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all to fall asunder, like a sheaf of arrows, whereof one is pulled out; and, by the Roman law, if all the points referred be decided save one, that one keeps the whole open; and the excepting bribery, &c. was never intended to exclude nullities, such as the determining *ultra vires*, and the submission's wanting writer's name or witnesses. THE LORDS thought the argument from the judicial decreets to consensual ones, proceeding on arbitration, not convincing; but found, by the regulations 1695, decreets-arbitral were so secured, as to be unquarrellable *quoad* what was legally and formally determined, by what was therein *ultra vires* and unwarrantable, else such decreets had no strength nor firmness by that act; and, therefore, found the decreet binding and obligatory, *quoad* all that was submitted, and only null as to the general discharges, which they rectified by this interpretation, that they should extend no farther than what was contained in the claims given in; and so here *utile per inutile non vitiatur*.

Fol. Dic. v. 1. *p.* 463. *Fountainhall, v.* 2. *p.* 168.

1709. *February* 23.

STEWART of Invernytie *against* Sir JAMES MERCER of Aldie.

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Contending parties having submitted all their differences in general, and one *per expressum*, the arbiters determined the special difference, and referred another point to the determination of a third party. The decree was sustained, in respect the party, whose claim was referred, judicially passed from that claim.

STEWART of Invernytie, having married a daughter of Sir James Mercer of Aldie, pursues for her tocher, which ended in a submission and decreet-arbitral, ordaining them to pay 26,000 merks. Of this decreet Sir Laurence Mercer, now of Aldie, raises a reduction on sundry nullities; 1*mo*, That it was a sum far beyond what the estate could bear; but decreets-arbitral are not quarrellable on iniquity, by the new regulations 1695; therefore, he recurred to nullities, *viz.* that the submission being general, of all debateable matters betwixt them, yet the arbiters had only decided one article, and left the others undecided; 2*do*, That they had delegated their power of judging on the article of the aliment, and referred it to the determination of the old Lady, for her decision therein, which no arbiters have power to do, *industria personalis* being elected and relied on in such cases. *Alleged* for Invernytie, That, though the submission bore a general clause, yet it was only special *quoad* the quota of the tocher, which was the only proper subject submitted, and was accordingly determined, the other article of the aliment being inconsiderable; and so have the Lords decided, March 1630, Stark against Thumb, No 4. p. 6834. where a decreet-arbitral was sustained good, though only deciding one particular, and remitting the rest to the judgment of Lawyers; and, lately, Dec. 1702, Crawfurd against Hamilton, No 5. p. 6835. where the Lords found the arbiters had gone *ultra vires*, yet, in regard the party had restricted it, the Lords would not annul it, except *quoad excessum*; and, by the late regulations, a decreet may be opened on a nullity *quoad* a part, and yet stand good as to

the remainder. As to the *second* nullity, it was denied, that the reference of the aliment was not the appointing of new arbiters, nor the delegating their power; but only for explicating the executive part thereof, which the law permits, L. 32. § 16. D. De Recept. "Si arbiter dixerit ut arbitrio Publii Mævii fundus tradatur vel satisfactio detur, tunc parendum est sententiæ," just as if a submission be in relation to the sale of lands, and the arbiters decern them to be sold, and fix the price, but remit the draught of the disposition, and the sufficiency of the progress to be adjusted by the parties Lawyers; certainly that reference would never annul the decreet, and no more can it do here. *Answered* for Aldie, That it cannot be presumed when one submits all debateable matters in general, it is their design still to leave the seed of a new plea behind, but rather to have all the grounds of debate *funditus* taken away; and is expressly so decided in the Roman law, L. 25. D. De Recept. "Labeo ait, si arbiter de quibusdam dicat sententiam, de aliis vero non, ejus sententiæ impune non pareri, qui officio in sententia dicenda functus non est," because he has not done his duty, by not determining the whole. And for the practique cited, one single decision cannot overturn clear principles; and Durie observes a decreet-arbitral was found null, where it only cognosced the claim of one of the parties, June 30. 1625, Falconer against Wiseheart, *voce* WRIT. See Spottis. p. 13, (No 10. p. 645). And Invernytie's passing from the article of the aliment is not good to support the decreet-arbitral; for, then, wherever there was a defect in a decreet of adjudication, or the like, *ultra petita*, the party's voluntary restriction to the true sum would supply the defect; and yet this would not be allowed. And as to the delegation, the same law above cited, § 16. expressly has these words, *Julianus dict. impune non pareri, si jubeat ad alium arbitrum ire, nam sic nunquam erit finis;* and if delegation were once allowed, what hinders the person delegated to make a new reference to another, and *sic in infinitum*, and thus without my consent, I may be put in the hands of my unfriends. THE LORDS sustained the decreet-arbitral, and repelled the reasons of reduction foresaid.

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Fol. Dic. v. 1. p. 463. Fountainhall, v. 2. p. 496.

*** Forbes reports this case:

1709. *February* 26.—INVERNYTIE and ALDIE, and their Ladies, having submitted all differences betwixt them, particularly that about the Lady Invernytie's heritable bond of provision for L. 10,000 Scots, annualrents, and penalty, dated 12th June, 1669, with full power to the arbiters to determine in the said matters as they should think fit, they decerned the Laird of Aldie and his Lady to pay to Invernytie 26,000 merks, in full satisfaction of the principal, annualrent, and expenses, and of whatever the Lady Invernytie could pretend to, through her father, Sir James Mercer of Aldie's decease; and decerned Invernytie and his Lady to grant to Sir Laurence a general discharge to

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the foresaid effect; and ordained the parties to refer themselves to the determination of the Lady Dowager of Aldie, as to the Lady Invernytie's aliment the time she stayed with her mother. Sir Laurence Mercer and his Lady raised suspension and reduction of this decreet-arbitral upon these grounds, 1*mo*, The arbiters had only determined one article of a general submission, and left another undecided, which is contrary to the civil law, *L.* 25. *D. De Recep. Arb.* and June 30. 1625, Falconer against Wishart, *voce* WRIT, the LORDS found a decreet-arbitral null, because the arbiters had decerned only upon one of the party's claims, and left the other undecided. 2*do*, The arbiters not only left an article of the submission undecided, but also delegated their power to a third party, for the decision thereof, which no arbiters could effectually do; for, *impune non paretur, si arbiter jubeat ad alium arbitrum ire, ne finis non sit*, *l.* 32. § 16. *D. eod.*

Answered for Invernytie, 1*mo*, *Esto*, a submission simply general required a total decreet, the submission here being both general and special, a decreet upon the special article is valid, though nothing is done upon the general; because, *utile per inutile non vitiatur*; as a decreet upon one head of an articulate libel would subsist, though the rest be undetermined; so a decreet-arbitral upon a submission, containing some special controversies and a general compromit, determining the special articles, was sustained, though one article that fell under the general submission was remitted to the judgment of two Lawyers. Nor doth this contradict the decision betwixt Falconer and Wishart; for the submission there was altogether general; and arbiters decided only upon one side, remitting the other party's claim entirely to the Judge Ordinary. Again, in this case, the arbiters having power to determine as they thought fit, were at liberty both as to the justice of the cause, and the manner of determination. And if the delegation as to the aliment was null, as the suspenders plead, then the general discharge, ordained by the decreet-arbitral to be granted to them, excludeth the charger's pretensions upon the account of aliment; so that all matters are in effect determined. Besides, the chargers do judicially pass from the aliment, which obviates any prejudice to the suspenders, through the arbiters delegating the same. 2*do*, Suppose the arbiters, by the delegation, had exceeded *vires compromissi*, that would only annul *quoad ultra; cum utile per inutile non vitiatur*. And December 25th, 1702, Hamilton against Crawfurd, No 5. p. 6835., arbiters going beyond their powers, was found not to annul what they determined within their powers.

Replied for Aldie, A party's voluntary restriction of his pretensions cannot be sustained to support a null decreet. 2*do*, Arbiters having determined what was submitted, must in some cases remit the executive part to Lawyers, or persons experienced; but here the arbiters referred the point of aliment, without determining any thing about it; which was in effect a new submission, contrary to law.

THE LORDS found, that Aldie had no prejudice by the arbiters delegation of the Lady's aliment, claimed by Invernytie, in respect he passed from the same judicially; and, therefore, sustained the decreet-arbitral, except as to the penalty.

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Forbes, p. 327.

SECT. II.

Writs of importance subscribed by only one Notary.

1616. *November* 29. GIBSON *against* EXECUTORS of EDGAR.

No 7.

IN an action pursued by David Gibson *contra* the Executors of umquhile Edward Edgar, the LORDS found a bond of L. null, because it was only subscribed by one notary; and where the party would have retrenched his sum to L. , the LORDS found, that the bond was not divisible.

Fol. Dic. v. 1. *p.* 463. *Kerse, MS. fol.* 47.

1623. *November* 13. MARSHALL *against* MARSHALL.

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Found in conformity with the above.

IN an action of transferring, Marshall *contra* Marshall, the Lords sustained a sasine produced, to verify the defender to be heir to his predecessor, which was given to him by hasp and staple, by the bailies of Kirkcaldy, of a tenement of land in Kirkcaldy; which sasine, the LORDS found sufficient to prove the defender heir, albeit that it was *alleged*, that it could not prove, wanting an adminicle, being only the assertion of a notary, and no retour, nor other warrant produced for giving thereof. And where it was *answered* by the pursuer, That Kirkcaldy was the King's free burgh, and that the form in all burghs was to give sasines after this manner, without any other adminicle; the defender *duplied*, That albeit Kirkcaldy had the privilege of the King's free burghs royal, yet they hold not their lands, nor the town of the King's Majesty in burgage; but they hold the same of the Prince, as Lord of Dumfermline; so that sasine of the lands, so holden, could not be given without some warrant or adminicle; albeit the King granted them the liberty of a burgh, which altered not the holding of their town and lands; which allegeance and duply was repelled, in respect the said sasine was the defenders