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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.

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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-

fary, but this gave a handle to any of the arbiters to blow up the submission, and, by the stile of the present one, the overfman and one of the arbiters, in case of their variance, was authorised to determine: Now either they varied, and then it was the case proper for the overfman's interposition; or they agreed, and the decret was the opinion of all the three.

As this question depended on the tenor of the submission, there could be no arguing from the decisions, unless the tenor of the several submissions were fet forth, and that in Dr Middleton's case was reversed; and the LORDS found otherways in a case between Mr Thomas Rigg and Mr Hugh Baillie advocates.\*

It appeared by the proof, that the suspender, having been sent for to meet with the overfman and arbiter, was not at home, and that the overfman never saw Lecky's remarks.

A good deal was said in the argument concerning the equity or iniquity of the decret, but the LORDS agreed they could not reduce nor suspend solely on iniquity.

THE LORDS, 27th June, sustained the reasons of suspension.

On a bill and answers, they altered and repelled the reasons.

*A. & Ferguson & W. Grant.*

*Alt. Lockhart & Hamilton-Gordon.*

*Clerk, Murray*

*Fol. Dic. v. 3. p. 36. D. Falconer, v. 1. p. 125*

1748. July 21.

MACBRYDE and LOGAN *against* The EXECUTORS of GOVERNOR MACRAE.

MR HUGH BAILLIE of Monkton disposed his estate to four persons, for payment of his debts to themselves and his other creditors; and Hugh Roger, merchant in Glasgow, one of them, in virtue of powers from the rest, made a bargain with James Macrae, sometime Governor of Madras, and a minute of sale was signed, which not being sufficiently determinate of the conditions of the bargain, it was agreed, that any dispute which might arise should be adjusted by two indifferent persons to be mutually chosen; and in case of their disagreeing, by an overfman to be chosen by them: And disputes having arisen, a submission was entered into, 'obliging the parties to stand and abide at whatever the said arbitrators, and in case of their variance, the overfman, should determine, conform to their decret-arbitral to be pronounced by them, and subscribed by them betwixt and the — day of — next, or any other day to which they should prorogue that present submission.'

The submission was continued, by several prorogations, till 1st October 1739; and the arbiters, 5th September, had pronounced a partial decret, and referred the remaining questions to the Lord Cathcart as overfman, who prorogated it to 31st October, the date of the prorogation bearing 27th October, and 10th October

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\* This is probably the case which is alluded to by Lord Bankton, B. 1. tit. 23. § 9. Neither it, nor those of Maver, and Middleton, above-mentioned, have been yet found. Examine Appendix and General List of Names.

No 58.  
Question upon a clause in a submission, whether the overfman alone had the power of prorogation.