

No 69.

Answered: The proof, the competency of which is disputed by the pursuer, was at first allowed *ex proprio motu* of the Lord Ordinary, the fact having been stated in the course of the proceedings; and although the defenders have endeavoured to support the justice of that judgment, which was very properly calculated to remove any doubt in the question, How far the decree-arbitral ought to be supported? yet, even independently of any proof, there is no just or relevant ground upon which this decree-arbitral could be set aside or opened. At the same time, the facts admitted to proof were justly viewed as material by the Lord Ordinary, because, if proved, it will establish a *personalis exceptio* sufficient to bar the pursuer from objecting to the decree-arbitral, as supposed defective or imperfect on the foresaid account.

The pursuer's reasoning, in opposition to the competency of this proof, is totally inapplicable to the present case. The tendency of the proof that has been allowed, is not to alter the decree-arbitral in any one article, or to put a construction upon it different from what the words of it, as now conceived, do naturally import; but it is to establish a fact, which, in the nature of the thing, can only be established by parole evidence, and which, if proved, must have the effect to bar the pursuer from pleading the objection that is now offered against the decree-arbitral under challenge. If the fact be, that it was at the earnest request of the pursuer himself that the decree-arbitral was conceived in the terms it now stands, it would be contrary to good faith, and both to law and reason, to allow the pursuer to lay hold of that circumstance for overturning the decree-arbitral altogether.

THE LORDS adhered to the Ordinary's interlocutor.

A&C. Dean of Faculty, R. Cullen.

Alt. R. M'Queen, W. Wallace.

Clerk, Gibson.

Fol. Dic. v. 3. p. 37. Wallace, No 81. p. 205.

1789. December 15.

THOMAS ELLIOT against JOHN ELLIOT.

No 70.

An arbiter, in a settlement of accounts, having involved, with the subject of the submission, a similar settlement between himself and the parties-submitters, the decree, though from thence the transaction did not appear, was found null.

JOHN ELLIOT and THOMAS ELLIOT entered into a submission to Elliot of Whitehaugh, and two other arbiters, the object of which was to settle accounts betwixt the parties-submitters. It appeared to the arbiters, that the sum of L. 74 was due by Thomas to John; but in their decret-arbitral they decerned for L. 62 only.

It happened that Whitehaugh was creditor to John for L. 12, and debtor to Thomas for a larger sum; and the design of the arbiters was, that John's debt to Whitehaugh should be deducted from the sum to be awarded in his favour against Thomas, while the amount of the debt by Whitehaugh to Thomas was proportionably diminished. Accordingly Whitehaugh granted to John a receipt for the L. 12, and to Thomas a bill for the balance due to him. Of this transaction, however, no notice was taken in the decret-arbitral, though stated in minutes formed by the arbiters.

The decret-arbitral was challenged by Thomas in processes of suspension and of reduction, on this ground, That the settlement thus effected, was not only *ultra vires compromissi*, but inconsistent with that impartial and disinterested situation of arbiters relative to the matter at issue, which the law holds as essential to their character;—the pecuniary interest of one of the arbiters being here involved in their determination.

The Court seemed to be clearly of opinion, that nothing unfair was intended or could be occasioned by the proceeding in question; but that, nevertheless, it was necessary to give a check to every thing that tended to create any bias in the delicate situation of arbiters; and therefore

THE LORDS adhered to the Lord Ordinary's interlocutor, which found, ' That it was not only *ultra vires compromissi*, but a very improper conduct in one of the arbiters, to settle accounts betwixt him and the two parties-submitters; this settlement having been executed before the decret-arbitral was signed, by one of the parties granting a receipt to the arbiter, and the other a bill to him.'

A reclaiming petition against the judgment of the Court was appointed to be answered, but afterwards refused.

Lord Ordinary, *Monboddo*. Act. *Dean of Faculty*. Alt. *G. Fergusson*. Clerk, *Home*.
Fol. Dic. v. 3. p. 37. Fac. Col. No 98. p. 178.

Stewart.

In the case of Wallace against Wallace, No 30. p. 639. observe; a decret-arbitral was reduced, because a party was decerned in 5000 merks, without mentioning any cause, or any thing being produced to instruct that he was at all debtor.

In the case of Johnston against Crawford and Meason, 13th December 1776, *voce FOREIGN*, the LORDS found, That a decret-arbitral, pronounced between parties in Holland, by Dutch arbiters, on which execution was pursued against the representatives of one of the parties in this country, was not challengeable on the head of iniquity.

SOLEMNITIES of Submissions, and Decrees-Arbitral. See WRIT.

ARBITERS named jointly. See *Solidum et pro rata*.

ARBITERS determining in some articles, and leaving others open. See INDIVISIBLE.

CHARGE upon a Decree-Arbitral, upon what number of days. *See Inducia Legales.*

GENERAL SUBMISSION, what it imports. *See GENERAL SUBMISSION.*

Whether Decrees-Arbitral may be explained by the oaths of the arbiters after they are *functi*. *See PROOF.*

VERBAL SUBMISSION, whether it admits of *locus pœnitentiæ*. *See Locus Pœnitentiæ.*

VERBAL SUBMISSION, how proved. *See PROOF.*

See Grant against Grant, Stair, v. 2. p. 709. voce PERSONAL OBJECTION.

See Row against Row, Forbes, p. 58. voce WRIT. Privileged Writs.

See Paton against Leith, Forbes, p. 261. voce WRIT. Privileged Writs.

See Stewart against Mercer, Forbes, p. 327. voce INDIVISIBLE.

See Gibson against Cowie, Durie, p. 419. voce WRIT. Privileged Writs.

See Stark against Thumb, Durie, p. 511. voce INDIVISIBLE.

See Hunter against Haliburton, Durie, p. 655. voce PRESUMPTION. Rite et Solemnitur Acta.

See Beatie against Dundee, Durie, p. 678. voce WRIT. Privileged Writs.

See L. Hartwoodmyres against Turnbull, Durie, p. 716. voce IMPLIED DISCHARGE and RENUNCIATION.

See Rothes against Lesly, Durie, p. 784. voce PROOF. Deed without witnesses if probative?

See Fairies against Johnston, Durie, p. 159. voce WRIT. Privileged Writs.

See Ochterlony against Grant, Sel. Dec. p. 91. voce FOREIGN.

See LEGAL DILIGENCE.

See HOMOLOGATION.

See OBLIGATION.