The Lords repelled the defences, the daughter being a child of the same marriage. No. 268.

Act. *Sir Tho. Wallace.* Alt. *And. Macdoual.* Clerk, *Dalrymple.*

Edgar, p. 149.

1736. *December* 10. ROBERT SIMPSON *against* PETER STRACHAN.

No. 269.
Whether decree-arbitral, signed, but remaining with the arbiter or his clerk, be effectual before it is delivered to the parties or put into the register?

These parties having referred certain differences betwixt them to an arbiter, he pronounced his decreet-arbitral therein a short time before the submission expired; after which, Simpson, having got notice what the terms of it were, alleged, That the arbiter had forgot a material article, whereby he was greatly lesed by the decreet; therefore he begged, That the arbiter would either review the same, as it was still in his clerk's hands, or not give it out, unless the other party would agree again to submit the affair to him; but the arbiter, judging he was *functus*, refused to alter; whereupon Simpson insisted in an exhibition and reduction thereof, as being an undelivered evident, or that the Lords would find and declare the arbiter had still a power to make effectual or destroy the decreet.

The arguments urged for the pursuer were: That, until an arbiter publish his decreet, it is in his power to make it effectual or not as he pleases; seeing it is the due publication thereof, by delivery to the parties, or putting it in the register, that can render it a decree; and, of consequence, unquarrellable by the regulations 1695. If indeed it had proceeded on a submission, obliging the arbiter by his acceptance to determine, the question might have been different; for then what he did would not have been a discretionary, but a necessary act; as the parties, in such a case, would have had a right to exact a decreet, which the arbiter could not have with-held from them, whether he was satisfied with it or not. But the submission whereon this decreet proceeded bears no such clause. It was in the power of the arbiter either to pronounce his decree or not; and, as this was optional to him before giving judgment, it follows, that he might legally refuse to publish it after it was signed; more especially, considering that, before a decreet is given out or published, it does not belong to the parties, but to the arbiter, who may do with it as his own judgment directs, just as in the case of a bond or other deed, that one could not have been compelled to subscribe; which, however, when subscribed, may still be rendered ineffectual by not delivery. Nor does it make any difference betwixt the two cases, that the arbiter may be thought, by accepting the submission, to be under a natural obligation to give forth his decreet; seeing such obligations do not produce any action in law, whereby he can be compelled to do it; and consequently he may refuse to make it effectual when signed; a doctrine which likewise holds in judicial deeds, as every Judge may cancel an interlocutor signed by himself before it is published.

No. 269. Answered for the defender: Where publication is introduced by statute as in the cases of interdictions and inhibitions, such deeds are not perfect until they are published; but no law makes it necessary towards the completion of a private deed or contract. Indeed, delivery of a writ is sometimes requisite in order to make it effectual; but, if it is out of the granter's hands, the person, in whose favours it is conceived, has a right to sue for exhibition and delivery, without necessity of proving it was delivered, as that is presumed; but, where the deed is obligatory on both sides, as in mutual contracts, such writ is effectual without delivery; the application of all which to the present case is obvious; seeing this decreet is, in virtue of the submission, a deed of mutual consent, and to all legal effects, the same as if the parties had covenanted what the arbiter decreed; hence it follows, that it was a complete deed from the moment it was executed, without the necessity of delivery, and, after that period, while it was in the arbiter's keeping, he must, from the nature of the thing, be considered only as custodier for the parties. In the *next* place with regard to what the pursuer prays, That the Lords would declare the arbiter has still power to review or destroy the decreet, it is sufficient to observe, That, as such power is solely lodged with the arbiter, the Court cannot communicate, or give to another, a right which they have not; and, if he scruples his own power, that is what cannot be helped; there being no clause in the submission whereby he can be compelled to proceed in any one step of the arbitration. At the same time, the decreet is so well founded, that, if it were not the hazard of being involved in a law-suit, the defender would have no scruple in consenting to open it.

The Lords repelled the reasons of reduction.

C. Home, No. 41. p. 73.

1754. *December* 10. ALEXANDER FRASER *against* His MAJESTY'S ADVOCATE.

No. 270.
Bonds of provision when set up as claims on estates forfeited to the Crown, found not to be good unless delivery is proved

Alexander Fraser, second of the late Lord Lovat, entered a claim upon the forfeited estate of Lovat, in terms of 20th Geo. II. Cap. 41. for £4000, contained in a bond of provision, granted by Lord Lovat in favour of the claimant.

Objected for the Crown: That this bond was never a delivered evident.

Answered for the claimant: That delivery of bonds of provision is presumed by law, though found in the father's custody, whom law presumes to be the proper keeper of such bonds; and that, in the case of the children of Bowhill, after the rebellion 1715, bonds of provision to the children, with a clause empowering the father to revoke, were sustained by the Court of Inquiry; and that non-delivery, and a power of revocation, are equivalent.

Replied for the Crown: That, though the law presumes delivery of bonds of provision, when the question is among the children, yet the case is entirely different, when such bonds come to be set up as claims against the Crown: Were these