as it must be taken that the attesting witnesses would, if alive, have given evidence of the sanity of Maitland at the time the deeds were executed. There is positive evidence, therefore, of the sanity at the time of the execution of the deeds, or at least that he was sane in the judgment of the attesting witnesses; there is positive evidence of the sanity in the notes written by Maitland himself, which show that he knew and understood the nature of the transaction. There is on the one side clear positive evidence to support the deeds; and, on the other, only general evidence to reduce them, which, consistently with the positive evidence, cannot be true. This is not, therefore, a case of a doubtful balance of testimony, but the Appellant's evidence is decidedly the stronger.

May 16, 1817.

INSANITY.

Judgment of the Court below REVERSED.

SCOTLAND.

APPEAL FROM THE COURT OF SESSION.

JOHNSTON—*Appellant.*
CHEAPE and another—*Respondents.*

AND

JOHNSTON—*Appellant.*
CHEAPE and others—*Respondents.*

ARBITER, well known to the parties for his skill in the subject of reference, acting under submissions re-

June 9, 11, July 8, 1817.

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ARBITRATION.

citing that the parties had "confidence in him as a fit "person," and had "confidence in his judgment" to carry into effect certain improvements upon lands, and apportion the expense among the parties, refuses to communicate the notes of his opinion, or a draft of the award, before it was pronounced to one of the parties applying for such notes or draft, and refuses to receive proof of alleged material facts laid before him by the same party; he being himself a competent judge of the subject, and chosen for that reason, and having no doubt in his mind; the award was held good, notwithstanding such refusal: for, (*per* Lord Eldon, C.) an arbiter is not bound in all cases to receive evidence, whether it will have any effect on his mind or not. But even by the law of Scotland, which attaches so much value to arbitration, a refusal by an arbiter to receive proof where proof is necessary, may amount to what they would consider as a ground for setting aside an award. (*Vid.* Sharpe v. Bickerdyke, *ante*, vol. iii. p. 142.)

An arbiter has an interest in the subject of reference, and this is well known to the parties before they sign the submission; the award is good, notwithstanding the interest.

Five parties agree to refer the direction of certain extensive improvements, and the apportioning of the expense among them, to an arbiter, the submission bearing that the award is to be pronounced "betwixt and the day "of " (omitting the usual words, *next to come*), "or "between any farther day to which this submission may "be prorogated, and which he (the arbiter) is hereby "empowered to do at pleasure." Three of the parties sign the submission in March, 1811. The arbiter prorogated the submission on the 8th November, 1811, and 2d November, 1812. The two other parties signed the submission, one on the 20th March, the other on the 9th April, 1813, and the award was pronounced in May, 1813, when the work was completed. One of the parties who first signed endeavours to get rid of the award on the ground that the legal time had expired, the prorogations being ineffectual because two of the parties had not signed the submission till after the date of the last of them. But held that as the party had seen the work going on in the interval between 1811 and 1813, without intimating any such objection, he must be considered as having waived it, and should not be permitted to take advantage of it after the completion of the work.

Arbiter, in his award goes beyond the limits of the submission: this does not vitiate the whole award, but the excess held *pro non scripto*, and the award good to the extent of the power. June 9, 11, July 8, 1817.

ARBITRATION.

FIRST CAUSE.

THE Appellant Johnston, in 1813, brought an action to reduce an award against the Respondents Cheape and the arbiter. The award was founded on a submission between Johnston and Cheape, empowering Thomson as arbiter to decide the proportion to be paid by each of them of the expense of deepening a drain called Rossie-Drain, "from "the point where it falls into the Eden up to the "march between our properties at Bowhouse "Moss," and of keeping clear the said drain "between the aforesaid points." in all time coming. The submission proceeded on a recital of confidence in Thomson as a fit person to determine the value of the operation to their respective properties, and to ascertain the proportion of the expense which each ought to pay. The reasons of reduction were in substance corruption, partiality, and interest, in the arbiter, and also excess in the award; the arbiter having charged the Appellant with the expense of deepening a part of the drain which lay beyond the points limited by the submission. The interest consisted in this, that the arbiter's own lands would be benefited by deepening the drain; and it was alleged that there was "strong reason to believe" that the arbiter was actuated by a corrupt motive arising from a private transaction or understanding

Action, 1813, to reduce an award.

Submission.

Reasons of reduction.

June 9, 11, July 8, 1817.

ARBITRATION.

between him and Cheape, relative to the draining of the arbiter's own lands, by which the expense would be diminished to the arbiter in proportion as it should be diminished to Cheape in respect of the operation in question. The circumstances alleged in support of the charge of partiality, were the refusal by the arbiter to receive evidence of material facts which the Appellant brought under his view, and offered to prove, and his refusal to communicate to the Appellant the notes of his opinion, or a draft of the decree arbitral before it was pronounced. And the cases of *Blair*, Jan. 1738—*Wallace v. Wallace*, Feb. 1762—*Williamson*, 1766—*Logan v. Lang*, Nov. 1798—and *Elliot v. Elliot*, 1789—were cited.

Defences.

In defence it was stated that the reason why the arbiter has refused to communicate his notes or a draft was, that, though often employed as an arbiter, he had never been accustomed to do so, and that he had refused the evidence because, from his own knowledge of such matters, he had no doubt as to the effect of the operation on the respective properties of the parties; that as to the matter of interest, he had no interest in the subject that was not well known to the parties when they subscribed the submission. It was denied that there was any transaction or understanding of the nature stated by the Appellant, or that there was any partiality or corruption, or any excess in the award. But if there was an excess, that might be rectified without affecting the rest of the award. (*Vid.* the next cause.)

May 12, June 7, July 1, 1814.

The Court below repelled the reasons of reduc-

tion and sustained the defences, and Johnston appealed.

June 9, 11, July 8, 1817.

ARBITRATION.

SECOND CAUSE.

Mr. Johnston the Appellant, and the Respondents Messrs. Cheape, Wemyss, Heriot, and Buist, having lands on the banks of the river Eden, in Fife, engaged, by signing a minute to that effect in April, 1810, with a view to the improvement of their lands, to deepen the channel of the river, and remove a bridge, and erect another, and that a neighbouring gentleman well known to them all for his skill in such matters, should be empowered to execute the work, and settle the proportions of the expense; and a submission was accordingly prepared reciting the proposed objects, and then proceeding in these terms: "and having confidence "in the judgment of Andrew Thomson, Esq. of "Kinloch, for getting these improvements carried "properly into effect, therefore we do hereby give, "grant, and commit full power, warrant, and au- "thority to the said Andrew Thomson, as sole "arbiter chosen by us, to get the said bridge over "the river Eden, near the village of Kettle, re- "moved, and a new one erected to the westward "of that bridge; to cause the said river to be "deepened and widened at and above the said old "bridge (beginning as near to it as can be done, and "at the same time obtain a proper level) upwards "to where the Rossie Drain falls into the said river, "and to get the river between these two points "embanked, and what other improvements executed "he may deem necessary for completing the object "in view, and that in any manner he may think

Submission.

June 9, 11, July 8, 1817.

ARBITRATION.

" proper, and with power to him to enter into con-
" tracts with workmen for finishing said works, and
" to proportion the expense of the said improve-
" ments among us as he shall conceive just and
" reasonable, according to the benefit which the
" lands belonging to or possessed by each of us will
" derive therefrom, and also with power to the said
" arbiter to take all manner of probation, and to
" direct measurements and valuations to be made,
" and do every thing else necessary, or that he
" should think proper, for enabling him to decide
" and determine in the matter hereby submitted
" and referred to him; and whatever the said arbiter
" shall decide and determine by decreet arbitral to
" be pronounced by him betwixt and the day
" of or between and any farther day to which
" this submission may be prorogated, and which he
" is hereby empowered to do at pleasure: We
" hereby bind and oblige ourselves, our heirs, and
" successors, to acquiesce in, impliment, and per-
" form, under the penalty of 100*l.* sterling, to be
" paid by the party failing to the party observing,
" or willing to observe the same over and above
" performance; and we bind and oblige ourselves
" and our foresaids respectively to keep the said
" river and the banks thereof, after the said im-
" provements are completed, opposite to the lands
" belonging to or possessed by each between the
" above-mentioned points, and which are to be
" thereby benefited, in good and sufficient con-
" dition and repair in all time thereafter, so that
" none of the lands belonging to or possessed by
" any of the parties in this submission can be in-

"jured by neglecting such repairs, otherwise the "person or persons failing so to do shall, over and "above performance, pay whatever damage any of "the others shall happen to sustain thereby, as the "same shall be ascertained by fit neutral men." June 9, 11, July 8, 1817. ARBITRATION.

The submission was signed by the Appellant on the 11th, and by the Respondents, Cheape and Buist, on the 14th March, 1811. The arbiter immediately began and proceeded with the work, and prorogued on the 8th November, 1811, and 2d November, 1812. The Respondents Heriot and Wemyss signed the submission, the one on 20th March, the other on 9th April, 1813. The work being completed in May, 1813, the arbiter then made his award, which, after reciting the submission, prorogations, and execution of the works, proceeded in these terms: "And being well satisfied "with the manner in which these operations have "been executed, and that the object which the "parties to the submission had in view, will be "completely answered, and having caused measure- "ments of the work executed to be made and as- "certained, the whole expences of the operations "including interest up to the term of Whitsunday, "1813, as per a particular state thereof, signed by "me of this date as relative hereto, to amount to "the sum of 759*l.* sterling; and having frequently "gone over and inspected the grounds belonging to "or possessed by the said parties, which have been "or may be benefited by the said operations; "having heard the parties as to their claims, having "got all the information which I consider necessary "for determining the matters submitted to me, and

Dates of the signatures.

Award.

June 9, 11, July 8, 1817.

ARBITRATION.

" having maturely deliberated upon every circum-
" stance relating thereto, and being now well and
" ripely advised therein, and having God and a good
" conscience before my eyes, do give and pronounce
" my final sentence and decreet arbitral as follows,
" viz. I find and hereby decern and ordain that the
" above-mentioned sum of 759*l.* sterling shall be
" paid proportionally as follows by the respective
" parties, being the ratio in which I am of opinion
" and hereby find that the lands belonging to or
" possessed by each of them, have already been or
" may be still benefited in consequence of the
" operations above-mentioned; viz. The said Wil-
" liam Johnston shall pay the sum of 535*l.* sterling,
" the said John Cheape shall pay the sum of 146*l.*
" sterling, the said James Balfour Wemyss shall
" pay the sum of 43*l.* sterling, the said Henry Buist
" shall pay the sum of 22*l.* sterling, and the said
" James Heriot shall pay the sum of 13*l.* sterling;
" and each of the said parties shall farther pay the
" legal interest of the sums above-mentioned, to be
" paid by them respectively from and after the said
" term of Whitsunday, 1813, till they are paid;

Excess.

" and I hereby also decern and ordain the said par-
" ties, or such of them as have lands in property
" or possession opposite to the said river, and their
" heirs and successors, to keep the river and the
" banks thereof now that the said improvements are
" completed opposite to the lands belonging to or
" possessed by each of them, within the above-men-
" tioned points, in good and sufficient condition and
" repair, in all time coming, so that none of the
" lands belonging to or possessed by any of the

" parties in the submission shall be injured by
" neglecting such repairs otherwise, I hereby decern
" and ordain the person or persons failing so to do,
" not only to perform these stipulations, but also to
" pay whatever damage may be sustained by any of
" the other parties in consequence of such neglect,
" as the same may be ascertained by fit neutral
" men."

June 9, 11, July 8, 1817. ARBITRATION.

Mr. Johnston, in 1813, brought an action against the other parties and the arbiter, to reduce the award for these reasons: 1st, (Reason of style). 2d, That the award was void, the term of the submission having expired as to him before it was pronounced, and the prorogations having no effect because they could not apply to the supposed submission amongst five parties upon which the decree proceeded, two of the parties not having signed till after the date of the last prorogation. 3d, That the decree was *ultra vires*, in ordaining that the parties should keep the banks in repair in all time coming, &c. that matter not being submitted to the arbiter, but disposed of by the agreement of the parties. 4th, That the arbiter had decided in his own favour a matter in which he had an interest, his own lands being benefited by the operations, the whole expense of which he laid on the parties to the submission, and chiefly on the Appellant. 5th, That there was strong reason to believe that he was actuated by a corrupt motive arising from some transaction or understanding between himself and Cheape. 6th, That the arbiter acted with partiality, having refused to give the Appellant for perusal a draft of the decree

Action to reduce the award.

Reasons of reduction.

June 9, 11, July 8, 1817.

ARBITRATION.

before it was pronounced, and to receive evidence offered by the Appellant to show that his proportion of the expense ought to be but small, though the Appellant submitted to him full observations in writing containing a statement of facts leading to that conclusion.

Defences.

The defences were—to the second reason, that the Appellant having signed the submission it was *jus tertii* on his part to state this as a reason of reduction. 3d, That it was by no means clear that the powers of the arbiter were not sufficiently ample for the purpose; but if not, though the clause should be held *pro non scripto*, the award would be good as to the rest. 4th, That this reason was well known to the Appellant before he signed the submission. 5th, That the character of the arbiter was an answer to this reason, and that Cheape pointedly denied any such understanding or transaction. 6th, The arbiter heard all the facts condescended upon, but did not think them of such a nature as to alter his judgment, founded on his own knowledge of the subject, and the opinions of other persons of skill, of whose assistance he availed himself.

Judgment below. July 8, 9, 1814.

The Lord Ordinary repelled the reasons of reduction, sustained the defences, &c. and decerned, and to this judgment the Court unanimously adhered; and Johnston appealed.

For the Appellant it was contended, 1st, that the award was null and void, because the term of the submission had expired before it was pronounced; and the present case was distinguishable from that of *Taylor v. Grieve*, Fac. Coll. 25th Nov. 1800,

because, although it was there decided that a submission does not expire until a year from the date of the last subscription, that subscription was within a year of the first subscription, all the parties having subscribed within a few weeks of each other, whereas here the last subscription was not within a year of the first; and, as the arbiter's power where the day is left blank is limited to a year, the submission fell, and no award could be made upon it; and the orders of prorogation were ineffectual, because the arbiter had no power to make any such order till all the parties had subscribed. 2d, The decreet arbitral being a nullity, could not be homologated. 3d, That the award was *ultra vires* on the ground mentioned in the reason of reduction; and that, supposing it were not *ultra vires*, the arbiter had done injustice in leaving out of that part of the award the words "to be thereby benefited." 4th, That the refusal to receive the Appellant's evidence indicated partiality and corruption, and it had lately been decided in Dom. Proc. in *Sharpe v. Bykerdyke*, that an award could not stand where an arbiter did not receive material evidence tendered; the principle of that decision was, that it was essential in the nature of an award that the arbiter should hear both sides. 5th, The arbiter had an interest in the matter which was unknown to some of those who chose him judge; and the Court below refused a diligence to produce an agreement to show that he had a direct interest, and it must be taken that he had.

Sharpe v. Bykerdyke, *ante*, vol. iii. p. 102.

For the Respondent it was contended: 1. As to the point of corruption and refusal of the evi-

June 9, 11, July 8, 1817.

ARBITRATION.

dence, that the evidence had been heard, although the arbiter, as he was entitled to do, acted on his own judgment. (*Kirkaldy v. Dalgairns*, Jan. 1809.) There might be cases where the rejection of material evidence might indicate corruption, so as to afford a ground to set aside an award; but here the arbiter was chosen expressly for his own skill in such matters, and the whole was referred to his discretion: he heard all that he thought of consequence, and decided on his own opinion. There was nothing that indicated a corrupt motive; and by the law of Scotland, if the arbiter acted *bonâ fide*, the award could not be set aside. The regulation of 1695, which was sanctioned by act of parliament, was directed against such cases as this. As to the case of *Sharpe v. Bickerdyke*, that was a case of falsehood, and depended on very particular circumstances. But this award might be supported even in this country. 2. As to the question of interest, it was no more than this, that the arbiter might wish to deepen his own drain, and that those operations would be of advantage to him if he did. But the parties were aware of that interest when they chose him, and the objection amounted to nothing. 3. If the award was *ultra vires*, it might be reduced *pro tanto*, without affecting the rest. (*Montgomery v. Strang*, June, 1798—*Kyd v. Patterson*, Fac. Coll., June, 1810.) 4. That although the usual way was to insert in submissions after the blank for the day, the words *next to come*, which confined the submission to a year, these words had been omitted here. Why? because it was known that the work could not be finished, nor the award

Interest. *Vid.* Mathew v. Allerton, 4 Mod. 226.—Comb. 218.

made within a year; and, besides, the Appellant had seen the work going on without stating any such objection at the time; and he could not be allowed to take advantage of it after the work was finished, but must be held to have acquiesced in the validity of the prorogations.

June 9, 11, July 8, 1817.

ARBITRATION.

Reply. The principle upon which the case of *Sharpe v. Bickerdyke* was decided, was, that it was essential in the nature of arbitration that the arbiter should hear both sides. An arbiter must hear both sides; and in this case the evidence was rejected, not because the arbiter had examined it and thought it of no consequence, but, because his mind was made up without it. The case of Kirkaldy did not apply to this question. With respect to the point of interest, an interest more remote than that which would render a person an incompetent witness, was an objection to jurors and arbiters. There was no evidence that the parties, when they signed the submission, knew of the interest arising from the agreement with Cheape; and it must be taken that there was such an agreement.

Mr. Campbell, It is not positively averred that there was any such agreement, and it is denied that there was.

Sir S. Romilly and *Mr. Leach* for the Appellant; *Mr. Warren* and *Mr. Campbell* for the Respondents.

Lord Eldon. (C.) The reference in the first of

Judgment.

July 8, 1817.

ARBITRATION.

1st Cause. Obligation and submission by the parties.

these causes was in these terms:—"We, John "Cheape, Esquire, of Rossie, and William John- "stone, Esquire, of Lathrisk, considering that our "respective properties *have been* much improved "by the deepening of the drain from the Loch of "Rossie, and that it would be still more advan- "tageous to us to obtain a further level, which we "will be able to do, when the proposed alterations "upon the river Eden, between the bridge over the "same near the village of Kettle, and where the "said drain falls into the Eden, are completed. "Therefore we bind and oblige ourselves, our heirs, "and successors, to bring up the said level, or such "proportion of it as we, or either of us, shall think "requisite, as soon as it can be accomplished, from "the said point where the Rossie Drain falls into "the Eden, up to the march between our respective "properties at Bowhouse Moss, and to keep the "same redd and clear and in good order in all time "thereafter, at our mutual expense, which shall be "proportioned according to the benefit accruing "therefrom to our respective properties; and having "confidence in Andrew Thomson, Esquire, of "Kinloch, as being a fit person for determining "the value which such operations will yield to our "respective properties, and ascertaining the pro- "portion of the expense thereof which each of us "shall pay. Therefore we do hereby nominate and "appoint the said Andrew Thomson sole arbiter "between us, to decide and determine what pro- "portion each of us shall pay of the expense of "the operations *already executed* upon the Rossie "Drain, from the point where it falls into the Eden

" up to the march between our properties at Bow- July 8, 1817.
" house Moss, and of *what is to be* hereafter done
" when the improvements upon the channel of the ARBITRATION.
" Eden are finished; and also in keeping redd and
" clear and in good condition the said drain be-
" tween the foresaid points in all time coming, ac-
" cording to the benefit which he shall think our
" respective properties have derived and will obtain
" from such operations, with power to the said
" arbiter to take all manner of probation, and to
" direct measurements and valuations to be made,
" and to do every thing else necessary, or that he
" shall think proper, for enabling him to decide
" and determine in the matters hereby submitted
" and referred to him, and whatever the said arbiter
" shall decide by decreet arbitral to be pronounced
" by him betwixt and the day of or
" between and any future day to which this sub-
" mission may be prorogated, and which he is
" hereby empowered to do at pleasure, we hereby
" bind and oblige ourselves and our foresaids to ac-
" quiesce in, impliment, and perform, under the
" penalty of 100*l.* sterling," &c.

That was the power which the arbiter was to have; and what use he should make of it was left very much to his own discretion, at least so it would be construed in this country. This gentleman made his award, and ordained " that of the above-men-
" tioned sum of 2105*l.* 2*s.* the said John Cheape
" shall pay 1335*l.* 2*s.* and the said William John-
" stone shall pay 770*l.* being the ratio in which I
" hereby find their respective properties to be be-
" nefited by the operations on the drain, and as

July 8, 1817.

ARBITRATION.

Award.

" the whole of the said sum of 2105*l.* 2*s.* has been " advanced by the said John Cheapé, I hereby " decern and ordain the said William Johnstone to " make payment to him of the said 770*l.* with the " legal interest thereof, from the respective periods " when the advances were made till paid. And I " hereby farther decern and ordain the said parties " and their heirs and successors to pay for any " future operations on said drain, and in keeping " the same redd, clear, and in good condition be- " tween the foresaid points in the proportions above- " mentioned; and I also decern and ordain the said " parties and their foresaids to acquiesce in, impli- " ment, and perform this decreet arbitral in all " respects, to each other, under the penalty of " 100*l.* sterling," &c.

The Appellant refused to obey the award, and a charge upon the decree having been given, he offered a bill of suspension; and, at the same time, brought an action of reduction (with which the suspension was conjoined) to reduce the submission and decree, alleging:—1. The common reason of style:—2. That the arbiter had decided in his own favour, a matter in which he was interested; for that a considerable number of years ago the arbiter cut a drain from his own lands, passing through Mr. Cheape's property, and falling into the Rossie Drain; so that the arbiter had burdened the Appellant with the expense of an outlet for his (the arbiter's) own drain. As to that second reason—and the second and third reasons are, as to this point, much the same—I see no ground for insisting upon that as any objection. The parties knew whom the

Objections of interest and corruption unfounded.

arbiter was, and he was chosen on account of his own skill in such matters; and I see nothing in the proceedings to show that he acted corruptly or even improperly. At the same time, there can be no doubt that, even in the law of Scotland, which attaches so much value to arbitration, the refusal by an arbiter to receive proof, where proof is necessary, may amount to what even they would consider to be a ground for setting aside the award.

July 8, 1817.

ARBITRATION.

But there may be such a refusal to hear evidence by an arbiter as would lay a ground for reducing an award.

In the second cause, which is connected with the first, the submission was in these terms (*vid. ante*).

2d Cause.

One question in this case was, whether the arbiter's authority to decide extended beyond the year; and another question was, whether he had any right to decide that the parties should keep the river and banks opposite their lands, which were to be benefited by the improvements, in good and sufficient condition and repair, in all time coming; and, although the award, as to this point, followed the terms of the submission, it was insisted that it was *ultra vires*, and that they themselves were to determine what should be done after the work was completed. But it was farther contended, that even if the arbiter had authority to deal with that point, yet he had not done justice to the Appellant, because he ought to have confined that part of the award to such lands of the Appellant as were "*to* "*be thereby benefited*," his authority not extending beyond that: and the Appellant insisted that only some of his lands were benefited, whereas it was on the other hand contended that they were all benefited.

Johnstone also insisted that as he subscribed the Objection that

July 8, 1817.

ARBITRATION.

submission in 1811, and as the award was not made till May, 1813, the legal time had expired before it was pronounced, and that as to him it was good for nothing; and that the objection was not removed by the prorogations, because they applied only to a supposed submission amongst five parties; and that the submission which he signed was not, at the time of the prorogations, a submission amongst five parties, some of the parties not having signed till after the date of the last prorogation: and a distinction was stated between this and the case of *Taylor v. Grieve*, in as much, as there the last signature was within the year. I have considered this objection, and I agree with the Court of Session in the opinion that it cannot be supported. For when one considers what was to be done, the channel of the river to be deepened, a bridge to be taken down, and another to be built; and that he saw all this going on without making any objection at the time, I think it is reasonable to take it as if he had said that he never meant to make the objection; and to hold that he should not be permitted to make it with effect after the work had been finished.

the legal time had expired.

Not sustainable, because the party, having seen the operations going on for a long time without intimating any such objection, it was reasonable to hold that he had waived it.

Corruption.

Then it is insisted that the arbiter acted with a partiality that indicated corruption. That, however, depends on the view which he took of his duty; for an arbiter is not bound, in all cases, to receive evidence, whether it will have any effect on his mind or not. The submission bore that Mr. Thomson was chosen arbiter because he himself knew the subject. But he saw all the evidence and all the inferences arising out of the circumstances; and

Arbiter not bound to receive evidence in all cases, whether it will have any effect on his mind or not.

he seems to have proceeded on this ground, July 8, 1817.
"taking all these matters to be facts, yet having
"my own local knowledge to guide me, and all the
"other circumstances in my view, I cannot adopt
"your conclusion." So that on all these grounds
I take the judgment of the Court below to be
right.

ARBITRATION.

But I have one difficulty in this second case. Suppose we should be of opinion that the submission did not authorize the arbiter to decide upon the manner in which the parties were to act with respect to these improvements in future, the question will arise whether that vitiates the whole award. If I were now to give my own opinion, I must say that this part of the award might be held, as they express it, *pro non scripto*, and that the rest would not be affected; and then what I wish is, to be sure that I apply that principle as the Court below would apply it. My own opinion is, that the arbiter has so far gone beyond his powers.

Ultra vires.

The judgment in this second cause was this: After the usual recitals, the Lords find that the arbiter, in so far as he has decerned and ordained that the said parties, or such of them as have lands in property or possession opposite to the said river, &c. should keep the river and banks thereof, &c. in good and sufficient condition and repair, in all time coming, &c. otherwise that the person or persons, failing so to do, should not only perform these stipulations, but also pay whatever damage might be sustained, &c. as the same might be ascertained by fit neutral men, had no authority so

Judgment read July 10, 1817.

July 10, 1817.

ARBITRATION.

to decern and ordain; but that this ought to be held *pro non scripto*, and to be considered as an excess not vitiating the other parts of the decreet arbitral; with this finding the cause was remitted to the Court of Session to vary its judgment, so far as the finding might require it to be varied; and the judgment was in other respects AFFIRMED.

The excess held *pro non scripto*, without vitiating the other parts of the award.

Excess.

In the first cause the Lords found that the arbiter had no authority, according to the terms of the submission, to decern or award that the Appellant should be charged with, or pay the following sums or charges, or any of them, viz. (stating them); but this to be without prejudice to any right of the parties to establish the charges, if they could, against the Appellant in any other mode of proceeding; and, "find that this excess in the de-"creet arbitral ought not to be taken to affect its "validity, farther than as it may be necessary to "rectify the same with respect to the said excess." The cause remitted to vary the judgment as far as this finding might require; and in other respects the judgment AFFIRMED.

Charges expunged as *ultra vires*, without affecting the validity of the award in other respects.

SCOTLAND.

APPEAL FROM THE COURT OF SESSION.

DIXON and others—*Appellants*.

GRAHAM and others—*Respondents*.

March 12, 24; June 23, 1817.

APPEAL from a judgment in declarator in 1810, suffered to drop, and action of reduction brought in 1812, to re-