LANG, ... APPELLANT.
BROWN ET AL., ... RESPONDENTS.

1855. 7th, 8th May.

Arbitration—Prorogation—Oversman or Umpire.—Notes of a proposed decree arbitral, although issued and intimated to the parties, with a direction to the clerk to prepare an interim decree arbitral on the principles thereof, unless objections were lodged within fourteen days, will not entitle the arbiters, after the expiration of the submission, to convert the notes into a decree arbitral.

If the arbiters, agreeing on certain points, devolve, in the pursuance of their authority, the decision of others on an oversman or umpire, he can prorogate or adjourn the submission only so far as relates to what is referred to him. He cannot prorogate the submission *in toto.*

THE decision of the First Division of the Court of Session was pronounced on the 23d November 1852, and very fully reported in the Second Series (*a*).

Sir *Fitzroy Kelly* and Mr. *Brown* for the Appellant.

The *Solicitor General* (*b*) and Mr. *J. Miller* for the Respondents.

The circumstances are stated in the following opinion, delivered in moving for judgment, by—

Lord Chancellor's opinion.

The LORD CHANCELLOR (*c*):

My Lords, this is one of those unfortunate questions which you have to look at with a merely technical eye, and to view in such a manner as would apparently defeat what is the substantial justice of the case. But however disagreeable a duty that may be to perform, I shall never cease to think that it is the duty of a

(*a*) Vol. 15, p. 38. (*b*) Sir R. Bethell.
(*c*) Lord Cranworth.

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Court of Justice to administer the law strictly, and to see that the rules of law are complied with. And I think it becomes me to impress upon your Lordships the observation, that although an attention to those rules may inflict hardship in a particular case, yet that your Lordships would be inflicting infinitely greater hardship on Her Majesty's subjects in general, if you were not to leave the rules of law certain, so that they may be clearly acted upon.

What is said in the present case is, that certain differences were referred to two arbitrators, with a power to them, if they disagreed, to appoint or call in an umpire, as we should term it in England, or an oversman, as they term it in Scotland; and it was part of the terms of the reference, that the award or decree arbitral, whether by the arbitrators or the oversman, should be made within a particular time; that there was a power of extending the time—a power of prorogation, as it is called in Scotland—but that that power was not exercised, and that no award or decree arbitral was made until after the time had elapsed within which the parties, according to the terms of the reference, were to make it; so that the award or decree arbitral, which has, in point of fact, been made, is consequently a nullity.

My Lords, in considering these questions of the validity of awards, or decrees arbitral, as they are called in Scotland, we must never lose sight of this consideration, that we are merely determining on the construction to be put upon the contracts of parties; because every award has its force, not by virtue of the award itself, but by virtue of the previous contract of the parties giving it effect; and what we have to consider, therefore, is, whether the award which was then made is an award which the parties agreed should be binding on them.

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Now, in the more ordinary terms of a reference or submission to arbitration, the way in which the parties generally submit the matter is this: they submit all matters in difference to two arbitrators, one generally named by each party, and, in case of their difference, to an umpire, who is either fixed on by the parties themselves, or is to be chosen by the arbitrators; and when that is the form of the submission, I take it to be clear, as a matter of substance and not of form, that all that the arbitrators would have to do would be this, they would hear the parties, and if they agreed, they would make an award; if they did not agree, they would state their disagreement, and refer the whole question to the umpire. But if they took upon themselves to decide half of the matter, and referred the other half to the decision of the umpire, that would be bad. That is not what the parties agreed to; they never agreed to leave one half of the question to be decided by two persons, and the other half by a third. There might be very substantial reasons against entering into such an agreement. They might well feel that it was only by looking to the whole of the case that a substantial award could be made. That must be the construction put on the terms of a reference such as I have suggested; and that I take to be the decision of the Court of Exchequer, in the case of *Tollit* v. *Saunders* (*a*), which was referred to by the *Solicitor General* yesterday. But this being sometimes inconvenient, it is competent to the parties (as every word contained in the submission is truly but a contract between them) to vary the terms of submission if they think fit, and to stipulate, not that all matters of difference shall be referred to two arbitrators, and that those arbitrators, in case of disagreement, shall refer to an umpire, but

(*a*) 9 Price, 612.

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that all matters in dispute shall be referred to two arbitrators, and that they shall decide on all matters that they can agree upon; and that if there be anything upon which they cannot come to an unanimous decision, and cannot concur in their award, the matter upon which they do not concur shall be left to the settlement of an umpire. This is a contract that parties may enter into, and it is a common form of contract. Parties may also stipulate, if they think fit, not merely in the terms which I have last suggested, but that the arbitrators may, from time to time, as they differ, refer each subject or point to the oversman, retaining concurrently their jurisdiction over each subject. That is likely to be in ordinary cases very inconvenient, because, without saying that it is absolutely illegal, a concurrent jurisdiction, to be exercised over a part of a subject-matter by one tribunal and over another part of a subject-matter by another tribunal, must be attended with very great difficulties. But I believe that that is a course which is sometimes adopted, particularly with regard to great railway contracts, upon which questions are arising from day to day.

Having made these general observations, we are now to consider what is the particular contract which these parties have entered into, and what is the mode in which it has been performed or attempted to be performed? In the first place, there is this provision in the deed of submission; the parties begin thus: they agree to submit all differences. What the precise question was, we have never heard distinctly explained, but it appears to have had relation to the "profits" of the barque "Caroline" of Greenock (*a*). The agree-

(*a*) "The submission proceeds on a narrative of the interests of the parties as joint owners of the 'Caroline,' and the differences that had arisen in regard to their accounts in connexion with that vessel."

ment was to submit "all differences depending and subsisting between them on any account, occasion, or transaction whatever in connexion with said vessel or otherwise, including their respective claims to the expenses of said proceedings, to the amicable decision, final sentence, and decree arbitral to be pronounced by Robert Daw Kerr and John Denniston," the two gentlemen who were chosen by the parties, "and in case of their differing in opinion, to any oversman to be appointed by them, which they are hereby authorized to do." Now, if the instrument had stopped there, I should have been clearly of opinion, that all the power that was delegated was a power to the arbitrators to decide, if they could decide. If they could not decide, they were to say so, and then appoint an oversman, and let him decide. But it goes on to say: "And whatever the said arbiters or oversman shall determine in the premises by decreet arbitral or decreets arbitral, interim or final, to be pronounced by them," within a certain time, the parties obliged themselves to perform.

The inference which both parties would draw from that, and which has been drawn by the Court below is an inference irresistible, that the meaning was not that the arbitrators should be bound to decide everything themselves, or to transfer everything to the umpire, but that they might make interim awards, one or more, deciding on certain matters, and leave the other matters, if they could not agree on them to be decided by the umpire. That is the common sense, and I think it has been rightly assumed to be the correct interpretation of the submission.

The arbitrators proceeded and decided certain of the matters, and on the 16th of November 1846, they drew up a note wherein they set forth a number of conclusions which they had arrived at, and they direct

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their clerk to prepare an interim decree to be issued on the requisition of either of the parties, if no representation should be lodged against these notes within fourteen days after the date of intimation; and then they appoint Mr. Andrew Lindsay to be the oversman, and as they may differ about the remaining subjects in dispute, they refer those to the oversman and direct the clerk to prepare a minute of nomination and devolution accordingly.

Such a deed was accordingly prepared, and in this deed they state what they have done, and then they nominate and appoint Andrew Lindsay to be the oversman; they refer the said two points on which they differ to him, and to that extent they devolve the submission on him.

Now, what was the position in which the parties then stood? With regard to those matters which they had devolved on the oversman they were *functi officio.* They had left them to him to decide.

But how did they stand in regard to the rest of the matters? As to the argument raised, but not very strongly pressed, that the arbitrators had made an award by the notes or minutes which they so drew up and issued, and all the Judges having been consulted, only two of them came to the conclusion that these notes or minutes might be taken as being a decision, I think that both upon principle and upon authority it is impossible to say that they amounted to a decision either in form or in substance. Indeed the decisions of the Courts in Scotland for the last century and a half have determined that, upon the ground of the Act of 1681, such notes or minutes do not constitute an adjudication (*a*).

(*a*) "This serves," as Lord Ivory remarks, "to explain the earlier authorities, in so far as these in any instance allowed effect to the *written memorandum of judgment* which was subscribed, and

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The arbitrators did not mean to adjudicate; they studiously left it open to themselves to change their opinions if they should think fit. They directed it, no doubt, to be drawn up, and to be prepared in proper form unless the parties should within fourteen days show cause to the contrary, as we say in England. But it is clear that at the moment they signed these notes or minutes they did not mean that they should form an adjudication. Therefore, the doubt expressed by Lord *Lyndhurst* in the case of *Gray* v. *McNair* (*b*) would not have presented itself to the minds of the parties here. There the parties had drawn up something which was meant on the face of it to be an award, but which wanted the form of an award, and his Lordship said it was contrary to his English notions to say that it was not an award. But here it was intended to leave matters open, probably to be adopted, but certainly not of necessity. Therefore, I think that part of the case is clearly disposed of.

Then arises the other question which is certainly important, a question on which the Judges in Scotland have differed, a majority of eight being of opinion one way and five the other way, namely, whether, although these notes or minutes when issued by the

given forth by the arbiters, as being truly the final award,—and of which the subsequent engrossment of the decree was then considered no more than the *formal* embodiment. Such written memorandum or judgment was, according to the practice of those days, *itself* regarded as in substance equivalent to decree, and being at that time, though without the solemnities afterwards introduced, probative as a written instrument, the engrossment of the decree followed on it as constituting in truth its warrant. But there is no instance of the Courts having given effect to such a shape of award, subsequent to its being *ruled* that decrees arbitral, in order to be probative, required the statutory solemnities of the Act, 1681."

(*a*) 5 Wils. & S. App. Rep. 313.

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arbitrators on the 10th November 1846, were not valid as an award of decreet arbitral, yet when they were put into form on the 24th and 28th of May following, the award or decree arbitral so made in May 1847 did not thereupon become a perfectly binding decision. That, I apprehend, entirely depends upon whether or not there was a valid prorogation; because if there was not a valid prorogation, if the time for making the award or decree arbitral really expired in December 1846, and if this award or decree arbitral was not made till May 1847, I cannot accede to the argument pressed by the *Solicitor General* that you must tack the one to the other, and take that which was done in May, after the time had expired, as an embodying of that which had been done in November preceding. I see no authority for applying the doctrine of tacking in this case. So that the question comes to be, whether there has or has not been a valid prorogation.

Now, I consider it to be clear that the power of prorogation by the oversman is confined to the matters referred to him, and that I conceive disposes of the whole question. I think this is a conclusion necessarily resulting from the nature of the office he fills. When the arbitrators differ on any point, and this point is referred to the oversman, the submission must be read just as if he had been named as the sole referee, and as if the points referred to him were the only matters in dispute. The submission did not mean to give him any power to determine whether it would or not be right for the Arbiters to prorogate any time for making their award. The power of prorogation is incidental and ancillary to deciding the matters referred; and it is a power upon the exercise of which a discretion must be exercised, just as much as any other parts of the contract. These consequences

flow from the nature of the case, and they are illustrated by the document to which I have referred, the document whereby the arbiters appoint Mr. Lindsay as oversman, and refer the two points on which they differ to his determination, with all the powers competent to the office of oversman. The moment that instrument is executed I take it that the oversman is in exactly the same position as if there were no other matters in difference but those which were referred to him; as if he had been originally appointed solely to carry out the terms of reference contained in the submission. What he did was this; he executed a valid instrument, a prorogation, in which, after reciting his appointment, he prorogated and adjourned the said submission, (that is, as far as he was concerned, for with regard to no other part of the submission had he any authority), and the period for deciding the matters referred to him to a day named. Therefore the state of the case is this, the submission is to be read as if it was a submission of the two matters in dispute only to Andrew Lindsay, with power to him to prorogate. He accepts the reference and does prorogate; that gives him a full power to make his determination within the time to which his prorogation extends. But how does it affect any other matters? Evidently not at all. It would be out of the four corners of the instrument of submission, and beyond what is there included or intended to be included. The right of prorogation is a discretionary right, to be exercised as the interests of the parties may require; and it is a right to be exercised with reference to those matters that are before the party by whom that discretion is to be exercised.

My Lords, I come therefore to the opinion that except as to what was before himself there was no power whatever in the oversman to prorogate, and

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that in point of fact he never did prorogate. I come to that conclusion which is decisive of the case; and even if there could be a valid devolution to the oversman, yet while the matter is not so devolved he is not finally to decide it. There appears to me to be great weight in what is said by Lord *Fullarton* and Lord *Ivory* on this subject, that the functions of the arbiters cannot be in operation as to part of the matters in dispute, while those of the oversman are in operation as to the rest. I give no decided opinion as to that; I do not say that there cannot be such a state of things, but I do say that there cannot be such a state of things without an express contract to that effect. It is clear that there is nothing of the sort in the present case.

My opinion therefore is,—first, that the notes or minutes of November 1846 were not and did not become a valid award or decree arbitral; and, secondly, that the oversman had not the power of prorogation save as to the matters referred to himself. I have come to this conclusion upon purely technical grounds. We are deciding the case on a mere matter of form, but after the observations I took the liberty of addressing to your Lordships in the commencement, I trust there will be no hesitation in adopting my conclusion; which is, that the interlocutor appealed from must be reversed.

Interlocutor reversed.

LANG—RICHARDSON, LOCH, AND MCLAURIN.