mend to your Lordships, on both these points, to affirm the decision of the Court below.

July 8, 1831.

The House of Lords ordered and adjudged, That the interlocutor complained of be affirmed.

Appellants' Authorities.—2 Ersk. 6, 45; Stat. 1555, c. 39; Bell on Leases, p. 497; Gordon, 13th January 1803 (13,854).

Respondents' Authorities.—2 Stair, 9, 34; 2 Bankton, 9, 32; 2 Ersk. 6, 35; Bell on Leases, p. 497; Bryson, 28th July 1744, Kilk.; Earl of Haddington, 24th February 1693, 1 Fount. 565; Duke of Athol, 15th March 1819 (F. C.); Gordon, ut supra.

Spottiswoode and Robertson,—John M'Queen,—Solicitors.

No. 25.

Robert Gray and John Woodrop, Appellants.—*Campbell—Spankie.*

James M'Nair, Respondent.—*Lushington—Kaye.*

Arbitration.—Held, (affirming the judgment of the Court of Session,) that although interim decreets arbitral had been subscribed, given to the clerk, and copies sent to the parties, yet as the submission was terminated without any final judgment and the decrees had never been delivered or recorded, they were null.

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2d Division.
Ld. Mackenzie.

Gray and Woodrop were proprietors or tenants of a field of coal in the lands of Westmuir, and Gray was proprietor of the adjacent coal situated in the lands of Greenfield. The coal of Greenfield stands upon a higher level than that of Westmuir, and the descent of the water from the one field to the other was prevented by a barrier which had been allowed by tacit consent to remain between the two fields. M'Nair conceiving that he was not bound to refrain from working this barrier, commenced operations upon it, whereupon a dispute took place, and the parties agreed to submit it to the decision of James Farie and Colin Dunlop. A regular deed of submission was in consequence executed in October 1823, with power to the arbiters "to "pronounce decree or decrees partial or total," "to do every

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" thing necessary for bringing the matter submitted to a just " and speedy issue, and whatever decree or decrees, partial " or total, interim or final, the said arbiters in one voice shall " give forth and pronounce betwixt, and the day of " &c. " the said parties oblige themselves to fulfil and perform," &c. " Declaring that the said arbiters shall not have power to " name an oversman to decide between them in case of their " differing in opinion, but that in case of their so differing in " opinion this submission shall fall and expire."

On the 18th of August 1824 the arbiters subscribed a regular interim decree arbitral, containing a clause of registration in these terms: " Therefore we, the said James Farie and Colin " Dunlop, arbiters aforesaid, do hereby, in one voice, pronounce " and give forth our interim-decision and decreet arbitral upon " the foresaid submission in reference to us, and the terms and " manner following; viz. we find that the said James M'Nair " never had and has now no right to cause the water of the " Prickleymuir or Upperfield of coal mentioned in the said sub- " mission, and belonging to him, to run or issue so as to flow " into the Westmuir colliery, belonging to or possessed by the " said Robert Gray and John Woodrop, his partner, mentioned " in the submission, or to carry on any operation which may " produce that effect; and we prohibit and discharge the said " James M'Nair and his successors from doing so: and in the " event of the said James M'Nair or his foresaids contravening " the finding and prohibition above written, we find him liable " to the said Robert Gray and John Woodrop, and their suc- " cessors, in the damages to be sustained in the Westmuir col- " liery on that account; and we decern and ordain the said " James M'Nair and his foresaids to abide by our decision and " decreet above written, and to observe and fulfil the same, to " and in favour of the said Robert Gray and his foresaids, under " the said penalty of 500*l.* sterling, to be paid, in case of failure, " besides performance, as specified in the foresaid submission: " and we reserve the further consideration and determination of " the other points referred to us, as aforesaid, in the event, that " the parties shall not adjust and settle the same by an amicable " compromise between themselves, within thirty days from and " after the date hereof: and we again earnestly recommend to " the said parties to make such settlement and compromise."

This decree was placed in the hands of the clerk to the submission, and copies of it, certified by the clerk, sent to the parties. But it was neither delivered to them, nor put upon record. Thereafter M'Nair began to carry on a dook-working, from which he raised water by means of a pump to a level from which it found its way into Gray's coal work, and this having been complained of to the arbiters, they, on the 5th of January 1825, (after having previously granted an interim interdict,) subscribed, along with their clerk, a second interim decree, whereby they found that the said James M'Nair neither had "nor has any right or title, by a pump or any other artificial "means, to raise water from a level lower than the opening "between his colliery and the Green colliery or waste, so "as to make the said water issue through that opening into "the colliery of Westmuir, belonging to or possessed by the "said Robert Gray and John Woodrop, his partner; find that, "from the last report of James Merry and John Wilson, the "inspectors aforesaid, dated the 14th September last, the said "James M'Nair was then using a pump in his said colliery for "the purpose, and that had the effect above mentioned; and "therefore we decern and ordain the said James M'Nair imme-"diately to cease using the said pump for the purpose, or so "as to have the effect aforesaid, and prohibit and discharge him "from resuming or exercising any such operation in his said "colliery hereafter. And further we find the said James "M'Nair liable to the said Robert Gray, for and in behalf of "himself and the said John Woodrop, his partner, in the "damages occasioned to them in their said colliery of Westmuir "by the use of the said pump as aforesaid, from and after the "said 19th day of May last (the date of the interlocutor above "mentioned), and allow the said Robert Gray to give in a con-"descendence of the damages claimed by him on that account. "And we decern and ordain the said James M'Nair and his "foresaids to abide by our interim decision and decree arbitral "above written, and to observe and fulfil the same, to and in "favour of the said Robert Gray and his foresaids, under the "said penalty of 500*l.* sterling, to be paid in case of failure, "besides performance, as specified in the foresaid submission. "And we reserve the further consideration and determination "of the other matters referred to us as aforesaid." This decree

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July 8, 1831. contained a clause of registration, was delivered to the clerk, and copies of it, certified by the clerk, sent to the parties, but it was neither given up to them nor recorded.

About this time the Court of Session had pronounced a judgment in the case of Harvey, 26th November 1824,* sanctioning the doctrine, that unless there was a special contract, law did not require that a barrier should be left between two adjacent coal fields; and, in consequence of this decision, it was alleged that one of the arbiters became satisfied that they had no right to prevent M'Nair from working the barrier, while the other was of a different opinion. Gray and Woodrop then insisted that the clerk should deliver to them the two interim decrees, and in consequence he laid before the arbiters this memorial: "On the 18th of August "1824 the arbiters subscribed an interim-decreet arbitral in the "said submission, and on the 5th of January last they subscribed another interim-decreet arbitral therein. A copy of "each decree was immediately after sent by the memorialist, "with the permission of the arbiters, to the parties respectively, "or their agents; and the decreets themselves have remained "in the custody of the memorialist as clerk to the arbiters. "Mr. Mitchell, as agent for Mr. Gray, has, both by letter and "personal application, insisted that the memorialist shall put "the said two interim-decreets upon record in a competent "register; and, on the other hand, Mr. Murray, as agent for "Mr. M'Nair, has, in like manner, insisted that the memorialist "shall not part with the said interim-decreets for any purpose "whatever, except by the special authority of both the arbiters, "as instructed by the letters of these gentlemen respectively to "the memorialist laid before the arbiters. The memorialist, "as clerk to the arbiters, considers himself entirely under their "direction and control in this question; and, in the circumstances above stated, the memorialist finds it indispensably "necessary to apply for and procure the instructions and authority of the arbiters to direct his procedure upon the opposite "demands now urged by the parties in the submission respectively; and the memorialist craves the instructions and order "of the arbiters accordingly."

* 3 Shaw & Dunlop, 322.

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On considering this memorial, the arbiters, on the 6th of April 1825, ssued this deliverance: "We, James Farie and Colin "Dunlop, the arbiters in the submission within written, having "taken into consideration the account of the expences incurred "to Thomas Falconar, our clerk, for business done by him under "the submission, amounting to 30*l.* sterling, find the same "justly stated, and Messrs. Robert Gray and James M'Nair, "the parties submitters, jointly and severally liable in payment "thereof to the said Thomas Falconar; decern and ordain them "to make payment thereof to him accordingly, and to relieve "each other equally of the same. And we having likewise taken "into consideration a memorial for the clerk to the submission, "dated the 1st of April current, decline to give any deliverance "thereon, and quoad ultra, we declare the submission termi-"nated. In witness whereof," &c.

Immediately thereafter the parties presented petitions to the sheriff of Lanarkshire, the one praying that the clerk should be ordained to deliver up the interim decrees in order to be recorded, and the other that he should be interdicted from doing so; and the clerk, with the view of obtaining judicial exoneration, raised a process of multiple-poinding before the Court of Session, and the petitions were thereupon advocated ob contingentiam. M'Nair also instituted an action concluding to have the interim decrees reduced and set aside, or at least to have it declared that they were null and void.

In defence, Gray and Woodrop maintained that, as the arbiters had full power to pronounce interim decrees, and they had done so, and issued copies to the parties on which they had acted, the decrees were good and effectual; while, on the other hand, M'Nair contended that, as the interim decrees remained in the hands of the clerk, and so were within the power and control of the arbiters, they had never been delivered; and as the arbiters had declined to authorize the clerk to give them up, and had declared the submission at an end, they had necessarily been revoked, or at least were ineffectual. The Lord Ordinary reported the question to the Court on cases.* On advising the cases, the

* As a practical illustration of his argument, M'Nair stated that the Lord Ordinary had pronounced and subscribed a judgment in his favour, accompanied by a full note of his opinion, but that before issuing it he deleted it, and took the cause to report.

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Court *, on the 31st of May 1827, pronounced this judgment; "In the reduction and declarator, in respect that the interim "decreets-arbitral were neither put on record nor delivered to "the parties, find it unnecessary to reduce the said interim "decrees, the same never having been complete or valid decrees-"arbitral; but, in terms of the declaratory conclusions, find the "same to be null and void, and declare the submission termi-"nated and the parties released therefrom: in the advocations "and multiplepoinding, find it unnecessary, in respect of the "above findings, to give any farther judgment; and, in the "whole conjoined processes, find no expences due to either "party, and decern." †

Gray and Woodrop appealed.

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† 5 Shaw and Dunlop, 735.

* *Lord Pitmilly* observed, It is necessary to consider together both of the objections taken to these decrees-arbitral by the pursuer, as the second aids the first very much. As to the first, if both the arbiters had concurred in wishing to recall the decrees, I have no doubt but that they might have done so to the very last. The case of Robertson is an authority in point; and the opinion of Lord Braxfield is entitled to great weight; and when, on a point of pure Scotch law, we find such authority, I am not inclined to go further; nor is the case of Simpson a contrary authority, as the arbiter there was functus. If, then, it was competent for both to recall the decrees, I do not think it alters the matter that one only refuses to deliver them. The second objection confirms the first, as the arbiters declare the submission at an end, because they differ on the points decided in the decrees already pronounced, of which I think there is sufficient evidence. If they did not exhaust the whole matter referred to them, the submission flew off; and I therefore think that both objections are well founded.

Lord Alloway.—I take a different view of this question. So far as we are to proceed on authority, there is none exactly applicable to this case. In the case of Simpson there was a positive decree cancelling the former one. There is nothing of that kind here, and I hold the decrees in this case to have been regularly issued, the clerk having sent copies to both parties, and the arbiters themselves stating in the second decree that the first was issued. It seems to be conceived that the arbiters could not give a decree till they had settled the whole matters in dispute; but it was provided by the submission that they might give interim decrees, and that, if they afterwards differed, they might give up. I cannot hold that they differed on the subject of these two decrees, as we cannot resort to the examination of the arbiters to explain their decree, or receive their evidence.

Lord Justice Clerk.—I concur with Lord Pitmilly. We have here a memorial by the clerk, asking leave of the arbiters to record the decrees. This they refuse, and I cannot hold them delivered by copies being sent to the parties. The word "issued," used by the arbiters in the second decree, is employed in the same sense as we talk of issuing notes, merely communicating them to the parties, but not delivering them as valid decrees. To constitute delivery, it must be the principal, and not a copy,

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Appellants.—The ground on which the judgment of the Court below rests is, not that the arbiters had no power to pronounce the decrees in question, but that these decrees, although pronounced, required actual delivery or registration to make them effectual. This, however, is not consistent with law, and is at variance with practice and with the case of Simpson v. Strachan, where it was decided, that neither actual delivery nor registration is essential to the validity of a decreet-arbitral. In the case of Robertson, relied on by the respondent, the only point decided was, that an arbiter, before either delivery or registration, may alter his decree; but in the present case there was no alteration, nor is there evidence of even an intention to alter. On the contrary, the arbiters left the question to be decided on the assumption, that if it should be held that the decrees were lawfully issued, effect should be given to them. Besides, the clerk was authorized to deliver a copy of those interim decrees; and his having done so was equivalent to delivery of the award itself. There is also the important circumstance, that the second decreet-arbitral recites the first, and states it as an "issued" decreet-arbitral, which is equivalent to a declaration of the arbiters that the first decreet-arbitral was complete.

Respondent.—In the case of Robertson it was decided, that an award, though signed by the arbiters and delivered to the clerk, might be altered by them, and that they do nothing effectual until the decreet is either delivered or registered. In the present case the decrees remained in the hands of the clerk, or, in other words, in those of the arbiters, and they not only refused to deliver them, but declared the submission at an end. The case of Simpson is inapplicable, because there the submission had expired, and the decision was, that the arbiter, being functus officio, he could not afterwards alter it.* But in the present case the submission

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which is delivered; and I conceive that the case of Robertson, and the opinion of Lord Braxfield, directly apply. As to the other objection, I have also great difficulty. It does not appear to me to be a case where the clause in the submission applies; but the first is sufficient to decide the case.

Lord Glenlee.—I am of the same opinion.

* The respondent quoted, from the session papers of Simpson v. Strachan, the following case, which does not seem to be reported: "A submission was "entered into by Mortonhall on the one part, and his sister, with William Ross her

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was subsisting. Besides, although power was given to the arbiters to issue interim decrees, this was on the condition that they should proceed to pronounce a final judgment; but they refused to do so, and consequently the whole fell to the ground. Neither the authorized delivery of a copy of the decreets, nor the reference in the second to the first as an issued decreet, can operate favourably to the appellants.

Lord Lyndhurst.—My Lords, the question in this case was a technical question of Scotch law, arising out of the execution of a decreet-arbitral. There was a reference to certain arbitrators, and by the terms of the reference the arbitrators had authority to pronounce decree or decrees partial or total. They had no authority, in case they differed in opinion, to call in any umpire, and therefore, if they differed in opinion on any point, that point would have to remain unsettled; but, when they concurred in opinion, they had authority to pronounce partial or total decrees; and whatever decrees, partial or total, interim or final, the arbiters pronounced, the parties obliged themselves to fulfil and perform. In the month of August 1824 they pronounced their first interim decree, and in the month of January following they pronounced their second interim decree. Those decrees were drawn up, and were signed by the respective arbitrators, and copies, certified by the clerk whom they had appointed, transmitted to the parties. If those decrees were to be viewed according to the law of England, and the transaction had taken place in this country, they would have been operative and binding awards. But this question is not to be decided by English, but to be decided exclusively by the rules and law of Scotland. Standing here as I do (or rather as I did

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"husband, on the other part. The arbiters, when the submission was near expired, "decerned Mortonhall to pay certain sums to Ross; and they kept the decree in their "own hands. Ross's creditors did, soon thereafter, arrest these sums in the hands of "Mortonhall; and subsequent to the arrestment Ross granted a declaration, sus-"pending the payment of certain of these sums till he should have secured his wife "in a jointure at the sight of the arbiters, who had refused to give out and publish "the decree-arbitral till this was done. In a furthcoming the creditors urged, that "there was a jus quæsitum to them by the decree-arbitral and their arrestment, the "effect of which could not be restrained by any deed of Ross or the arbiters, af er "the right they had acquired by their arrestment on the said decree-arbitral. It "was answered, that so long as the decree, though pronounced and signed, re-"mained in the hands of the arbiters, it was their own, and they might give it "forth or not as they thought fit; and therefore they might give it out on such "terms as they pleased; and such condition thereby became as strong as if it had "been a quality engrossed in the decree; which answer the Lords sustained."

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when this case was argued before your Lordships at your Lordships bar) *, more as an English than a Scotch lawyer, certainly all my feeling was in favour of the validity of those decrees, and my inclination was to sustain them; but, having considered the subject frequently since, I am compelled to say, that, according to the law of Scotland, those decrees are not binding decrees. By that law, in order to render a decreet-arbitral binding, it is not sufficient that it should be drawn up in form, and signed by the arbitrators, and retained in their possession, or in the possession of their clerk; but something further must be done—the decree must either be delivered or entered on record, or some authority at least must be given for the purpose. It may be assimulated to the execution of a deed in England, which is also a technical instrument, and which requires technical forms to be complied with. With us, in the execution of a deed, it is not sufficient that it should be signed by the party to be bound by it—that it should be sealed by the party to be bound by it—and that it should be attested. Another circumstance is necessary—it must be delivered; and, unless it be delivered, it is not binding. Now, my Lords, this being according to my apprehension and understanding of the law of Scotland, we must apply it to the facts of this case. The first interim decree was made in the month of August 1824, the second in the month of January following. They were signed by the arbitrators, and left in the clerk's possession. They never were out of his possession. I consider the decreets-arbitral, under the circumstances I have stated, not as decreets-arbitral, but as decreets-arbitral intended to be decreets-arbitral, when completed by a delivery, or by being entered on record. But it is stated that there is a fact in this case which is equivalent to a delivery. In this case the arbitrators authorized their clerk to deliver out a copy of the decreets-arbitral intended to the parties. It was delivered; and it is said that a copy being so delivered is equivalent to the formal delivery of the award. I think it has not that effect. I cannot recommend your Lordships to go the length of saying it has that effect. Before the decreet-arbitral is delivered, it is merely a decreet-arbitral intended to be delivered as a decreet-arbitral—intended to be a judgment pronounced; and therefore the copy, before it was delivered, is nothing but a copy of what was intended to be delivered—is nothing but a copy of judgment intended to be pronounced, and clearly not equivalent to a decreet pronounced or delivered. But then there is another circumstance that was also

* The case was heard in when his Lordship was Lord Chancellor.

July 8, 1831. suggested, and which struck me at the time as being entitled to very considerable weight. The second decreet-arbitral recites the first, and in reciting the first it states it is a decreet-arbitral that had been "issued;" and it appeared (as it was contended) that this amounted to declaration by the arbitrators themselves, that the first decreet-arbitral was a complete decreet-arbitral. But I think, on consideration, it has not that effect. If there were any thing in it certain or positive as to the first, it might admit of this construction; but the circumstance of its being stated in the second decreet-arbitral to have been issued must be considered with reference to the evidence and state of facts, and cannot be considered in itself as amounting to making a complete delivery—a complete decreet-arbitral of the first—when, in point of evidence and fact, the first was never delivered at all. Upon this ground, therefore, and from the explanation given by one of the Judges below, that it is an expression constantly used where notes only are issued, it does not appear to me to conclude this question. This further observation also arises with respect to this view of the case—that the second decreet-arbitral, which states the first decreet-arbitral to have been issued, never was a complete decreet-arbitral itself, but simply was a decreet-arbitral intended to be complete; therefore, there is the less reason to give to the first the character of a complete decreet-arbitral, merely from being recited in the second, which itself was not a complete decreet-arbitral. I, therefore, my Lords, am bound to come to the conclusion, according to my judgment, that, according to the law of Scotland, what has taken place in this case does not amount to a delivery of the decreets-arbitral. They continued, up to the time when the arbitration was terminated, in the possession of the clerk of the arbitrators. A memorial was presented to the arbitrators by the clerk, to know what was to be done with respect to those decreet-arbitrals. In answer, the arbitrators stated that they could give him no instructions. They never, therefore, directed him to deliver those decreet-arbitrals—never agreed to deliver, nor was the clerk directed to put them on record. They never agreed, therefore, that they should be complete decreet-arbitrals. I am of opinion, consequently, that they cannot be considered complete decreet-arbitrals; and under such circumstances I should recommend your Lordships to affirm the judgment of the Court below.

The House of Lords ordered and adjudged, That the interlocutor complained of be affirmed.

Appellants' Authorities.—4 Ersk. 3, 33; Lovat, June 17, 1738 (625); Halkerston, June 30, 1625, (645); M'Callum, June 3, 1825 (4 S.& D. 66, and ante, Vol. 2,

344); Simpson, Dec. 10, 1736 (No. 2, Elchies Arbit. and 17,007); Woodrop, Feb. 4, 1794 (628); Glover v. Glover, 1802 (Wilson's Digest, House of Lords).

Respondents' Authorities.—Robertson, June 20, 1783 (653); 2 Hailes, 912; Maxwell, Dec. 19, 1561 (643).

RICHARDSON and CONNELL,—MONCREIFF, WEBSTER, THOMPSON,—Solicitors.

No. 27.

JOHN CATHCART of Genoch, *Appellant.*—
Dr. Lushington—Greenshields.

SIR JOHN ANDREW CATHCART Bart. and Curator, *Respondent.*—
Lord Advocate (Jeffrey)—Rutherford.

Tailzie—Stat. 1685.—An heir of entail was in possession of estates under an entail, restraining him by effective prohibitory, irritant, and resolutive clauses from altering the order of succession, but not (as he considered) from contracting debt—circumstances in which (affirming the judgment of the Court of Session) the debt he contracted was regarded not to be a real debt, but the whole to be a collusive and simulate contrivance, with the view not to contract a true debt, but to alter the order of succession, and therefore the transaction was reduced at the instance of the next heir of entail.

The reading of the Statute 1685, that a defect in any part of the statutory requisition of an entail vitiated the whole entail, as well in questions with creditors as inter hæredes—rejected by the House of Lords.

July 18, 1831.

1st Division.
Lord Moncrieff.

SIR ANDREW CATHCART of Carleton, Bart., made up titles, was infeft in and possessed, as heir of entail, the estates of Carleton and others in Ayrshire. The entail was contained in a marriage contract executed in 1717, and in a procuratory of resignation, dated 1722, under reserved powers in the marriage contract. The prohibitory clause in the entail was in these words:—"That it shall not be lawful to nor in the power of the said "John Cathcart, nor any of the heirs of tailzie and provision "above specified, to alter, innovate, or change this present tail"zie and order of succession, or to sell, alienate, or dispone, "neither irredeemably nor under reversion, nor yet to wedsett "or burden with infeffments of a'rent, nor any other servitude or "burden, the tailzied lands and estate above wryten whatsom-