

by the submission power by himself to prorogate, the LORDS repelled the objection.

They considered the power of prorogation, by the above recited clause in the submission, to be given to the same parties to whom the power of determining was committed; that is, to the arbiters, and in case of variance, to the overman.

Kilkerran, (ARBITRATION.) No 6. p. 35.

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1773. *January 19.* ANDREW GARDNER *against* ROBERT EWING.

EWING being charged with horning at the instance of Gardner, for payment of certain sums awarded by a decret-arbitral, pronounced by an overman, in consequence of a submission the parties had entered into, referring the matter in dispute, which was relative to their marches, to William Millar and Patrick Dun as arbiters, with power to chuse an overman; he suspended, upon alleged informalities and irregularities in the decret and previous procedure, which, he contended, did render the decret-arbitral void and null; and, particularly, *1mo*; That there was even no deed of acceptance, by the arbiters, of the submission; nor, *2do*, Any minute of their having differed in opinion; and, *3tio*; That even the decret-arbitral itself did not bear that they had differed, and, on that account, had proceeded to name an overman; which last objection had been found fatal to a decret-arbitral; November 30. 1716, Gordon *against* Abernethy, No 56. p. 655.

THE LORD ORDINARY at first pronounced an interlocutor in general, repelling the reasons of suspension. And, by a subsequent interlocutor, adhered thereto, 'in respect, that the decret-arbitral charged on does bear, that the arbiters could not agree in the decision to be pronounced, and had chosen an overman.'

Ewing reclaimed upon his former grounds, referring to the authorities of Erskine, B. 4. tit. 3. § 29.; and of Bankton, tit. Arbitration; and the foresaid decision in the case of Gordon *against* Abernethy; That there the objection to the decret-arbitral was, that it did not appear from the decret itself, that the arbiters had differed before chusing an overman; to which it was *answered*, (as in the present case), that the decision of the overman did of itself afford complete evidence that the arbiters had differed: And, although this fact was farther offered to be instantly instructed by the oaths of the arbiters, yet the court were of opinion, that the assertion of the overman was not a sufficient document that the arbiters had varied; and they therefore 'found the decret-arbitral, not bearing the arbiters to have varied, null, and that the nullity could not be supplied by an after probation.'

Answered, The submission to Millar and Dun, with power to chuse an overman, was signed by the parties on the 8th November 1771. On the 6th December, the arbiters, one of whom, Dun, had been brought from Paisley, met upon the ground; and, as they did not agree in opinion, it was necessary to chuse an overman. This was a matter of some difficulty; but, having at length agreed on

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Found that the *res gesta*, in a submission, proved, by implication, that the arbiters had differed in opinion, which had occasioned them to chuse an overman, so that there was no necessity for a special minute to that effect.

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James Gardner of Duncrean, they named him, by a minute of the following tenor: 'Blairquhomrie, the 6th December 1771. James Gardner of Duncrean, —and also that William Millar and Patrick Dun, both arbiters, have elected and chosen the above man to be overman in submission by Robert Ewing and Andrew Gardner to them as arbiters, as witness our hands. (Signed) *Patrick Dun. William Millar.*'

This minute is perhaps not so distinct as it might have been, as it was wrote in the country, without the assistance of a man of business; but the Court cannot have any doubt of the meaning of it. The next step was the overman's signing a minute accepting of the submission. This bears date the 10th December; and a third minute appears, of date the 31st of that month, signed by both the overman and William Millar, one of the arbiters, appointing Alexander M'Culloch to be clerk.

Then follows the decret-arbitral, dated the said 31st of December 1771, which begins in this manner: 'I James Gardner of Duncrean, overman appointed by William Millar of Culdervan, and Patrick Dun gardener in Paisley, arbiters mutually chosen by the parties designed in the foregoing submission, in virtue of the powers vested in them by the said submission, and conform to a minute subscribed by the said arbiters, of date the 6th December current, on a paper apart, naming me to be their overman, in regard they could not precisely agree as to the decision to be pronounced with respect to the matters thereby submitted, to which mutual reference is hereby had, and I have taken upon me the determination of the matters submitted to the said arbiters, and to me as their overman, in virtue of the said submission; and having, in conjunction and concert with the said William Miller, one of the said arbiters, made choice of and appointed Alexander M'Culloch, writer in Buchanan, to be my clerk, conform to another minute subscribed by the said William Miller and me, of this date, and as relative thereto, and I have heard and carefully considered the claims of parties anent the matters in dispute, and having God and a good conscience before my eyes, do hereby give forth,' &c.

Here it is expressly set forth in the decret-arbitral itself, that the arbiters had met, and had not agreed, and, therefore, that the overman had been named by them, and had accepted, &c. The case, therefore, differs from that of Gordon *contra* Abernethy. The judgment, in that case, went expressly upon this ground, 'that the decret-arbitral did not bear the arbiters to have varied.' Here the decret-arbitral bears them to have varied, and therefore the contrary judgment falls to be pronounced.

Besides, upon looking into the decision, as collected by President Dalrymple, it appears to have been admitted on both sides, that the concurrence of the arbiter for one of the parties would have been sufficient evidence of a difference of opinion, and would have supported the decret-arbitral. And, in a case noticed by Bankton, B. 1. tit. 23. § 9. June 1724. Rigg*, 'the recital of the decree pronoun-

* Examine General List of Names.

ced by the oversman, with concurrence of one of the two arbiters, bearing, that the arbiters disagreed, was found a presumptive proof of it.

Now, here we have one of the arbiters concurring with the oversman, and even joining with him in the choice of a clerk; and we have the other arbiter concurring in the nomination of this oversman, and signing a minute to that purpose; which, in common sense, can import nothing else than that they differed in opinion, and therefore devolved their powers on the oversman, who accordingly pronounced his decision upon the express recital of a difference in opinion; for so the decret-arbitral bears; nor can the charger enter into the criticism, that the words, 'not precisely agreeing,' mean, 'that they did not differ.'

The minutes, and whole procedure, though briefly expressed, do clearly show, in the *first* place, That the two arbiters met, and, not agreeing in opinion, chose an oversman. *2dly*, That this oversman accepted, and signed his acceptance. And, *3dly*, That the oversman, along with one of the arbiters, appointed a clerk to the submission. And, *lastly*, That he pronounced a distinct and full decret-arbitral on the several matters in dispute; which decret-arbitral was favourable to the suspender, so far from containing the least matter of complaint at his instance.

The proceedings, in short, are sufficiently complete of themselves, and require no extrinsic evidence to support them. And, as to the observation, that the arbiters do not appear to have accepted, How can this possibly be maintained, when they acted under the submission, and even went the length of appointing an oversman? An acceptance of a submission does not require to be minuted in any precise form of words. It is enough if the proceedings show that the arbiters did accept and act.

Observed on the Bench, The decision quoted from Dalrymple is not a good one. Here, *res ipsa loquitur*, that the arbiters differed, from their naming an oversman.—Nor ought the circumstance of the minute naming the oversman, not being properly tested, create a difficulty, where a formal decret-arbitral followed in consequence thereof. Decreets-arbitral ought not to be got the better of upon critical forms, where they are substantially right; and there is full evidence here that the present was a very moderate one.

THE LORDS adhered; and, farther, decerned for the expence of the answers.

Agt. *Ilay Campbell.*

Alt. *Walter Campbell.*

Clerk, *Tait.*

Fol. Dic. v. 3. p. 36. Wallace, No 45. p. 119.

1780. *January 20.*

JAMES HERRIOT *against* JOHN WIGHT.

THESE parties submitted all disputes between them to James Ronaldson and John Scott as arbiters; with powers, in case of variance, to elect an oversman. The arbiters differed in opinion, and made choice of Robert Wight, who gave a judgment in favour of Herriot.

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The devolution to an oversman must be signed by the arbiters before witnesses.