Court below, and have read them with attention and care; and it would have been very unfortunate indeed if your Lordships had proceeded to pronounce judgment upon the case as stated in the printed papers on the one side, without an opportunity having been afforded to investigate the real facts of the case. My Lords, the question in this case was, whether or not the appellant was the owner of certain yarn which he had sent down from London to Edinburgh? He had sent it down by the waggon in his own name; he went himself to Edinburgh after it; applied for it at the waggon office, and there he found a stop was put upon it by the defendants. That stop they put upon it on the ground that it was not the property of Turner, but that it was the property of Paul, Wathen and Company, and that Turner was acting as their agent;—that they were creditors of Paul, Wathen and Company. If those facts were made out, there is no doubt they were justified in what they did. Now, clearly, prima facie, this was the property of Mr Turner—he had sent the property to Edinburgh to his own address;—he applied at the waggon office—prima facie, this property being in his possession, he would be considered the owner of it; but in the progress of the cause Mr Turner was subjected to what, in Scotland, is called a judicial examination, which is in some manner similar to a bill of discovery in this country. My Lords, I have read through that judicial examination, and I have no hesitation in stating, that no jury in this country would have hesitated for a moment as to the effect of it, if it had taken place before them. It is perfectly impossible to read that examination, and not to see that this was not the property of Turner, but that he was acting as the agent of Paul, Wathen and Company. I should advise your Lordships, under these circumstances, to dismiss the appeal. July 7. 1830.

The House of Lords accordingly 'ordered and adjudged, that 'the interlocutors complained of be affirmed.'

MONCREIFF, WEBSTER and THOMSON,—Solicitors.

JOHN MACLELLAN, Appellant.—*Lushington—Russell.* No. 27.

ALEXANDER NORMAN MACLEOD, Respondent.
Brougham—John Campbell.

Arbitration.—1. Held, (affirming the judgment of the Court of Session), that a reference or submission by a landlord and tenant during the currency of a lease, and on the eve of a break, to a third party, as to a deduction of rent, was constituted by a series of letters; that it related to the period of the tenant's possession posterior to the break, and not to the prior years; and therefore, that the decree, which was confined to the posterior years, was good: And, 2. observed, That even although the reference had

embraced both periods, yet, as the tenant was the sole claimant, and decree was given on part of his claim, it was no objection that judgment was not pronounced on the other part; but the case would have been different, if there had been claims on both sides, and judgment given only as to one of the claims.

July 9. 1830.

2D DIVISION.
Lord Mackenzie.

MACLELLAN took from MacLeod of Harris a lease of the farm of Ensay, for 21 years from Whitsunday 1813, at the rent of L.250, payable at Martinmas yearly. It was inter alia agreed, that MacLellan should have his option to give up possession of the farm at the term of Whitsunday 1818, on giving six months' previous notice to MacLeod or his factor.

MacLellan entered into possession; but finding the rent too high, and that, during 1815, 1816, and 1817, instead of deriving any profit he was a loser, he proposed to MacLeod that the rent should be reduced, to which, he alleged, MacLeod acceded.. On the other hand, MacLeod averred, that although the matter was the subject of consideration, he had not given any such promise. While affairs were in this situation, MacLellan intimated that he would avail himself of the break at Whitsunday 1818. He did not however actually remove. A great deal of correspondence followed, which MacLellan alleged to import a reference to Mr Brown, to award what deduction should be allowed from the rents of the years prior to 1818; whereas MacLeod represented the reference to relate solely to the years during which MacLellan continued to possess after the year 1818. Mr Brown accepted the reference contained in this correspondence; and found, 1*st*, 'That 'at the term of Whitsunday 1818, L.74 was a fair and proper 'abatement to be made from the rent of L.250 sterling then 'payable from the farm of Ensay, under the lease granted thereof 'to the said John MacLellan; and therefore, that from that time 'he falls to be only charged L.176 of rent, to be levied in terms 'of the lease, and subject to the other conditions therein men-'tioned; and, 2*dly*, Decerned and ordained the said John Mac-'Lellan to make payment to the said Alexander Norman Mac-'Leod of the said reduced rent, in terms of the lease aforesaid.'

MacLellan raised an action of reduction of this decree,* chiefly on the ground that the award was ultra vires compromissi, as the subject of reference was the amount of the deduction from the rent of the years previous to 1818, and not subsequently. In defence MacLeod contended, that the correspondence clearly shewed that

* He averred corrupt partiality in the arbiter; but the facts alleged in support of it, were neither by the Court of Session nor the House of Lords considered of such a description as to affect the award.

the reference related to the years after 1818; and he brought an action against MacLellan for enforcing the award, and payment of the rent. Parties agreed that the points between them should be discussed in the reduction. The Lord Ordinary repelled the reasons of reduction, and assoilzied MacLeod; 'but without prejudice 'to the pursuer claiming, either through the award of Mr Brown 'or otherwise, a reasonable deduction from the rents of the farm 'of Ensay for the years prior to 1818;' and on MacLellan reclaiming to the Inner-House, their Lordships adhered with expenses.* July 9. 1830.

MacLellan appealed.

Appellant.—MacLeod undertook to give the appellant an abatement from the rent for the years prior to 1818; and the correspondence which passed between the parties proves, that it was as to this period, and not to that subsequent to 1818, that the arbiter was to confine his attention. This award therefore is clearly ultra vires. But even if parties had also contemplated the subsequent rents, then the award is null, in not having embraced the whole subject-matter referred. It is a fatal vice in an award, where the arbiter pronounces judgment on the articles claimed on one side, and leaves all those on the other undetermined.

Respondent.—The point truly submitted was the deduction for the years after 1818. As to the previous years, although there had been some communing between the parties, the respondent had never agreed to a deduction; nor does it appear from the correspondence, that these previous years were to be taken at all into the consideration of the arbiter. But the respondent has no objection that this point should be decided by arbitration. Indeed the matter is kept open by the judgment complained of. Supposing both periods had truly been submitted to the arbiter, his having given out his award only as to one period does not vitiate the award; for here the claim was all on one side. If the appellant is not protected by the award declaring the amount of the deduction from the subsequent years, then he is liable for the full rent for those years to the expiry of his lease.

Lord Chancellor.—My Lords, In this case, a person of the name of MacLellan is appellant, and MacLeod respondent. The facts are very shortly these, as far as it is necessary to state them

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* 6. Shaw and Dunlop, 790.

July 9. 1830. for the purpose of understanding the judgment I am about to submit to your Lordships' consideration:—Mr John MacLellan rented a farm from Mr MacLeod. The farm was situated at Ensay, in the island of Harris. He rented it on a lease dated in 1814, but to commence from Whitsuntide in the year 1813, for a period of twenty-one years, at the rent of L. 250 a-year; and there was a clause in the lease, by which he was empowered, on giving six months' notice, to put an end to the lease at the expiration of five years from the commencement, namely, at Whitsuntide 1818. The years 1815, 1816, and 1817, were what were called bad years in that part of Scotland. During this period, he had more than once personal communication with Mr MacLeod, his landlord, and letters also passed between them, in which he complained of the badness of the seasons, and the high rent he paid, and he submitted that he ought to have some deduction; and it appears that Mr MacLeod was willing that some abatement should be allowed to him, but no distinct agreement was come to between the parties. When the month of November in the year 1817 arrived, it became time for Mr MacLellan to consider whether or not he would avail himself of the clause by which he was empowered to put an end to the lease at Whitsuntide 1818, and accordingly he gave the regular requisite notice; and having given the requisite notice, that led to a further communication between the landlord and the tenant, the respective parties. The result was, that there was a dispute between them; and it was agreed that the subject of the dispute should be referred to a person of the name of Brown—a person expressly selected by Mr MacLellan himself—a person of unimpeachable integrity, as I conceive, and unconnected at the period with the parties. Mr Brown ultimately made his award; but that award was not made until the year 1824; and by that award he directed, that, from Whitsuntide in the year 1818, a reduction of L. 74 a-year should be made from the rent for the remaining period.

Objections on the part of Mr MacLellan have been made to this award. He contended in the first instance, strongly, that Mr Brown had made the award with reference to matters which had not been submitted to him; that he was not authorized to take into consideration the rent from the period of 1818, but that the only point submitted to him was the abatement of the rent for the antecedent period;—that was contended strenuously by Mr MacLellan, and is contended in the papers upon your Lordships' table. It appears to me, however, impossible to come to that conclusion. In order to understand and comprehend what was the intention of the parties, it is necessary to read through the whole of this voluminous correspondence. I have thought it my duty to read every one of these letters, occupying, I think, one hundred pages of the quarto volume now lying before me; and I have reason to believe the Noble Lord* who was present during

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* Earl Radnor.

the argument, has also imposed upon himself the same burden. We have both come to the same conclusion. It is, in my opinion, perfectly impossible that the proposition contended for by Mr MacLellan can be sustained. I will refer to one or two of the letters and documents, for the purpose of satisfying your Lordships that, at all events, it was intended to refer to the arbitrator the period beyond Whitsuntide 1818. In a letter from Mr MacLellan to Mr Dallas he says,—'At the same 'time, if Mr MacLeod will let me have the farm at a reasonable rent, I 'will most willingly continue his tenant;' that is, after the notice had been given for the purpose of terminating the holding. He then says,— 'I have great confidence in Mr MacLeod that he will deal with me on 'as liberal terms as he can, consistent with his own interest; and I am, 'on the other hand, very much disposed to give as high a rent as the 'place can possibly afford.' In another letter from Mr MacLellan to Mr Brown, the arbitrator, he says,—'I think their relative values at 'both periods is the safest and best criterion of the rent which the 'place should now pay.' Afterwards, in the course of the reference, in another letter to Mr Brown, he says,—'I have not submitted any 'mode of management to the arbiter;—the true question is, what ought 'to be the rent of the farm of Ensay, under the ordinary management 'of the country, at the period I resigned the lease?' And then, the arbitrator having made his award in the manner I have stated, and Mr MacLellan being extremely dissatisfied with the award, and having expressed himself in the strongest terms upon the subject, he states,— 'The opinion you appear to have formed of the rent at which Ensay 'should be fixed astonishes me—it must, to dead certainty, be founded 'in error.' He never found fault with Mr Brown as having fixed the rent as a rent prospective from Whitsuntide 1818, but found fault with him solely on the ground of the amount of reduction mentioned in the award. It is perfectly clear, therefore, from these letters, and from other letters contained in the correspondence, that at all events the reference was intended to embrace the period prospectively from Whitsuntide 1818; at the same time I am ready to admit, that this correspondence throws some doubt upon the question, whether it was not also intended to embrace the anterior period—an abatement for which was called for by Mr MacLellan. But supposing that to be so, I apprehend this award must, by the law of Scotland, be maintained. According to the law of Scotland, it is not necessary, where there is a general submission to the arbitrator, in order to render his award valid, that it should dispose of the whole matter intended to be submitted to him;—where he disposes of a part of it under such circumstances, the award may be sustained. Where he disposes of a part of it on the one side, and takes no notice of the claim upon the other, under such circumstances, of course, the award would not be valid; but if the question be, during a long series of years, what deduction can the parties have? and the arbitrator decides that he shall have a deduction for a certain part of the period,—I apprehend his having omitted the dis-

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posal of the deduction in respect to the other period—the claim being all on one side—will not vitiate the award; and I think, therefore, the Court below acted with perfect propriety in sustaining this award, as fixing the rent to be paid from Whitsuntide prospectively, though the arbitrator did not decide what abatement should be made for the anterior period, supposing it appears, on the construction of this voluminous correspondence, that it was intended that point should be submitted to him. And this gentlemen, Mr MacLellan, will not sustain any injury, if the award is sustained without prejudice to any claim he may have in respect of the rent for the anterior period.

My Lords, there was another circumstance involved in this case. Some misconduct was imputed to Mr Brown; but upon reading the letters, and considering the circumstances of the case, I have come to the conclusion, and I believe the Noble Lord entirely agrees with me, that, upon the whole, the facts to which reference has been made were not of such a description as to affect the award. I shall therefore, under these circumstances, humbly submit to your Lordships, that the decision of the Court below ought to be affirmed.

The House of Lords accordingly 'ordered and adjudged, that 'the interlocutors complained of be affirmed.'

J. MACQUEEN—MONCREIFF, WEBSTER, and THOMSON,—Solicitors.

No. 28. JOHN MORRISON and Others, Appellants.—*Spankie—Russell.*

JAMES MITCHELL, Respondent.—*Brougham—Wilson.*

Jurisdiction—Road—Statutes, 33. *Geo. III. c.* 138.; 4. *Geo. IV. c.* 49.—Question remitted for the opinion of all the Judges, Whether, where a party, accused of evading a toll-bar, has been assoilzied by the Justices of Peace from a demand for statutory penalties, the Court of Session has jurisdiction, in an advocation, to find him guilty, and award the penalties.

July 14. 1830.

2D DIVISION. Lord Cringletie.

By the statute 8. Geo. III. cap. 63. constituting the Forth and Clyde Canal Company, they were authorized, besides forming the canal, 'to do all other matters and things which they shall think 'necessary and convenient for the making, extending, improving, 'preserving, completing, and using the said navigation, in pur-'suance and within the true meaning of this Act.' A canal was accordingly made between Port Dundas, near Glasgow, and Grangemouth, on the river Forth; and along the banks a towing-path was formed. The Company carried both goods and passengers between these two places.