1740.

CUNNINGHAM
v.
CHALMER,
&c.

SIR JAMES CUNNINGHAM, of Milne-craig, ... } *Appellant;*

Captain JOHN CHALMER of Gadgirth, and the EARLS of LOUDON, and STAIR, and COLONEL DALRYMPLE, } *Respondents.*

24th March, 1740.

PROOF—A proof taken in virtue of a diligence from the Court of Session, in the course of a submission, which came to an end without any decreet-arbitral being pronounced, admitted in the particular circumstances of the case, in a subsequent litigation between the same parties, the power of re-examining the witnesses being reserved.

PROCESS.—APPEAL.—The Court of Session having (by an interlocutor not appealed from) refused to make certain persons parties to a depending action,—it was found to be incompetent to call them as parties in the House of Lords, in an appeal from the final judgment in the action.

[Elchies *voce* Proof, No. 1. Fol. Dict. II. p. 349. Mor. Dict. p. 14044.]

No. 53.

The appellant and Captain Chalmer, (one of the respondents,) having submitted certain points in dispute between them to arbitration, it became necessary to examine witnesses in the cause; but as the arbiters had no authority to compel the appearance of witnesses, the Court of Session, upon application being made to them, made an order for witnesses to attend, and be examined upon oath before the sheriff of Ayrshire. Several witnesses were accordingly brought forward by the respondent, and examined by the sheriff, and their depositions taken down in writing; but the arbiters, not being agreed in opinion, did not pro-

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nounce any award within the time limited by the deed of submission, and the case having come again before the Court of Session, the respondent presented a petition, praying that these depositions might be admitted as evidence. Upon advising this petition with answers, the Court, (Jan. 20, 1733,) 'in respect it was not alleged that 'any of the witnesses examined before the arbiters 'were dead, or out of the country, refused the de-'sire of the petition.'

But upon advising a second petition with answers, their Lordships found, (Nov. 27, 1733,) "That the probation taken before the arbiters "ought to be admitted as evidence, so far as the "same is habile, and concluding upon the matter "of it."

And by another interlocutor, (Dec. 15, 1733,) they "adhered to their former interlocutor, with "this explication, viz. That as to living witnesses, "they may be examined at the desire of either "party."

A petition praying the Court to find,—that the testimonies of such of the witnesses then living, as the appellant shall think fit to repudiate, are not to be sustained as evidence—was refused without answers.

Entered Nov. 16, 1739.

The appeal was brought from these interlocutors of the 27th Nov. and 15th Dec. 1733, and others in the cause.

Pleaded for the Appellant:—The authority of arbiters is founded only upon the consent of parties, which implies this condition, that an award must be pronounced on the matters in dispute, and can have no operation if such award do not follow; and in the present case, as the arbiters did not give any award, their authority ceased, and the

parties could not be bound by the examinations taken by them. Arbiters, moreover, are not bound by the ordinary rules of law, and often examine witnesses, who would not be admitted in a court of law, reserving to themselves to consider what credit ought to be given to such testimony.

When it is intended that the evidence taken before arbiters should be afterwards received in a court of judicature, express provision is made for this in the bond of submission, which shows that the ordinary rule is against the admission of such evidence.

The evidence can never be said to be the best of its kind that could be had, when the witnesses, who were alive, were not re-examined in Court.

[No argument on this point appears for the respondent in his appeal case.]

After hearing counsel upon this point, 'It is declared, that the said proof taken under the submission to arbiters, having been in some degree authorized by the Court, by granting diligence for summoning the witnesses to be examined before the sheriff of Ayr, and the appellant having acquiesced so long under the interlocutors touching this point, the said interlocutors, so far as they relate thereto, ought to be affirmed; and it is therefore ordered and adjudged that the same be affirmed.' Judgment, March 25, 1740.

In the course of the proceedings in the Court of Session, application was made by Sir James Cunningham, to have the Earls of Stair and Loudon, and Colonel Dalrymple made parties to the action at his instance, although they had not been summoned originally; and the Court (February 24, 1732) ad-

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mitted "them to be parties to the cause, and al- "lowed them to be heard for their interests," but upon advising a reclaiming petition for Captain Chalmer with answers, they "refused to admit "them as parties in the cause." (8th June.)

This interlocutor was not appealed from. But Sir James afterwards endeavoured to make them parties in the House of Lords, by serving them with the order for giving in answers, and insisted that they ought to have been made parties by the Court of Session. It was objected, that as they had not been made parties in the Court of Session, which had even refused to hold them as such, whatever was done in that Court must be held as to them, *res inter alios acta.* The appeal could not be carried beyond the cause appealed, neither was it the custom of the House of Lords to hear and decide upon the rights of persons, who had not been heard on the merits of the case in the courts below.

Judgment, March 24, 1740.

After hearing counsel, "It is ordered, that the "said appeal as to the said Earls of Loudon and "Stair, and Colonel Dalrymple, be and is hereby "dismissed."

For Sir James Cunningham, *Ch. Areskine, Al. Lockart.*

For Captain Chalmer, *W. Noel, W. Murray.*

For the Earls of Loudon and Stair, and Colonel Dalrymple, *Js. Erskine.*