[27*th August* 1835.*]

Sir WILLIAM BAILLIE and others, (Trustees of the late DAVID CLYNE, S. S. C.,) Appellants.—*Sir John Campbell—Tinney.*

The EDINBURGH OIL GAS LIGHT COMPANY, Respondents.—*Dr. Lushington—H. Bruce.*

Arbitration — Judicial Reference — Partnership —Statute.—

A company brought an action against one of its partners for two calls upon his stock, and he raised a counter action of damages against the company, for the market price of his stock, as at a certain date, in respect the company had without his consent abandoned their business, and united themselves with another company; and these actions were referred to a judicial referee, who found that the company was entitled to decree for the calls, and that the partner was entitled to decree for a certain sum as the price of his shares, which sum (under deduction of the calls) he was entitled to recover on transferring his shares of stock to the company. Held (reversing the judgment of the Court of Session), 1. That in the action at the instance of the company the award of the referee could not be confirmed except as to one of the calls, in respect that both the calls proposed to be decerned for had been made at one time, whereas by the statute incorporating the company a month ought to have elapsed between them. 2. That in the action at the instance of the partner against the company the award was inconclusive, inasmuch as it did not bind the partner to convey his shares to the company, but only

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* The judgment was pronounced on 17th July, but was omitted to be reported under that date.

made the recovery of the sum awarded to him conditional on his doing so.

Question, Whether an error in law forms a good objection to a decree arbitral?

Appeal.—Circumstances in which a judgment of the House, embodying an agreement of parties, was recalled.

1st Division.

Ld. Corehouse.

THE Edinburgh Oil Gas Light Company was established by statute in the year 1824. At the formation of the company the late Mr. Clyne, solicitor in the Supreme Courts (who was represented by the appellants), became a proprietor of fifty-two shares of the capital stock.

By the 52d section of the statute it is enacted, "That "the committee of management shall have full power "and authority from time to time, at any of their "meetings aforesaid, to make such call or calls for "money from the several subscribers to and propri-"etors of the said undertaking, in order to defray the "expenses of or of carrying on the same, as they shall "from time to time find wanting and necessary for "these purposes, until the sums subscribed are fully "paid; but no such call shall exceed the sum of 10*l.* "per centum for or in respect of every share in the "said undertaking, and so that no such calls be made "but at the distance of one calendar month at least "from each other, and so that fourteen days previous "notice at least shall be given of every such call by a "circular letter to each proprietor, transmitted through "the General Post Office of Edinburgh, or by adver-"tisement or otherwise, as the committee of manage-"ment may direct."

By the 71st section it is further enacted, That "nothing in this act shall extend or be construed

" to extend to authorize nor shall it be lawful for the " said company to manufacture or produce gas or " inflammable air, or the products obtained in the pro- " cess of making gas or inflammable air, from pit coal, " cannal coal, or coal of any other species, description, " or denomination."

Towards the end of the year 1825 the committee of management resolved to make two calls upon the proprietors of 10 per cent. each; and accordingly, on the 12th December of that year, the clerk of the company addressed a circular letter to each of the proprietors, intimating that a fifth call of 2*l.* 10*s.* per share on the capital stock of the company was payable on the 10th of January 1826, and a sixth call of 2*l.* 10*s.* per share on the stock on the 13th of February following. The sum due upon Mr. Clyne's share of the stock of the company, under the first of these calls, was 130*l.*, and under the second a similar sum of 130*l.*, amounting in all to 260*l.* These calls were paid by all the other proprietors, but no part was paid by Mr. Clyne.

In the course of the autumn of 1826 it was ascertained, for the first time, by the committee of management, that the manufacture of gas from oil was to be extremely unprofitable to those concerned in it. For the purpose of communicating this intelligence to the proprietors, and obtaining their sentiments and instructions as to their ulterior proceedings, the directors caused a special general meeting of the company to be convened, in terms of the statute, by public advertisement in the newspapers, and by circular letters addressed to every proprietor upon the 4th of November 1826. At this meeting (which was not attended by Mr. Clyne) the proprietors, after hearing a report from the direc-

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tors, unanimously resolved to apply to Parliament for a repeal of the clause in their statute restraining the company from manufacturing gas from coal. In conformity with this resolution an application was made to Parliament, which proved ultimately unsuccessful. This result was reported by the directors to a general meeting of the proprietors, held on the 11th of June 1827, at which Mr. Clyne was present. This report, it appeared from the minutes, "was unanimously approved of," and the meeting resolved to adjourn consideration of the present state of the company's affairs, "and remit "to the directors, with instructions to report for the "consideration of a future general meeting, to be called "by circular letters for that purpose, upon the measures "of which they would recommend the adoption to the "proprietors."

After some time, and on considering another report by the directors, the proprietors resolved, at a meeting held on the 22d of January 1828, "again to apply to Par-"liament for power to manufacture coal gas," and a committee was appointed to carry this resolution into effect. While the directors were engaged with the necessary preparation for introducing a bill into Parliament they were induced to enter into a treaty with the Edinburgh Coal Gas Company, which, after some communing, resulted in the following minute of agreement, dated 8th March 1828, "At a meeting of the sub-committees "of the Coal and Oil Gas Companies, it is agreed that "the Oil Gas Company shall make over to the Coal "Gas Company their whole property of every descrip-"tion, real and personal, excepting the sums due for "calls made or to be made upon their proprietors and "accounts due by their customers, and that free of

" debt, the entry to be at the term of Whitsunday next,
" and the Oil Gas Company shall be bound to dissolve
" their company at the said term, or when required by
" the Coal Gas Company to do so. In consideration
" of which the Coal Gas Company shall admit the
" Oil Gas Company as proprietors of one thousand
" shares of the Coal Gas Company's stock, to be dis-
" tributed among the proprietors of the Oil Gas Com-
" pany, by the directors of that company, in proportion
" to the shares held by the proprietors of that company,
" and to draw dividends on these thousand shares, from
" the term of Whitsunday next, and to be subject to
" the whole regulations of the Coal Gas Company;
" the directors of the Oil Gas Company reserving
" power to sell such number of the one thousand shares
" of stock, not exceeding ninety, as they may find it
" expedient. In order to carry this agreement into
" effect, it is understood that the Oil Gas Company
" shall not present their proposed bill to Parliament, and
" that the Coal Gas Company shall, as soon as possible,
" apply for an increase of their capital stock, to such
" extent as the directors of the Coal Gas Company shall
" think proper; and if any difference shall arise as to
" the true intent and meaning of this agreement, or the
" mode of carrying it into execution, or in any way in
" relation to it, the same shall be submitted to Sir James
" Moncrieff, Bart., and Mr. Solicitor General Hope,
" with power to them to name an oversman in case of
" difference. This agreement is made subject to the
" approbation of a general meeting of the proprietors
" of each company, to be held as soon as possible;
" and this minute is signed by Sir Walter Scott,
" Bart., as chairman of the Oil Gas Company, and

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" William Trotter, Esq., of Ballindean, governor of " the Edinburgh Gas Light Company.

" (Signed) WALTER SCOTT, Chairman of the Edinburgh Oil Gas Light Company.

W. TROTTER, Governor of the Edinburgh Gas Light Company."

This agreement was reported by the directors to a special general meeting of the proprietors of the Edinburgh Oil Gas Light Company, which was held on the 27th of March 1828, when it was unanimously resolved:—" That the proprietors of the Oil Gas " Company do confirm the agreement made with the " Edinburgh Gas Light Company, and also do remit to " the directors, with full power to them, or to any " committee appointed by them, to take all measures and " to sign all deeds necessary for carrying the same into " full execution." Mr. Clyne was not present at this meeting, but it was alleged that the resolution was intimated to him, and to all the proprietors, by a circular letter dated 1st April 1828, and signed by the manager. In consequence of this resolution the directors concluded the agreement with the Coal Gas Company on the terms above set forth. The Coal Gas Company from that period commenced supplying the customers of the Edinburgh Oil Gas Light Company with coal gas, and in particular it was alleged they had since furnished this gas to Mr. Clyne, who had previously been a consumer of oil gas.

In January 1827 the directors of the Oil Gas Company raised an action against Mr. Clyne for payment of the above two calls of 130*l.* sterling each, with interest till paid. In defence against this action Mr. Clyne pleaded:—1st, That the calls were not made for the necessary purposes authorized by the statute, but were

occasioned by unwarrantable speculations on the part of the pursuers; and 2dly, That the calls were not made in terms of the statute, in respect that although more than a month elapsed from the period when the first instalment fell due before the second became payable, yet in point of fact these two calls were made by the committee of management and intimated to the proprietors at one and the same time.

While this action was in dependence, Mr. Clyne, in October 1829, raised an action against the Oil Gas Company for 1,183*l.*, as the market price of his shares of the stock as at 21st February 1825, on the ground that the company had, without his consent, abandoned the manufacture of oil gas, and transferred their stock to the Coal Gas Company, on receiving in lieu thereof certain shares of the stock of the Coal Gas Company.

In support of this action, Mr. Clyne maintained the following pleas:

1. As the company had been incorporated by statute, and the powers, rights, and duties of the directors and of the shareholders, to the public and to each other, had been defined and regulated by this statute, neither the directors nor any number of the shareholders were entitled to deviate from the rules laid down by the statute, or to dissolve the company, or to divert its property to other purposes than those prescribed and authorized by the statute, or to deprive him without his concurrence, of his right and interest in the company, or to transfer his right and interest therein to any other company, or individual, or set of individuals, without his consent.

2. As the company had abandoned the object and infringed the constitution of the company by converting

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it from an oil into a coal gas company, and had annexed it and all its property to another company, and had unauthorizedly, and for an inadequate consideration, transferred his rights and interest in the company's stock to the Edinburgh Coal Gas Company, they were bound to refund the monies advanced by him under the stipulations of their own contract, and not entitled to exact payment of calls.

On the other hand, it was pleaded by the Oil Gas Company, 1. That under the circumstances in which the affairs of the company were placed at the time of the agreement with the Coal Gas Company, the Oil Gas Company was legally entitled to abandon the manufacture of oil gas, to dispose of its property, and divide the proceeds rateably among the proprietors; and these measures having been effected in the way most beneficial for the shareholders at large, it afforded no relevant ground of action or complaint against them that the consent of Mr. Clyne, an individual proprietor of stock, was not specially adhibited.

2. That Mr. Clyne was barred by homologation and acquiescence from challenging the proceedings of the Company, and having sustained no loss from the proceedings, but, on the contrary, having generally benefited thereby, his claim of repetition and damages against them was unfounded.

These actions were remitted to the Jury Court. In the action at the instance of the Oil Gas Company against Mr. Clyne the following issue was prepared:

" Whether the defender is indebted and resting owing
" to the pursuers in the sum of 130*l.* sterling or any
" part thereof, with interest thereon from the 10th day
" of January 1826, and the sum of 130*l.* sterling or

" any part thereof, with interest thereon from the 13th " day of February 1836, as the instalments or instal- " ment on the shares of the said company held by the " defender as aforesaid." And in the cause in which Mr. Clyne was pursuer the following issue was prepared for trial: " Whether the defenders wrongfully violated the " provisions of the aforesaid statute, and thereby became " indebted to and are resting owing to the pursuer in " the sum of 1,183*l.* 10*s.* 5¼*d.* or any part thereof, with " interest thereon, as the value of the shares of stock " held by the pursuer as aforesaid?" or " Whether " the pursuer homologated or acquiesced in all or any " of the said actings of the defenders?"

Both causes came on for trial on the 19th of December 1831. After the counsel for Mr. Clyne had opened his case, the following agreement was in presence of Mr. Clyne subscribed by the counsel for the parties, in consequence of a suggestion from the bench that the causes were much more proper to be decided by a referee than by a jury:—

" The parties agree to refer the two actions to " Mr. John Boyd Greenshields, with full power to " determine all questions between the parties, and " to determine the question of expenses; and they " request the Court to interpone their authority to " this minute of judicial reference.

" JOHN HOPE, for Pursuer.

" JAMES KEAY, for the Oil Gas Company.

" Failing Mr. Greenshields the parties agree to refer " to any referee to be named by the Lord President.

" JOHN HOPE. J. KEAY.

" 19th Dec. 1831."

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On this minute being lodged in process, the Lord President made a remit to Mr. Greenshields, who however declined to accept the reference. On the same day, and before the interlocutor containing the remit to Mr. Greenshields was signed, Mr. Clyne wrote to the Clerk of the Jury Court, stating that he had just returned from the Court, and was ignorant of the tenor of the minute which had been proposed or agreed to; that the proposal was quite unexpected by him, and therefore he took the first opportunity of stating, that if it "contains any thing prejudicial to the ordinary remedies "of law, and particularly to the right of appeal to the "House of Lords, it is what I cannot assent to." He wrote in the same terms to the opposite agent. On the 22d December he moved the Court to remit both causes to the Lord Ordinary, and the Oil Gas Company at the same time moved the Court to name a new referee. On considering these motions, the following interlocutor was pronounced: "The Lord President, in virtue of the "power given to him by the within judicial minute, "and in respect Mr. Greenshields has declined to "accept, names Mr. Duncan M'Neill, advocate, as "judicial referee in these cases, and the Lords of new "remit to the said Duncan M'Neill, as judicial referee, "to consider the cases, and to report; and continue "both cases till such report is made; and refuse both "motions for Mr. Clyne."

Mr. M'Neill accepted the reference, and on the 25th of May 1832 pronounced an award on the narrative, inter alia, of "My having frequently met with the "agent for the Edinburgh Oil Gas Light Company, "on behalf of the said company, and with the said

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" David Clyne for himself; and having seen and con-
" sidered the said two causes, and the mutual claims
" and allegeances, and pleas in writing, and the books
" and documents produced, and having heard and con-
" sidered the parole proof adduced by both parties for
" several days before me; and having thereafter, on the
" 27th day of February 1832, heard the counsel for both
" parties at great length on the proof and documents,
" and whole merits of both causes; and having there-
" after, on the 19th of March 1832, issued full notes of
" my views thereanent; and having thereafter, on the
" 11th of May 1832, at the desire of the parties, again
" heard the counsel for both parties fully, and being
" well and ripely advised in the whole matters, and
" having God and a good conscience before my eyes, I
" do give and pronounce my final decision, determina-
" tion, and award, as follows:—Primo, I find that, in
" the action at the instance of the Edinburgh Oil Gas
" Light Company against Mr. Clyne, the pursuers are
" entitled to decree for 130*l.* sterling, with legal in-
" terest thereof, from the 10th day of January 1826,
" and for the farther sum of 130*l.* sterling, with the
" legal interest thereof from the 13th day of February
" 1826, being the two calls or instalments concluded
" for in the summons at the instance of said company
" against Mr. Clyne, and amounting, the said two
" calls or instalments, with interest, to 289*l.* 16*s.* 10$\frac{3}{4}$*d.*
" at Whitsunday 1828. Secundo, I find that, in the
" action at the instance of Mr. Clyne against the
" Edinburgh Oil Gas Light Company, he is entitled to
" decree for 780*l.* sterling, with the legal interest
" thereof from the term of Whitsunday 1828; but the
" said company is entitled to deduct therefrom the

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" aforesaid sum of 289*l.* 16*s.* 10¾*d.* found due to them " as at Whitsunday 1828, leaving a balance due by " the said company to Mr. Clyne at Whitsunday 1828 " of 490*l.* 3*s.* 1¼*d.*, which sum, with the legal interest " thereof, from Whitsunday 1828, till paid, Mr. Clyne " is entitled to recover from the said company, upon " his surrendering the 52 shares of the Edinburgh Oil " Gas Light Company stock held by him, or trans- " ferring the same in favour of the said company, or " of any person or persons they may direct for their " behoof. Tertio, I find that the Edinburgh Oil Gas " Light Company are entitled to reservation of any " claim they may have against Mr. Clyne, for any " calls or instalments subsequent to 13th February " 1826, paid by other partners of the company, but " not paid by Mr. Clyne, and Mr. Clyne is entitled " to have his defences against any such claim reserved, " and that the said company are not entitled to " withhold or delay payment, in the mean time, " of the said balance of 490*l.* 3*s.* 1¼*d.* and interest, " or any part thereof, on account of any such al- " leged claim for subsequent instalments. Quarto, " I find that neither party is entitled to expenses " against the other party, but that both parties are " conjunctly and severally liable to the clerk to the " reference for his expenses and trouble, which I tax " at 21*l.* sterling, with relief to either party paying the " same against the other party to the extent of one " half."

The Oil Gas Company applied to the court to interpone their authority to the award; Mr. Clyne opposed the motion on the ground, 1st, That the alleged reference was not binding on him, and he had recognised

Mr. M'Neill merely as a commissioner leading a proof, on the import of which the courts were to decide. 2d, That the award was ex facie irregular, as it reserved certain claims, and therefore did not exhaust the reference. 3d, That it was ultra vires in so far as it contained a qualification not in the summons, that Mr. Clyne should not recover the sum awarded to him unless he executed a conveyance in favour of the company of the shares of the company's stock held by him. To these pleas it was answered, 1st, That the judicial reference was regularly entered into; the jury had been discharged on the faith of it, and both parties had pleaded before the judicial referee. 2d, That the award did exhaust the reference, as the claims which it reserved did not fall within the conclusions of either of the actions referred. 3d, That Mr. Clyne could not both claim damages and keep the shares, the value of which had been awarded to him, and therefore the referee had rightly ordained him to convey them on receiving payment of the sums decerned for.

The court pronounced the following interlocutor, dated 28th June 1832: "Dismiss the motions for "David Clyne, and approve of this award by Dun- "can M'Neill, the judicial referee; interpone the "authority of the court thereto, and decern against the "parties for implement thereof to each other."[1]

Mr. Clyne having died, Sir William Baillie and others, his trustees, presented an appeal in the cause at the instance of the company against him, and a separate appeal in the cause at his instance against the company.

Appellants.—1. The alleged reference never was entered into by Mr. Clyne, and that which was subscribed

[1] 10 S., D., & B., 723.

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by counsel, at the suggestion of the presiding judge, was irregular on several grounds, and having been in due time disclaimed by Mr. Clyne, the attempt to give effect to it was incompetently made. No minute was submitted to or signed by him, nor was he aware of the precise terms of the one written and signed by counsel till the day following. He was taken on this occasion completely by surprise, and was therefore entitled to every indulgence in deciding how far it was binding on him. In principle, every reference of a judicial nature betwixt litigants, being a voluntary contract to depart from the ordinary course of procedure, may be resiled from, so long as the rights of parties are entire.

2. The circumstances under which the judicial reference is said to have been entered into rendered it still more objectionable. It is evident from the record that the questions raised under both actions were questions of law, and not such as could competently or with propriety form the subject of a jury trial. Accordingly, Mr. Clyne uniformly contended that both actions ought to be decided in the Court of Session; while the respondents insisted that they should be remitted for jury trial, although the jury clerks declared that issues embracing the real merits of the case could not be framed.

3. The alleged award is incompetent on various grounds, independent of the nullity of the minute of reference on which it is said to have proceeded. By the first finding in the award the Oil Gas Company have obtained decree for the whole of their demand, thus finding by implication in the action against Mr. Clyne that the company was entitled to dissolve itself without the authority of Parliament, by virtue of which it existed, to alienate its property and Mr. Clyne's in-

terest therein, and at the same time to pursue as an existing company for calls authorized by the statute, although the expenditure which these calls were meant to cover was shown to have been incurred by undertakings and procedure not warranted by the statute. This finding was not only contrary to the record and evidence, and unsupported by legal principle, but affords a striking contrast to the second and third findings, by which the claim made by Mr. Clyne in his action was disposed of.

By the second finding, the referee, instead of awarding the sums actually disbursed by Mr. Clyne, or lost by him, reduced his claim to 780*l.*, and by deducting the amount of the calls pursued for by the company reduced it still further to 490*l.* 3*s.* 1*d.* Again, instead of giving an immediate decree for that sum, a condition was introduced into the award, for which neither the summons nor the record gave any warrant; viz. that Mr. Clyne should be entitled to recover this reduced sum, or any sum due to him, only "upon his surrendering the "fifty-two shares held by him, or transferring the same "in favour of the said company, or of any person or "persons they may direct for their behoof." Thus, instead of a decree under the summons for any sum of damages, there was only a conditional finding; and Mr. Clyne, unless he complies with the terms of it, is denied all redress. By the third finding of the award, the Oil Gas Company "are entitled to reservation of "any claim they may have against Mr. Clyne for any "calls or instalments subsequent to the 13th February "1826, paid by other partners of the company, but "not paid by Mr. Clyne; and Mr. Clyne is entitled to "have his defences against any such claim reserved."

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There is no warrant under the terms of the summons in either of the actions, or under the alleged reference, for such a reservation, which, under the circumstances, in which the parties were placed, was most prejudicial to Mr. Clyne. Every reservation is prejudicial, as implying more or less directly a recognition of what is reserved.

The record in the Court below, and the documents therein referred to, warranted an immediate decree in both actions in favour of the appellants. The late Mr. Clyne having purchased and held shares in the Oil Gas Company on the faith of an express agreement between the parties, and also of an act of Parliament regulating the purposes for which the company was to be carried on, and the company having violated the provisions of that agreement and of the act of Parliament, and in particular having not only expended large sums of the company's stock in applications to Parliament and in other purposes, useless and prejudicial, and inconsistent with the statute, but having also finally extinguished the company, contrary to the statute, and merged it in a totally different company, to which they conveyed away all its property for an inadequate consideration, Mr. Clyne was entitled, in respect of these proceedings, to recover from them, in the action at his instance, the whole sums which he advanced on the faith of the contract and of the statute, and also the amount of loss which he has sustained from these proceedings.

The referee, by his award, has held that Mr. Clyne was bound, as a partner of the Oil Gas Company, to sanction proceedings contrary to their statute; and further, to transfer or allow his right and interest to be conveyed over to a different company for an inadequate

consideration. The Court of Session have frequently reduced decrees arbitral, on its being shown that they were contrary to plain law; and by the law of England such an award would be set aside as contrary to law. It has been held (as observed by Caldwell[1]) that the "arbitrators cannot decide contrary to law, because "that is beyond their power, for the parties intend to "submit to them only the legal consequences of their "transactions and engagements."

The same author observes, "that upon another "occasion it was said by the then Lord Chancellor[2], if "it appeared that the arbiters went upon a plain mis-"take, either as to the law or on a matter of fact, the "same is an error appearing on the face of the award, "and sufficient to set it aside."

The decerniture for one of the calls by the judicial referee was clearly illegal, because by the act incorporating the company the committee of management were not authorized to declare calls at a shorter distance from each other than one month, whereas the two calls pursued for had both been declared at the same time.

Respondents.—1. The parties having entered into a judicial reference, whereby they agreed to refer the mutual actions to the decision of Mr. John Boyd Greenshields, advocate, whom failing, to the decision of a referee to be named by the Lord President of the Court of Session, and the Lord President having appointed Mr. Duncan M'Neill, advocate, who accepted the reference, and pronounced an award, to which the authority of the Court was duly interponed, the appellants are bound to implement that award. A judicial

[1] Caldwell, p. 63.

[2] Cornforth v. Geer, 2 Vern. 705.

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reference being in fact a submission entered into by the parties under the authority of the Court, the same rules of law regulate the proceedings of the referee as are applicable to the case of an arbiter acting under a formal deed of submission. In neither case is the judgment liable to be set aside by way of exception, but can be challenged only in a proper action of reduction, expressly libelling on one or other of these grounds, viz. bribery, corruption, or falsehood.[1]

It is in vain for the appellants to maintain that Mr. Clyne was no party to the reference, and only recognised Mr. M'Neill as a commissioner leading a proof, on the import of which courts of law were to decide. It is not denied that the minute of reference was signed at the bar of the Court, in presence of the jury, by the leading counsel for Mr. Clyne, who opened the case on his behalf; neither is it disputed that it was signed by the authority and in the presence of Mr. Clyne, who conducted his own case as agent. In the letter addressed by him to the jury clerk, after the reference had been agreed to, he expressly admits that he was in Court when the minute was signed. In that letter he neither pretends that the minute was signed without his authority, nor does he repudiate the reference, but merely reserves the ordinary remedies of law competent in such proceedings.

2. The objection that the award of the judicial referee was pronounced ultra vires compromissi, in so far as it ordained Mr. Clyne to surrender the fifty-two shares of the Oil Gas Company's stock held by him, is not well founded. The action at the instance of

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[1] Act of Regul., 1695, sec. 25.

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Mr. Clyne from its very nature implied that Mr. Clyne was no longer bound to remain a member of the company, but was entitled to withdraw from its concerns, and to be relieved of his whole interest therein, together with all risk of future loss. Still less, as he contended, was he bound to become a member of a new company, with which it was alleged the former had become incorporated; but, on the contrary, he was entitled to repudiate the whole transaction, and to obtain repetition of the sums which his shares had actually cost, together with the profit which he might have obtained had he taken the advantage of a rise in the market to sell his stock at a particular period. The referee so far gave effect to this plea as to find that he was not bound, contrary to his inclination, to become a partner of the Coal Gas Company, but was entitled to be paid in money the value of his interest in the concern, which he ascertained to amount to 780*l.* sterling, instead of 1183*l.*, as claimed by Mr. Clyne, and which sum accordingly he ordained to be paid to him on his surrendering the fifty-two shares of the Oil Gas Company's stock held by him, or transferring the same in favour of the company or of any person whom they might direct for their behoof.

3 The award by the judicial referee sufficiently exhausts the reference; and it is no objection that it contains a reservation, in favour of the Oil Gas Company, of other claims for instalments due subsequent to February 1826. The action at their instance concluded for payment of the calls only which had fallen due at and prior to that period. For those which have become payable subsequently no action has yet been raised, and as it was only the claims included in the mutual actions then in dependence, which were judicially referred to Mr. M'Neill, it was

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clearly incompetent for him to decide any question not embraced under these actions. Had he given a decision upon these claims his award would, to that extent at least, have been reducible.

The reason of the respondents claim for the subsequent instalments being noticed at all in the award was, on the one hand to prevent them from withholding payment of the sums found due to Mr. Clyne by the referee on the plea of compensation, and on the other to prevent Mr. Clyne, or his representatives, from maintaining at a future period that these instalments fell under the reference, and had been decided by the arbiter.

The award by the judicial referee is well founded on the merits. When the agreement was entered into with the Coal Gas Company the affairs of the Oil Gas Company were in the most hopeless condition; their stock had not only fallen below par, but was unsaleable at any price; the production of oil gas had been ascertained to be so expensive as to render it impossible for the respondents to compete with the Coal Gas Company, and no alternative therefore was left but that of suspending the operations of the Oil Gas Company, disposing of their property to the best advantage, and dividing the proceeds among the shareholders. Accordingly this is all that was done by the agreement in question. The powers of the Oil Gas Company, as established by act of Parliament, were not disposed of. It is true that a condition was annexed to the bargain that the Oil Gas Company should dissolve itself when required; but as this cannot be done except by an act of Parliament, which has not yet been applied for, the Oil Gas Company is still in existence, and it is so con-

sidered by the appellants themselves, who are insisting in an action against the company in its corporate capacity.

The two instalments concluded for in the action at the company's instance against Mr. Clyne were made in terms of the statute, in respect that although the intimation of the two calls were made to the proprietors at one and the same time, more than a month elapsed between the respective terms of payment.[1]

[1] When these causes came to be heard at the bar the value of the Coal Gas Company's stock had risen in the market greatly beyond what it was at the period when the agreement between the two companies was entered into; and on the 14th of May 1835, after Sir John Campbell had opened the case on the part of the appellants, an agreement, which was embodied in the following judgment, was entered into between the parties, on the suggestion of the Lords Lyndhurst and Brougham.

" It is ordered and adjudged, by the Lords Spiritual and Temporal, in " Parliament assembled, that the appellants be at liberty to withdraw their " said appeal, by consent of the respondents, upon the terms following, " (that is to say,) that the appellants do pay or cause to be paid up all the " oil gas calls, as paid by other shareholders, with interest upon the same, " and that the said appellants be let in to shares of the Coal Gas Com- " pany in proportion to the number of their shares in the Oil Gas Com- " pany like the other proprietors, and be paid up all dividends on such " coal gas shares, with interest thereon; and that all proceedings, including " the action in implement of the award, be stayed and abandoned, each " party bearing their own costs, and that the appellants do pay one half " of the arbiter's expenses."

The day after this agreement was entered into, the agent for the appellants in Scotland, who was a trustee and one of the residuary legatees under Mr. Clyne's deed of settlement, presented an application to the House of Lords, stating, that when the said agreement was proposed at the bar he had been taken by surprise, and had not time duly to consider its import before it was signed by his counsel. That, on further reflection, he was satisfied that it would, if carried into effect, be very prejudicial to the interests of his constituents, particularly in so far as it stipulated that they should pay to the Oil Gas Company all calls made subsequent to the commencement of these proceedings, and for which no action had yet been raised by the company, and he therefore prayed their lordships to allow the causes to be reheard. That application was remitted to the Committee on Appeals, and after some discussion the prayer of this petition was granted, on condition of the appellants paying the additional costs thereby incurred. This order having been complied with, the causes were again heard.

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LORD BROUGHAM.—My Lords, upon two points I have no doubt in this case. In the first place, I have no doubt that the point with respect to the two calls, whether, in regard of the amount being twenty per cent. instead of ten, or in regard to the calls being two at the same time instead of two calls separated by an interval of a month and upwards,—that point has never been left to be decided by a jury; and if it shall be said that the issue did not leave that point to be decided by a jury I do not exactly see what was sent to be tried, except this very point. Nevertheless, I think if it be something less, or more than was necessary, or as much as was necessary, it is in point of fact the same amount that was left to the jury by that issue, and therefore the objection seems, in another stage of the proceedings, really in substance to come to the same thing, namely, instead of sending the issue to be tried, which is the objection, that they sent no issue to be tried at all but an issue of fact and an issue of law, when facts enough were admitted to raise a point of law, which I think they ought to have taken, and decided whether this was or was not contrary to the fifty-second section of the act. Now, the other point upon which I have no doubt, in certain respects, is, that the subsequent finding and award is not final, and that it does not direct any thing specific or positive to be done, but merely upon one party doing something, something is also to be done by the other;—if Mr. Clyne chooses to give up those shares, and divest himself of that property, the company shall pay him so much. It is in vain to say that this was only directing a party to do so and so, upon another party producing letters of administration; it is in vain to say, it is like a party who is

directed to do so and so upon a due discharge being executed; and it is in vain to say, as has been ingeniously put in argument, that it is directing a cautioner, upon the assignment of the principal obligor's interest;—it is in vain to say that any or either of the three cases put are at all the same as the one in question. There is no necessary connexion between letters of administration being produced and receipts being produced; one is by way of condition precedent, and the other is in the nature of a condition subsequent, namely, the assignment of the right of the principal obligor, or the person for whom the cautioner is bound; it is an order directing one thing to be done. There was no necessary connexion between the arrangement which the arbitrator was in the course of directing and Mr. Clyne divesting himself of his property in ceasing to be a shareholder. It did not direct him to give up the shares; it only said, if he chooses to get out of the situation of shareholder he can divest himself of the company property, and assign it over or give up the shares to the company, and the company shall do so and so. That is a perfectly different matter, and ought to be made the subject of a specific direction, binding Mr. Clyne obligatorie,—not at all binding the company in the event of Mr. Clyne executing the directions of the award, whatever they might be. I have no doubt whatever upon that; but there are two other matters which I wish to take time to consider, especially as raising another objection to the award, of a more specific nature than the second, from which it appears clearer that the award was not final, namely, the objection which applies to the calls that the reservation is bad. Now, if this is a general submission of the cause,

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and all matters in difference, or what comes to the same thing, submission of all matters in the cause, with a power to the arbitrator to whom that reference is made to dispose of all questions between the parties; if that be not so in Scotland, it would certainly be with us a general reference of all matters in dispute between the parties as well out of the cause as in the cause pending. But I am not quite clear that the form of that direction, perhaps from the wording, makes it a final proceeding; for it is reserving all questions touching shares and calls, which calls have been made during the interval between the action brought and the period of the reference. But it is said that is not the course, and in fact that there could be no such reference by the practice of Scotland. I shall look anxiously at this; for if so, this other consequence follows, which indeed is not repudiated, but expressly stated to be Scotch law, that if the word "other" had been inserted for the express purpose of showing that all other matters, as well as those pending in the suit, were referred to arbitration, that the use of the distinct word "other," would still only amount to a reference of the subject-matters in dispute in the cause. I apprehend "other," by the Scotch language, means all other questions than those in the cause, or it means nothing. I should be surprised to find the practice to be otherwise, as it would be giving a technical sense in opposition to the obvious meaning of the word in common use; however, I shall take the opportunity of satisfying myself upon this, which is a point of importance in practice. The only other point that remains to be considered is as to the effect of the supposed arbitration, whether it exists in these other suits; and it is said the only ques-

tion arises (if I should be against the appellant) upon the construction of the award, and consequently upon the import and effect of the third finding of the arbitrator, —I mean the question reserved; if I should be with the appellant, then upon the face of the award, there is a point of law, namely, the application of the construction of the fifty-second section. If I am of opinion against the appellant upon that, there will arise a third question; if I am against him upon those, of course the award is final; if I am against him upon those views, both upon the meaning of the reference, which prevents the effect of the third finding, and if I am of opinion against him upon the passage importing a legal question out of the summons into the award, and then dealing with it as a point of law arising upon the construction of the fifty-second section, there is an end of the case. But if I am with him upon the second point, and against him upon the first, if he can raise the question about the summons, then the only further question will be,—I being of opinion the second call is bad, at all events,—Whether or not the first call is good. That raises the question which has been argued. It is not said you may not have two calls on the same day; but then as it is said that they are not allowed to have more than ten per cent., that raises this question, Whether, if a call of ten per cent. has been paid on the 10th of January and another upon the 13th of February, it is not an evasion of the clause for raising money, on which they are tied down closely. If I am against them upon this, the appellant then would recover, and the company would be entitled to retain their judgment in the first action to the amount of 144*l.* 18*s.* 5*d.*, and then in the second there will be a general remit.

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The case then stood over till the 17th of July, when—LORD BROUGHAM said, My Lords, in this case I stated at considerable length, in the course of the argument and when the argument had closed, the view which I took of the two most material parts of it, and I stated the reasons why it appeared to me to be impossible to agree entirely with the judgment which had been pronounced below upon the former part of the case, affirming in all respects the award of Mr. M'Neill the arbitrator. It appeared to me that the award was not final in respect of the second finding, which did not give a positive direction to Mr. Clyne to surrender his shares, but only a conditional order, which imported that if he thought fit he might surrender them upon receiving the compensation stated from the company. But a question also arose, whether the third finding was not equally defective in point of conclusiveness, as it reserved to one of the parties all right of action with respect to the other calls which had not become due at the time the submission to arbitration was entered into. This depended upon whether or not we construe the words of the reference as importing a submission to arbitration of all matters in dispute between the parties, or only a submission to arbitration of the matters in dispute in the action already brought, and which was then referred. The words of the reference were these, "The actions, and all "questions bewteen the parties," or "all other questions, "between the parties;" and it appeared to me that this was a reference of all matters in dispute; it undoubtedly would have been so with us, being one, and perhaps the most ordinary mode of making a general reference to arbitration. If we refer all matters in dispute in a cause, that of course only is a submission to arbitration

of the cause itself, and nothing more; but if we refer, which is usual when a general reference is intended, "this cause, and all matters in difference between the "parties," or "this cause, and all questions between "the parties," these words import a general reference. I find, however, upon further consideration and examination of the authorities, and above all on a very instructive communication which I have had with some of the learned judges in the court below, that there is something peculiarly technical and strict in what is called a judicial reference in Scotland. It is stated to be an act of the Court,—it is said not to take the cause out of the Court,—the Court is understood still to retain its control over it, and its power of dealing with it, but the mode of inquiry and the manner of trial alone is changed by the reference, and the forum of the arbitrator is in this restricted sense, and subject to the control of the court, substituted for inquiry by the court itself. I will not stop to inquire how far this may find resemblance or analogy in our references under the statute of William, by making the submission a rule of court; but at all events, this is certain, that the course of proceeding in Scotland is so strict, and its incidents are so construed, as to make these words of reference, or words of reference similar to those used here, bear a construction materially different from what they would have with us; so that "referring the caúse, and all questions," or even "referring the cause, and all other questions," but certainly "refering the cause, and all questions," between the parties to arbitration, only imports that the generality of all questions is to be construed according to the more especial matters immediately preceding, and that "all "questions" in such a reference must be taken to mean

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all questions in dispute between the parties in the cause referred; that is to say, it is a reference only of all matters in dispute in that cause. This, therefore, removes all questions which may arise as to the conclusiveness of the award in this latter branch, but it leaves the want of conclusiveness in the second branch exactly where it stood before, and that is sufficient to prevent the interlocutor of the Court below from standing which confirms the award. With respect to the first branch,—that touching the two calls and interest on them, and in which the award was made against Mr. Clyne,—I stated at the argument my opinion, that one at least of those was not exigible, inasmuch as the fifty-second section of the act of George the Fourth requires that a month or more shall intervene between the making of any two calls; and those calls, though the payments under them were to be at an interval of a month, were nevertheless both made upon the same day. I formerly stated at greater length, the reasons why it appeared to me this was not a compliance with, but an evasion of the statutory provision; and an evasion of it in one of its most important particulars,—that of a right to make calls upon the shareholders for payments to the company; but the first of these calls does not appear to me to fall within the same objection, and therefore I am of opinion that one of those calls was duly made, inasmuch as it is not denied that above a month had elapsed from the last preceding call. The result of this will be therefore that the finding of the arbitrator in the first action must be reduced by one-half, and that instead of 289*l.* 12*s.* 10½*d.*, only 144*l.* 16*s.* 5¼*d.* will be payable by Mr. Clyne to the company; this includes principal and interest. But it was said that this part of the award may

stand separate from the rest, with which it is unconnected; and that this part of the award gave both calls, with the interest thereupon. That answer, however, will not suffice; for it is upon an error in law that I hold this part of the finding to be erroneous, and that error in law, though it does not appear in express terms upon the face of the award, yet appears by the award, taken together with that to which the award refers, and which, by that reference, must be taken to be imported into it; consequently, there is here just as much error in law as if that error had appeared upon the face of the award. The result of the argument with respect to the inconclusiveness of the award of course is that the interlocutor must be set aside, requiring the payment to Mr. Clyne from the company of 700*l.* odd, from which the company were also allowed to deduct that which was found due by Mr. Clyne to the company under the first head and in the first action. As there will now be no payment to be made by the company to Mr. Clyne, of course there is no occasion for mentioning the deduction; but one observation I have to make is of some importance, because it tends to prevent these proceedings from going further than the stage which they will reach upon this remit and reversal:—It is clear what the arbitrator intended to do. He has failed in accomplishing his object, by a defect, not so much in form as in substance, of his directions. If he had said, which he in all probability meant to say, that Mr. Clyne should surrender his shares and the company make him compensation, then the whole would have been right. I have looked into the facts of the case, and as far as I understand them I am very clearly of opinion that such would have been a right award; and that had it been so made the Court would

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have been right in confirming it. When this matter goes back again, the probability is, that the party against whom the award was made will not choose to refer, at least to the same arbitrator. It is also possible that either that party or the other may not choose to refer at all; but whether by a reference and an award, or by the Court dealing with the case itself, a similar judgment is in my opinion very likely to be arrived at. As at present advised, I think if it is come to, that judgment will be unimpeachable,—as at present advised, I am of opinion that if any other judgment is come to that judgment will be wrong,—consequently, if the result of the present reversal is, that in the further progress of the litigation the same conclusion is arrived at which I have already stated I believed it was the intention of the arbitrator and the Court to come to, that conclusion, I think, ought to stand; and if it should be brought here by appeal, the party appealing will, in all probability, not only have a decision here against him but have to pay the full costs of that proceeding. The best way will be to alter the interlocutor complained of, in the manner I have already described, the consequence of which will be, that the award will be set aside and the Court will be left to proceed with the cause as they shall see fit, the award being taken out of the field, and Mr. Clyne being directed to pay the sum I have already stated as one call, with interest.

The following judgments were thereafter pronounced:

In the action at the instance of the Oil Gas Company against Mr. Clyne, "It is ordered and adjudged, by "the Lords Spiritual and Temporal, in Parliament "assembled, that the interlocutors complained of in the

" said appeal be and the same are hereby reversed; and " it is found and declared, that in terms of the fifty-" second section of the act of Parliament (mentioned in the " proceedings in this cause) passed in the fifth year of " the reign of his late Majesty King George the Fourth, " intituled 'An Act for the better lighting the City and " Suburbs of Edinburgh by Oil Gas,' it was not compe-" tent to the company thereby incorporated to make " two calls for money from the subscribers to and " proprietors of the said undertaking at one and the " same time, and that it was by the said act enacted, " that no such calls should be made but at the distance " of one calendar month at least from each other: " And it is further declared, that instead of making " two calls for 130*l.* each upon the shares held by the " said David Clyne on the 12th day of December " 1825, it was not competent to the said company to " make more than one of such calls at one time; and it " is therefore further ordered, that the said cause be " remitted back to the First Division of the Court of " Session in Scotland, with instructions to the said " Court to set aside the award by Mr. Duncan M'Neill, " mentioned in the said appeal in terms of this judg-" ment, finding, and declaration, and to find the ap-" pellants liable in payment to the respondents of the " first instalment or call on the said shares, with inte-" rest since the same became due, and to proceed " further therein as may be just, and consistent with " this judgment."

In the action at the instance of Mr. Clyne against the Oil Gas Company, " It is ordered and adjudged, by " the Lords Spiritual and Temporal, in Parliament " assembled, that the interlocutors complained of in the " said appeal be, and the same are hereby reversed: " And it is further ordered, that the said cause be

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"remitted back to the First Division of the Court of "Session in Scotland, with instructions to the said "Court to set aside the award of Mr. Duncan M'Neill, "mentioned in the said appeal, and to proceed further "therein as may be just, and consistent with this "judgment."

SPOTTISWOODE and ROBERTSON,—RICHARDSON and CONNELL, Solicitors.