No. 28. ALEXANDER M'CALLUM, Appellant.—*Murray—John Campbell.*

WILLIAM ROBERTSON, Respondent.—*Shadwell—Keay.*

Submission.—A submission having been made to three arbiters, and in case of their differing in opinion, to any two of them, of all claims which the parties submitting had against each other for the proportions of profit and loss which they ought to have borne for a particular year, arising out of the transactions of a Company of which they were partners, and with power to the arbiters to ascertain whether there had been any error in the books of the Company; and a decree having been pronounced by two of them (without previously issuing notes) on the narrative that the other had differed in opinion; and having, without investigating the books, found one of the parties liable in a certain sum, as the loss corresponding to a certain share,—Held (affirming the judgment of the Court of Session), 1st, That the decree was valid, although signed by the two arbiters only, and although there was no evidence under the hand of the third arbiter that he had differed; 2d, That the questions submitted were exhausted; and, 3d, that the failure to issue notes was no objection to the decree.

May 23, 1826.

1ST DIVISION. Lords Kinneder, Mackenzie, and Eldin.

FOR some years prior to 1810, the appellant M'Callum was clerk and book-keeper of the Company of Robertson and Oughterson, merchants, Greenock, of which the respondent Robertson was a partner to the extent of three-elevenths. In that year, M'Callum was admitted a partner to the extent of one-eleventh, and he continued to hold that share alone till May 1815. During the intervening period, the books were regularly balanced by him, and the shares of profit or loss corresponding to the interest of the respective partners were carried to their separate private accounts. After they had been so balanced in 1815, M'Callum proposed that his share should be increased to two-elevenths, and it was alleged by Robertson that this was agreed to, and that the arrangement was carried into effect by transferring one of his shares to M'Callum, so that each of them thenceforth held two-elevenths. A considerable loss was sustained by the Company during the year 1815–1816, and it was ascertained that the proportion of it which fell on each one-eleventh share was £904, 16s. 10d. In dividing this loss, however, among the partners, M'Callum charged himself with only one-eleventh share, while he set against Robertson the loss corresponding to three-eleventh shares. This was carried to the respective accounts of the parties in a new set of books, which were opened in consequence of some of the partners having retired. These books were balanced in 1817, 1818, and 1819, on the above footing; but M'Callum being about to retire, and a settlement of accounts being about to take place in 1819, Robertson objected to the balance as struck in

1816, and maintained that as one of his shares had been transferred to M'Callum, he ought to have been charged with the loss falling on two shares, and therefore debited with £904, 16s. 10d. This being disputed by M'Callum, a submission was entered into by them on the 25th December 1821, by which they referred 'to James Leitch and Duncan Ferguson, merchants in Greenock, and Alexander Campbell, Sheriff-substitute at Paisley, 'arbiters mutually chosen by the said parties, and in case of their 'differing in opinion, to any two of them, all claims, disputes, 'and demands, subsisting between the said parties respecting the 'proportions of profit and loss arising out of the transactions of 'Robertson and Oughterson, merchants in Greenock, for the 'year ending in May 1816, which they ought respectively to have 'borne, and which ought to have been carried to their respective debits and credits in the books of that Company, with 'powers of the said arbiters to ascertain whether or not there 'was any error, and if any, to what extent, committed in the 'statement of the accounts of the said parties carried into the 'balance struck upon the books of the said Company upon the '7th day of May 1816; and for that purpose to call for production of the books of the said Company and all writings necessary, and in general to take all manner of probation by writ, 'witnesses, or oath of party, or in such other manner as they 'shall see proper.' May 23, 1826.

Robertson, in his claim laid before the arbiters, stated, that one of his three-elevenths had, prior to 1816, been transferred to M'Callum, who consequently held two-elevenths; and therefore in striking the balance of loss, only two-elevenths should have been put to his (Robertson's) debit, while two, instead of one-eleventh, should have been placed at M'Callum's debit. M'Callum, in his answer, admitted that an arrangement for increasing his share to two-elevenths had been contemplated, but he denied that it had been completed, and maintained, that he was justified in debiting himself with only one-eleventh, and debiting Robertson with the whole three-elevenths.

Various investigations took place before the arbiters; the parties were repeatedly examined; the depositions of witnesses were taken; and such documents and excerpts from the books produced as the parties thought were calculated to throw light on the point in dispute.

In May 1822, the following award was pronounced, without any notes of the opinions of the arbiters having been previously issued.

'The said arbiters having proceeded to consider a claim which

May 23, 1826. 'was laid before them by the said William Robertson, respecting the subject matter submitted as aforesaid, and also objections thereto, on the part of the said Alexander M'Callum, and having duly investigated the matter by examination of the parties themselves, and others connected with them, respecting the subject in dispute, and by examination of witnesses and of documents produced to the arbiters, hinc inde, and heard parties viva voce, the said arbiters have ultimately met and consulted together respecting the award which ought to be given: the said Duncan Ferguson declared himself to be of a different opinion from that which the other arbiters had formed upon the merits of the question at issue. Therefore, in virtue of the powers by the said submission, committed to any two of the arbiters, in the event of a difference of opinion taking place, and being well and ripely advised, and having God and a good conscience before our eyes, We, the said James Leitch and Alexander Campbell, two, and a majority of the said arbiters, do now give forth and pronounce our final sentence and decreet-arbitral as follows: viz. We find the said William Robertson entitled to receive from the said Alexander M'Callum the sum of £904, 16s. 10d. Sterling; which sum we decern and ordain the said Alexander M'Callum to pay to the said William Robertson within twenty-one days from the date hereof, with the legal interest to become due thereon, from and after the expiry of that time till payment be made.'

M'Callum being dissatisfied with this award, suspended a charge given on it, and raised an action of reduction, maintaining, first, that the submission was special, and regarded certain claims particularly described, whereas the award was merely a particular finding, that a sum of money was due, without reference to or decision of the matter specially referred; and, secondly, that the decreet was pronounced by only two of the arbiters, without any legal evidence of that deliberation by all the three, and that difference of opinion which, under the submission, conferred on the two who did agree the power to determine the points in dispute. Lord Kinedder in the reduction assoilzied Robertson, and in the suspension repelled the reasons, and decerned accordingly. This judgment was adhered to by Lord Mackenzie; but on a second representation, Lord Eldin appointed M'Callum to condescend on the facts he offered to prove with regard to the alleged omission of the arbiters to decide the special points referred to them by the submission, and their errors or omissions, in estimating the profit and loss account of the Company of Robertsons and Oughterson for the year from May 1815 to May 1816. Thereafter, on advising the

condescendence and answers, his Lordship found, 'that the de- May 23, 1826.
'creet-arbitral in question was not authorised by the submission;
'and therefore recalled the interlocutors complained of, and in
'the reduction reduced, decerned, and declared, in terms of the
'conclusions of the libel, and in the suspension suspended the
'letters simpliciter,' and found expenses due. Robertson having petitioned, the Court altered the interlocutor reclaimed against, and 'found that the decree-arbitral in question, having been 'signed by the two arbiters, was valid and effectual in point of 'form, and therefore, in the process of reduction, sustained the 'defences, and assoilzied the petitioner from the conclusion of 'the libel, and in the process of suspension repelled the reasons 'of suspension, found the letters orderly proceeded,' and expenses due. To this interlocutor they adhered on the 3d June 1825, and awarded £145, 11s. 6d. as costs to Robertson.*

Lord Hermand.—The Lord Ordinary's interlocutor is too general for me to understand its application to this case. It appears to me that the decree was authorised by the terms of the submission—that it has exhausted the question submitted,—and that it has been properly pronounced by the two arbiters.

Lord Balgray.—There is nothing in the objection that the decree has been pronounced and signed by only two of the arbiters. But I have some difficulty as to whether they have decided all that was submitted to them. When, however, I look at the pleadings for M'Callum in the submission, and to his judical admissions, I think that it is clearly made out, that the matter submitted was only, whether he held one or two shares; and therefore he ought not to be allowed now to insist that an investigation of all the previous accounts of the Company should have been gone into.

Lord Craigie.—I have considerable doubts on both points. We have no evidence of there having been a difference of opinion, except the mere statement of the two arbiters, which is not sufficient; but it was only when such a difference took place that they were to have authority to decide the question. I think we ought to insist strictly on matters of form in submissions, seeing the great difficulty in setting them aside, even where plain injustice has been committed. It also appears to me, that the proper inquiry has not been made, and the case has not been exhausted by the arbiters; but I am disposed to rest my opinion on the first point.

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* See 4 Shaw and Dunlop, No. 53.

May 23, 1826. *Lord President.*—If we do not hold that the arbiters differed in opinion, we must presume that they agreed; and if they did so, then the decree may be signed by the other arbiter at any time.

Lord Gillies.—The circumstance of the arbiter not having signed the decree is at least prima facie evidence that he dissented, and it is not alleged that he concurred in it. The decree appears to me to have exhausted everything submitted. The arbiters have rectified the error committed in making up the balance for the year 1815-1816, which was what they were called on to do. The interlocutor must therefore be altered.

M'Callum appealed.

Appellant.—The award was pronounced by two of the arbiters, without any other attestation than their assertion, that the third differed in opinion from them, or that he had even considered the points submitted. The decisions which are said to have settled this question, unfavourable to the appellant, do not apply.—In point of fact, the three arbiters never did ultimately meet and consult together respecting the award that ought to be given. Ferguson was present when consulting as to the amount of the appellant's interest, in which he differed from the other two arbiters, but not when deliberating on the amount of the loss arising upon transactions for the year ending May 1816. This was not a general, but a special submission; and the mere finding of a sum due, without referring to either of the special grounds, is not a decision on the points submitted. Neither did the arbiters exhaust the case before them. In addition to the question, Whether the appellant held one-eleventh or two-elevenths of the concern, there was the important inquiry, What should be put to his debt if he held the two-elevenths? That would depend on an investigation of the books, to ascertain what were the losses whilst the appellant held only one-eleventh, and what were the losses while he held two-elevenths; but this inquiry the arbiters did not go into, and although the fact is, that the heaviest losses were incurred when the appellant held only one-eleventh share. Besides, the arbiters pronounced decree, without having issued notes of their opinion, according to the invariable practice in Scotland.

Lord Gifford.—Such may perhaps be the practice in Scotland, but it is not required by law, and the omission to do so cannot render the decree objectionable.

Respondent.—The appellant does not allege corruption, bribery, or falsehood, and the decreet is valid and effectual in point of form. By the terms of the submission, it was competent, if there was a difference of opinion, for any two of the arbiters to pronounce decree. This was not the case of a devolution to an oversman—but each of the three arbiters had equal and correspondent powers—and no farther evidence than that afforded by the decreet is necessary, that one of them differed in opinion from the rest. The only claim and demand arising out of the dispute submitted, was the sum which the appellant was due to the respondent, in consequence of the transfer of the additional one-eleventh. There was no other disputed transaction between the parties; and, by the submission, the arbiters were authorised to decern for payment of whatever sum they should hold to be due by the one party to the other. They accordingly did so, and in doing so exhausted the submission—that is, they have fixed the sum with which the appellant ought to be charged. The pretence that there should have been an inquiry into the profit and loss of the various years to which the appellant refers, was altogether an after-thought on his part—no such claim was made to the arbiters, nor was their attention drawn to it. If the appellant had conceived that he had a right to go into a general accounting, he ought to have acted accordingly; but he did not, and, in truth, it was not a point submitted. The balances of former years have been all finally adjusted in the settlements of accounts for each respective year, and the matter submitted was, What was truly due by the appellant to the respondent? The arbiters took the requisite means to ascertain that point, and in deciding on it have exhausted the question submitted to their judgment. May 23, 1826.

The House of Lords ordered and adjudged, that the interlocutors complained of be affirmed, but found no costs due.

LORD GIFFORD.—My Lords, this is a case, in which Alexander M'Callum is the appellant, and William Robertson the respondent.

The simple question here is upon a decreet-arbitral, as it is called—an award as we should call it here—a decreet-arbitral pronounced between the appellant and the respondent. It appears that these two gentlemen were with others connected in partnership together at Greenock, under the firm of Robertson and Oughterson. That partnership commenced in 1809; and soon after the commencement of that partnership, and for several years afterwards, the appellant was entitled to one-eleventh share of the profits of the concern. It appears that, in the year 1815, Mr M'Callum

May 23, 1826. was desirous of increasing his share, and it is stated that, at the commencement of the year 1815, he had become interested in two-elevenths, taking from Mr Robertson, who had been previously interested in three-elevenths, one of his elevenths, and leaving him two-elevenths. It also appears, that though these arrangements were made, the accounts were still carried on by Mr M'Callum, who kept the books of the Company, as if he had been interested in one-eleventh; and that, at the close of the year 1816, there having been great losses incurred in that year in this concern, the amount of the one-eleventh debited to Mr M'Callum was the sum of £904 and a fraction. Afterwards, disputes arising between these parties as to the accuracy of Mr M'Callum's statement in 1816, t was agreed between the parties that these matters should be referred to arbitration; and it is important to call your Lordships' attention to the terms in which the parties submitted their disputes.

Three persons were named, namely, Mr Leitch, Mr Fergusson, merchant in Greenock, and Mr Campbell, the Sheriff-substitute at Paisley, as arbiters between the appellant and respondent; and the terms of the submission were as follows.—(His Lordship then read the terms of the submission.)

Your Lordships perceive that the matters referred to these gentlemen were the claims, disputes, and demands subsisting between the parties as to their respective proportions of profit and loss arising out of the transactions of Robertson and Oughterson, for the year ending in May 1816, and the arbiters were to have power to ascertain whether there was any error, and to what extent, committed in the statement of accounts between the parties. Accordingly, the matters went before those arbiters; and, for the purpose of satisfying myself as to the claims which these parties respectively laid before the arbiters, I called for the papers which had been laid before them, and which were furnished me by the parties. The reference was made on the 25th December 1821, and, in the month of May of the following year, 1822, a decreet-arbitral was pronounced by two of the arbiters—the third differing in opinion from them, and therefore not concurring in the award. Your Lordships will perceive, that, by the original reference, the matter was to be referred to these three gentlemen, and, in case of their differing, to any two, so that the two were competent to make the award. The decreet-arbitral, after reciting the submission in the terms which I have stated to your Lordships, went on as follows.—(His Lordship then read it.)

My Lords, after this award was pronounced, Mr M'Callum being dissatisfied with it, instituted proceedings in the Court of Session for the purpose of reducing or setting aside the award; and on the case coming before my Lord Kinedder, as Lord Ordinary, he pronounced an interlocutor of the 15th June 1822, the effect of which was to establish the award, and to assoilzie the defender from the action. I should have stated, that steps being about to follow on the decreet-arbitral, M'Callum, to stay them, brought also a suspension into Court. The matter came afterwards before Lord M'Kenzie, who succeeded Lord Kinedder

as Lord Ordinary, and he refused a representation for Mr M'Callum, coinciding, therefore, in opinion with my Lord Kinedder. A second representation was then presented by the appellant, and the question came before my Lord Eldin, as Lord Ordinary, and he took a different view of the subject, and appointed Mr M'Callum to give in a condescendence, framed in the terms of the act of sederunt, of the facts which he averred and offered to prove on his part, with regard to the alleged omission of the arbiters to decide the special points referred to them by the submission, and their alleged errors or omissions in estimating the profit and loss account. The matter came on afterwards again before his Lordship, and he found that the decreet-arbitral was not authorised by the submission; therefore, he recalled the interlocutors complained of, and in the reduction, reduced, decerned, and declared in terms of the conclusions of the libel, and in the suspension, suspended the letters simpliciter, and decerned. May 23, 1826.

The case was then brought before the Court of Session, and their Lordships altered the last interlocutor of Lord Eldin.

My Lords, the objections to this award were two:—First, That there was no sufficient evidence that the third arbiter had differed in opinion with the other two; and that, therefore, it was not competent for those two persons to agree in this award. The Court of Session have been of opinion, upon the authorities and the principles of the law of Scotland, that there was no ground for that objection, it having been distinctly stated upon the face of that award, that the third had differed in opinion from the other two; and in that opinion I concur.

The other objection was, that the arbiters had exceeded their authority, or, at least, had not properly executed their authority; because it was said, that there were two questions upon which they had to determine, namely, first, the extent of the share of Mr M'Callum during that year, commencing in 1815 and ending in 1816; and then if that point were determined against him, namely, that he was interested in two-elevenths instead of one-eleventh, that the arbiters ought, in the second place, to have gone into the accounts of that year; and that, if they had done so, they would have found that Mr M'Callum ought not to have been charged to the extent of two-elevenths of the losses which had been created by the accounts of that year; because, as he said, upon the examination, it would be seen, that some of those losses ought to have been carried to the account of former years, when he was interested in only one-eleventh, and that, therefore, the account ought to be varied in that respect; and he argued thus:—'So long as I am interested in one-eleventh of the 'profits, and have to bear one-eleventh of the losses, it does not signify 'to what particular year's account that loss was carried; for it was the 'same thing to me whether carried to the one year or the other, if during 'the whole of that period my interest was to the extent of one-eleventh; 'but if it be found that my interest was altered in the year 1815, it was 'of great consequence to me, whether those losses are thrown on the 'profits of that particular year, or some of those losses are carried to an-

May 23, 1826. ' terior years, wherein, although I was interested, I was not interested to ' the same extent.'

To this it was replied, that both these matters were before the arbiters; that, in the first place, they had to determine the amount of the shares; and, in the next place, if there were any errors in the account, they had power to correct those errors; that it was competent to Mr M'Callum to state those errors to them; and that, if he omitted to do so, it was no fault of the arbiters that they took the accounts before them as they have taken them. Now, it was for that purpose that I called for the papers in the submission, because it is certainly true, that Mr M'Callum had an opportunity, if he chose, of saying,—' Though you ' have the accounts before you, I will show you there are errors in these ' accounts; and if you think that I am interested in those two-elevenths, ' you must correct the accounts, in the manner I shall state to you, to ' the extent of these errors.' I do not find that such matter was brought before the notice of the arbiters. The only question brought before them was, whether he was interested in one-eleventh or two-elevenths; and the correctness of the accounts appears to have been assumed by them, as they had a right to assume those accounts to be correct, till errors were pointed out to them. They found that Mr M'Callum was interested in two-elevenths, and that he was indebted in the sum of £900 and a fraction; and being interested in two-elevenths, he ought to have charged himself with that as between him and Mr Robertson. The terms of the submission are, of ' all claims, disputes, and demands,' respecting the proportion of profit and loss for the year ending in May 1816, which they (the parties submitting) ought respectively to have borne, and which ought to have been carried to their respective debits and credits in the books of the Company, with power to the arbiters to ascertain whether or not there was any error.

Now, my Lords, I am free to confess to your Lordships, that, upon the hearing, I was a good deal struck with the arguments on the part of the appellant, that the arbiters had not done their duty, in not entering into the correctness of these accounts; but when you look at the decreet-arbitral, your Lordships will perceive it expressly proceeds upon the recital of the submission, and then it says, ' and the said arbiters ha- ' ving proceeded to consider a claim which was laid before them by the ' said William Robertson, respecting the subject-matter submitted as ' aforesaid, and also objections thereto on the part of the said Alexander ' M'Callum, and having duly investigated the matter by examination of ' the parties themselves, and others connected with them, respecting the ' subject in dispute, and by examination of witnesses and of documents ' produced to the arbiters hinc inde, and heard parties viva voce,' and so on; they conclude that Mr Robertson was entitled to receive from Mr M'Callum, in respect (as it must be taken) of that claim, which they recite had been laid before them by Mr Robertson, the amount of £904, which is the precise amount, if the account kept by M'Callum during that

year was correct, and which he would have been liable to Mr Robertson if he were interested in two-elevenths. May 23, 1826.

My Lords, after a very anxious consideration of this case, I must confess that I have come to the conclusion, that the Court of Session have decided rightly in this case; that the matter before the arbiters was with respect to the extent of the share of Mr M'Callum; and having decided that—at least having come to a conclusion upon it, and that the other question was also before them, namely, the loss with which he ought to be charged, we cannot set aside this decree. Mr M'Callum says, 'I 'never thought of going into the accounts—I did not think that they 'would have decided against me upon the eleventh;' and he adds, 'it is 'the practice of Scotland, in making out awards, that the arbiters fre- 'quently give out a sort of minute of their intended decision, that the 'parties may know beforehand what the decision is, and make any formal 'objection they think fit.'—It was admitted at the bar, that that was not called for by the law of Scotland; that it is not the law in that part of the kingdom that the arbiters shall make any such communication. The whole matter was before the arbiters. Mr M'Callum knew that the whole matter was before them, not only as to the extent of his share, but as to the necessary consequence of deciding against him as to the extent of that share, namely, the extent of loss he had incurred. Looking, therefore, at the nature of the submission, and to the recital of the award, that it expressly states that the arbiters have proceeded upon this submission, and that Mr M'Callum had an opportunity, if he chose, of stating his objections to this account; and no objection being made, but it being taken for granted by all parties that the accounts were correct, and that all that the arbiters had to decide was the amount of the share,—whether it was a mistake or not, I am of opinion that we cannot now inquire; that the opportunity has gone by. He ought to have stated, first, 'I am only in- 'terested in one-eleventh, or, if I am interested in more, I shall point out 'errors in the accounts.' It is preposterous to suppose, that the arbiters were to determine one branch of the proposition and not the other—the whole being referred to them; and they having the power to examine this account.

Taking all these circumstances into consideration, it does appear to me that there is no ground whatever to impeach the judgment which the Court of Session have given. Your Lordships will naturally suppose, this case underwent the repeated and anxious consideration of the Judges of the Court of Session; and, perhaps, although one may not concur in all the reasons they give for their decision, it is sufficient to say, that the result of their decision appears to be the correct result; and, therefore, in this case, I should humbly move your Lordships to affirm the judgment. This is, however, I think, upon the whole, a case in which your Lordships should not do anything more than simply affirm the judgment, and not fix the appellant with costs in consequence of his appeal against that judgment.

May 23, 1826. *Respondent's Authorities.*—White, July 7, 1796. (633.)—Dig. de Recept. l. 17.—Reg. Mag. 2. 5—1426. c. 87.—1 Bank. 23. 9.—Gordon, Nov. 30, 1716. (655.)—Middleton, June 9, 1791. (Rob. Ap. Ca. 391.)—Dunsmore, July 30, 1745. (656.)—Gardiner, Jan. 19, 1773. (659.)—Brodie, June 1, 1825.—(4 Shaw and Dunlop, p. 53.)—A. S., December 17, 1788.

J. CHALMER, MONCRIEFF and WEBSTER, *Solicitors.*

No. 29. LADY MARY L. CRAUFURD, Appellant.—*Shadwell—Robertson.*

J. and T. DIXON, &c. Respondents.—*Keay—Jas. Campbell.*

Tack—Coal—Reparation.—Stat. 59 *Geo. III.* 35.—A lease of all the coals within certain lands having been granted, without any stipulation as to leaving a barrier between them and the coal of adjoining lands; and power being given to the tenants to erect engines on pits, to draw the water from the coal on any of the adjoining lands, of which the tenants might happen to be proprietors or lessees; and the tenants having worked out the whole of the coal, whereby the water in the adjoining lands descended into and drowned the coal-field so let to them; and an action having been brought after the lapse of twenty years from the termination of the lease, concluding that the tenants should be ordained to draw off the water, and erect a barrier, failing which to pay damages,—Held (affirming the judgment of the Court of Session), 1. That the tenants were not bound to leave a barrier; and, 2. That the alternative conclusion for damages did not render a remit to the Jury Court imperative.

May 23, 1826.

1ST DIVISION.

Lord Alloway.

THE lands of Knightswood and adjoining lands, situated in the county of Dunbarton, belonged originally to the Earl of Craufurd. The strata of coal in them extend, in a rising position, from the lands of Knightswood towards the neighbouring lands, and were formerly worked in common. In consequence of this position, it was found necessary to sink pits on Knightswood, with a view of raising the water, and so to permit the coal to be worked in an ascending direction. The adjoining lands had been sold to different parties; and, in 1769, the late Earl of Craufurd, as proprietor of those of Knightswood, let to Alexander Houston, James Dunlop, and others, 'all and 'whole the coals, seams of coal, and coal heughs, within the said 'Earl his lands of Knightswood and others, lying in the parish 'of Kirkpatrick, and county of Dunbarton; and in consideration 'of the sum of £878 Sterling, paid by the lessees to the said Earl, 'being the total amount of the sum already expended by him 'in working and searching for the said coal, and erecting en-'gines thereon, and of all other advances thereanent, and of 'which he hereby acknowledges the receipt,' for thirty years, from Candlemas 1770. The lessees obliged themselves to pay