

1612. *January 28.* CAMPBELL *against* CALDER.

No 55.

In a submission, if there be a day assigned, betwixt and the which the arbiters may determine, and in case of their not agreeing before that day, power be given to the overman after that day to discern; if the overman discerns before that day, his decret is null. (See No 26. p. 637.)

*Fol. Dic. v. 1. p. 51. Haddington, MS. No 2371.*

1716. *November 30.* GORDON of Ardmelly *against* ABERNETHY of Mayen.

No 56.

GORDON of Ardmelly pursues a reduction of a decret-arbitral, pronounced upon a submission betwixt him and Abernethy of Mayen, concerning contraverted marches; on this reason, That the submission was pronounced by the overman alone, without the concurrence of any of the arbiters.

A decret-arbitral pronounced by an overman, found null, in respect it did not bear that the arbiters had varied, without which the overman could not interpose.

It was *answered*: The submission, according to common stile, did bear, that, in case of variance, the arbiters should chuse an overman, whose decision alone is sufficient: And in this case there was a prorogation of the submission, to this effect, that the parties and arbiter having met and examined witnesses, found it necessary to make choice of an overman, whom they did thereby name; therefore the said parties and arbiters did also thereby prorogate the submission to a further diet, betwixt and which time, the said parties, arbiters and overman were to meet at the same place, and fully to decide and determine all contraverties submitted.

By that prorogation, it was evident, that the arbiters had varied, whereby there was place for the decision of the overman, whose sole determination was sufficient, in case of variance, and was also a full probation that the arbiters had not agreed.

It was *replied*: *1mo*, The prorogation does not prove such a difference amongst the arbiters as could entitle the overman to decide; because it bears, that the parties, arbiters and overman, were to meet again, whereby the overman could not interpose, unless there had been a variance posterior to the prorogation. *2do*, Neither is the assertion of the overman a sufficient document that the arbiters had varied; but that ought to have been instructed by the concurrence of the arbiters for one of the parties, in pronouncing and signing the decret-arbitral. *3tio*, In this case the decret-arbitral does not so much as bear, that the arbiters had met and varied.

It was *duplicated*: Decreets-arbitral being firmly established by law as unquarrelable, except upon bribery or falsehood; they are not easily to be overturned upon formalities, which cannot be expected where arbiters are not lawyers, as it generally happens; and there is no need of the concurring of the arbiter for one party, seeing the trust is lodged in the overman; and it is easily presumed, that the arbiters for the party who acquiesces in the decret would concur, if that

No 56.

were necessary; and the omission of mentioning in the decret, that the arbiters had varied, is no material circumstance; but in fortification thereof, it is offered to be proven, by the arbiters oaths, that they did differ.

It was *triplied*: A decret-arbitral being formal in itself, is a firm security, and therefore the more necessary that it be duly pronounced and extended; and it is too great a trust to lodge in the oversman, that his assertion alone should prove; and it is yet more, to presume a variance, when the decret does not so much as affirm it; and if the decret be not good and valid of itself *ab initio*, it cannot *ex post facto* be supplied.

‘THE LORDS found the decret-arbitral, not bearing the arbiters to have varied, null; and that the nullity could not be supplied by an after probation.’

*Fol. Dic. v. I. p. 51. Dalrymple, No 141. p. 225.*

1745. July 30. DUNSMOOR and FINLAY, against CHRISTIE.

No 57.

A submission was entered into, to two arbiters, and, in case of difference, to a third, as oversman, provided one of them agreed with him. Decree was pronounced by one and the oversman, which was sustained, although no mention that the arbiters had differed, or that the oversman had heard parties.

WILLIAM CHRISTIE, shoemaker, Thomas Dunsmoor, merchant, and Robert Finlay, tanner, all in Glasgow, entered into a contract of copartnery, for making and selling shoemaker's work; and a considerable trade was carried on, both by way of exportation, and furnishing the home consumpt.

The society was dissolved, and several questions arising amongst the parties, they were submitted to James Loudoun and James Spreull, merchants in Glasgow, and Andrew Cochran, merchant there, oversman, on these terms: ‘That whatever the two arbiters, or, in case of variance, any one of them, with the said Andrew Cochran, should adjudge or determine against the parties, on the back of the submission, or on a paper apart, they bound and obliged themselves, their heirs, &c. to pay, fulfil, and perform.’

The oversman, and one of the arbiters, pronounced a decret against Christie, which was suspended.

*Pleaded* for the suspender: That the decret did not bear that the arbiters differed between themselves; nor was there any reference by them to the oversman; and this was a nullity in the decret; 1716, Abernethy of Mayen, against Gordon of Ardmelly, No 56, *supra*; the case of one Maver 1720; and January 1721, Doctor Middleton against the King's College of Aberdeen.

*2do*, The dispute being concerning an account and reckoning, it was agreed by the submission, that John Lecky, taylor in Glasgow, should examine the accounts, and make remarks upon them; and, upon consideration of these remarks, the arbiters should determine; but in fact the oversman never saw these remarks.

*3tio*, The oversman never heard the suspender.

*Pleaded* for the charger: That no doubt a submission might be so conceived as to make a reference by the arbiters to the oversman in case of variance neces-