotland upon this subject, and it may be, that although the law of England gives no such power incidentally to the arbitrator, the law of another country may give that power incidentally, and it appears to me to be clearly proved that the law of Scotland does give it incidentally. We have one case in which the question was expressly decided, and decided unanimously by the Judges; I refer to the case of Robertson *v.* Brown, which was identically this case, as far as the power of the arbitrator to award costs is concerned. That was not a judicial reference; that was not a reference of a cause depending in Court; but it was a general reference, such as this which we are now considering, and there, after long debate, and the case had been ably argued by two most eminent counsel, the present Lord Justice Clerk, and another most eminent counsel, and after they had been heard and all the authorities had been brought before the Court, the Court came unanimously to the determination, that this power incidentally belonged to the arbitrator.

Then, my Lords, there were other cases in which not exactly the same point arose, but in which the same doctrine was discussed. There was the case of Berry *v.* Watson, which certainly was a reference of a cause, and there, although it was not a judicial reference, it was held that the arbitrator had the power not only

to award the costs of the process, (the costs of the action as we should say,) but the costs of the reference. It was said that the point was not distinctly made. Why, it is quite clear that both those points arose, whether he had the power to award the costs of the reference, and whether he had the power to award the costs of the cause.

Then, my Lords, there was the case of Smith *v.* Banks, which certainly was a judicial reference. There was further, the case of Fairley *v.* Mc Gowan, which I think was likewise a judicial reference. But these cases laid down the general principle, that this power incidentally belongs to the arbitrator.

Well then, my Lords, what is there upon the other side? *Mr. Turner*, referring to text writers, has stated that *Stair* and all the great authorities of the law of Scotland are upon his side. *Mr. Parker*, I dare say, is a very respectable gentleman, but his work cannot be cited as an authority; we may look to his book to see what is the practice now existing, but he cannot at all be considered as an authority or a text writer to whose opinion any weight can be given, and he only talks doubtfully, and refers to the law of England, which he rather prefers, as I do, to the law of Scotland. But we cannot at all set up his opinion against these solemn judicial decisions.

With regard to the Juridical Styles, these go in express contradiction of the decisions of the Supreme Court, because when the precedent is examined, it refers to a judicial reference, at all events to the reference of a cause that is depending, and according to the opinion of the compilers of that Book of Styles, if you are to give the arbitrator the power of awarding costs where a cause depending is referred to him, it must be expressly mentioned. Now, that is contrary to the cases that have been solemnly determined by the Supreme Court in Scotland. Therefore there is, I consider, no authority whatsoever to meet those that have been relied on.

But, my Lords, I attach very great consequence to those

texts of the civil law which have been brought before us, for they shew that those decisions of Robertson *v.* Brown, Berry *v.* Watson, Fairley *v.* Mc Gowan, and Smith *v.* Banks, have that excellent foundation, the civil law, to rest upon. Mr. Burge has, with his usual industry and learning, laid before us authorities that clearly prove such to be the doctrine of the civil law. We have got the text of the Digest itself, which certainly does not say in so many words, that if there be a general reference to arbitration, the arbitrator has the power to award costs without that being in the submission, but it gives a power which is superior to awarding costs to the arbitrator, namely a power of calling upon either party during the progress of the submission or arbitration, who misconducts himself, so that his opponent is prejudiced, to make compensation to his opponent for the loss thus occasioned. That is a greater power which would comprehend the less power that we are now considering. Now, when we come to the Commentators upon that text, they in so many words lay down that without this power being expressly conferred by the submission it is possessed by the arbitrator.

Under these circumstances, I think there can be no doubt whatever that we are bound to affirm the decision of the Court of Session upon this subject. When we find their unanimous decision founded upon the texts of the civil law, it would not become us to follow our notions as English lawyers, or any speculative preference of one doctrine to another. We are bound to declare what the law of Scotland is; and I think it is proved to our entire satisfaction, that by the law of Scotland where there is a general reference, although there is no express power given to the arbitrator to award the costs, that power he is possessed of.

Under these circumstances, my Lords, I think we are bound to affirm the judgment, and I take the liberty of moving your Lordships, that the interlocutor be affirmed with costs.

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LORD BROUGHAM.—My Lords, I entirely agree in the view that has been taken by my noble and learned friend. I certainly, during the early part of the argument, did entertain considerable doubts, because it appeared to be contrary to our notions here, which led us in the first place to doubt, upon a matter too more likely in the two countries to be dealt with upon the same principles, than if it had been a question of feudal law, where the divergence of the two systems has been very great. It appeared that there was only one case, Robertson *v.* Brown; and that case did seem to have been disposed of without very great consideration, at all events, the record and the reports of the decision do not give us the reasons with any fulness, and the Court did appear in that case to refer to two other cases, which might have special circumstances connected with them, namely, being cases of judicial reference. However, when it comes to be looked into, it appears that one of them, though a reference of a process pending, was not a judicial reference; consequently, that in a certain degree goes to set up Robertson *v.* Brown. Robertson *v.* Brown is, however, a decided case. It is clear; it is unhesitating; it is upon the point; and it is the only case distinctly upon the point, namely, of a general submission; it is a case that never has been broken in upon either by the authority of any *dictum* of the Court *arguendo*, and much less by any contrary decision setting it aside; nor has it ever been set aside by anything that has passed here in the Court of Appeal, the Court of last resort. That, therefore, would of itself have been sufficient to have made one pause before coming to a conclusion against the present decision, strengthened as it is by and resting upon Robertson *v.* Brown; when I recollect, too, that there is no decision the other way at all, nor any authority, for I wholly deny the authority of Mr. Parker's book. This is not, properly speaking, a question of practice, upon which you may look into the works of living authors, as you would look into the books of Mr. Tidd and Mr. Chitty, and perhaps Mr. Archbold also, this is not a question of

practice; it is a general question of law, namely, has or not an arbitrator, empowered by, and acting under the authority of a general submission, without any express authority, the power of awarding costs of the cause and the submission. Now there is no authority whatever, except the doubtful dictum of Mr. Parker, upon this subject, who, be it observed, refers to the English law, but who, in his reference, has not given a very accurate account of the English law. His account of the English law is by no means remarkable for its accuracy; but that would be nothing, because we are upon a question of Scotch law.

Therefore, my Lords, that case standing uncontradicted by any other authority whatever, we are now to look to the foundations of the Scotch law, the fountains from which it was drawn, on submissions to arbitration; and those fountains are the civil law. Nothing can be clearer than the authorities referred to. The 39th law of the 4th book of the *Pandects*, title 8, is not in express terms with respect to the arbitrator's power of awarding costs, but it distinctly ascribes to him the larger power of punishing or inflicting a pecuniary penalty upon the parties for their misconduct in the suit, or in that out of which the suit has arisen. Now that is a larger power than the power of giving costs, and it appears to have well authorised the construction put upon it by the commentators, particularly Voet, the greatest of those commentators; and when I say "well "authorised" it, I mean authorised it just as well as ninety-nine in a hundred, you may say, of the inferences of those commentators are authorised, which are derived from the text of the *Digest*; for you shall much more easily find all the English law laid down by Lord Coke from the decisions of cases and the authority of Littleton, and the conclusions he deduces from those cases, than you shall find very many of the dicta, or rather of the authoritative statements of Voet, Vinius, Zoesius, and others of those great commentators, upon the text of Justinian's *Institute*, the *Pandects* and the *Code*. The *Code* I have not had an

opportunity of looking into, but the *Pandects* I have looked into. I have been prevented from looking into the *Code*, because the library of this House is so admirably well furnished that it has Heineccius but it has not Justinian. That is the peculiar feature of our selection, that to the fountains of all civil law we have not access. But the text of the *Pandects* themselves is quite sufficient, according to the course of the commentators, to justify their commentary, but their commentary is authority independent of the text, and if a text is found in Voet or in Vinius, and particularly in Voet, it is law, and would be citeable in any Court in Europe as making the civil law, unless a contrary text in Voet was to be found, whether it is strictly traced to the text of Justinian or not, just as many things are held to be undeniable by the authority of text writers to deduce the English law from statutory enactments, though when you come to look at those statutory enactments you find that they have made a very great step, in order to get at their conclusion; still we go not merely to the statute itself, but we go to the text writers' authority, as expounding that statute. Now nothing can be clearer than both those passages which have been cited by Mr. Burge from Voet and Lauterbach, for they most distinctly state that the arbitrator has, without any *compromissum* authorising him or empowering him, the authority to give the costs, for Voet first gives the cases where he is not authorised, for want of the *compromissum*, and then he says, "Non tamen "adeo angustis cancellis concludenda fuit arbitri auctoritas, quin "condemnationem faciens diem solutioni peragendæ possit sta-"tuere in expensas temerarium litigatorem damnare ac contu-"maciam ejus pecuniaria punire pœna." But he has much power beyond those, meaning to say (for it amounts to this) though there should be no submission, though there should be no authority given him *per vires compromissi*, he has the power of punishing, as the 39th law of the *Digest* says. and he has the power of punishing contumacy *pecuniariis pœnis*.

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My Lords, for these reasons I am of opinion that the case of Robertson *v.* Brown is authorised by the principles of that law from which the law of arbitrament and award is taken by the law of Scotland. With respect to the authority of the Juridical Styles, most undoubtedly it looks as if they thought it was the course of proceeding to arm the arbitrator with authority, and perhaps it may be, but it by no means follows that if he is not armed with authority, he has it not *per placitum* by the general rules of the common law.

Upon the whole, therefore, I entirely agree in the view that has been taken by my learned and noble friend, and hold that the decision having been rightly come to in the Court below, your Lordships ought here to affirm it with costs.

LORD COTTENHAM.—My Lords, the appellant complains of the award, and seeks to set it aside, upon the ground that the arbitrator has exceeded his authority and jurisdiction in having awarded the costs of the reference, and he here, by his appeal, complains that the Court of Session have failed in the performance of their duty, in not giving him a decree setting aside that award. The very ground, therefore, of the appellant's case upon the question of costs is, that by the law of Scotland the arbitrator has no such jurisdiction. Making that complaint it is for him to establish the position that, by the law of Scotland, no such power existed in the arbitrator, from want of express reference in the contract of the parties giving him that jurisdiction, and our inquiry is, how the matter stands upon the question, whether by the law of Scotland such a power is vested in the arbitrator, where there is no express contract to give him that power.

Now, my Lords, there is not much to be found under the references that have been made to the early period of the Scotch law. If there had been no authority at all upon the subject, either one way or the other, then no doubt the references which

have been made to the civil law would have been of extreme importance, and they are very important as the matter stands, because they do show a very substantial and sufficient foundation for what, we are informed by the Judges of the Court of Session, is the course of practice and the law of Scotland upon this subject.

Now, my Lords, the first case in point of date which has been referred to is that of Berry *v.* Watson, which was in the year 1827. I consider that as an authority going to the full extent of the present case, because although it is perfectly true that, in that case, there had been a suit between the parties, it was not a judicial reference within the meaning of that term. The parties agreed to put an end to the suit, and the terms of a reference were agreed to. That, however, was not immediately acted upon, but another document was drawn up, which stated that the parties had agreed to hold this as a concluded suit, and the subject matter of that suit so concluded by contract between the parties, was referred to arbitration. It was not, therefore, a case at all open to the observations which have been made upon some of the other authorities referred to, where there was a reference of a suit, keeping the suit alive and merely using the reference for the purpose of ascertaining some points between the parties; it was a determination of the suit, and a new and distinct reference to the arbitrator.

Now it is important, not only to see what was decided in that case, but the grounds upon which the Court put their decision when the matter was brought before them. The arbitrator in his award gave the costs of the proceedings, or the costs of the reference, as we should call it, and that was challenged, and a bill of suspension having been brought in order to set aside that award, certain conclusions were come to by the Court. The argument was, that expenses were concluded for in the action submitted. Then came this general proposition, "that both in "actions and in submissions expenses may competently be

" awarded, though not concluded for or specially submitted, and " that in practice arbitrators always award expenses in such " cases." Assimilating the case of a summons not concluding for costs, in which the Courts say that the Courts have jurisdiction as to costs, and the other case of there being a reference without mention of costs, in which they say the arbitrator has, notwithstanding, authority to award costs, and that such is the practice. My Lords, in inquiring what is the law of Scotland and what is the practice, we have the unanimous opinion of the Judges of the Court of Session, pronounced in 1827, that the practice of the Court and the law of Scotland is directly the reverse of that for which the appellant contends, and which he must establish in order to entitle him to have the judgment of the Court of Session in this particular case reversed. We not only have the decision in that case that it was competent to the arbitrator, although it was not a judicial reference, and although there was no contract to refer the costs, but we are told that it is as much of course that the referee, although there be no contract for him to adjudicate as to the costs of the proceeding, has power so to do, as it is to award costs, where a summons has no conclusion relative to the costs of the proceeding. The decision, therefore, goes upon the general principle, it is not a decision proceeding upon the particular circumstances of a particular case, and it does lay down a rule applicable to the present case.

My Lords, I pass over those cases which are cases of judicial references. No doubt they are distinguished and open to observations which may prevent them from being directly applicable to the present; but I do not see that in any of those cases the learned Judges drew the distinction, and the observation of one of the learned Judges, in one of those cases, is clearly referable to another part of the case, and I find that they all proceed upon general grounds.

Then, my Lords, we come to the case of Robertson *v.* Brown, which is admitted upon all hands to be directly in point. We

have then a series of authorities, not commencing, I admit, at a very early period, but uniform from the time they have commenced; not a divided opinion among the Judges, some thinking one course of proceeding to be the law of Scotland, and some thinking another course to be the law, but all concurring in opinion that it is not necessary to make the costs of the proceeding the subject of particular contract between the parties.

Then upon the other side, we have nothing to which we are entitled to look. The opinions of individuals, the authors or compilers of those books which have been referred to, are undoubtedly of some degree of authority. The fact of their being in the Juridical Styles, the statement of a course of proceeding more or less usually adopted, is no doubt not only matter of some importance, but it is also matter which may very properly be looked at to ascertain what is the course of practice; but it does not at all weigh against the authority of the decision of the Court of Session, and it is contrary to the law of Scotland and the practice of Scotland. Then has the appellant succeeded in making out his case, that the arbitrator in this instance exceeded his authority, and that the Court of Session were wrong in not setting aside this award? I consider the reverse of that to be most clearly and distinctly established. I think, therefore, that the interlocutor of the Court of Session is right, and ought to be affirmed.

Ordered and adjudged, That the petition and appeal be dismissed this House, and that the interlocutors, so far as complained of, be affirmed with costs.

SPOTTISWOODE and ROBERTSON—RICHARDSON and CONNELL, **Agents.**