

decret without the rest, the same is of no avail, because he being allenary but one colleague adjoined to the rest, has no power to give any decret without their consent. No. 121.

Fol. Dic. v. 2. p. 387. Balfour, p. 286.

1605. June 5. SUTHERLAND against TORRIE.

No. 122.

IN an action betwixt Sutherland and Torrie, the Lords found, that one decret-arbitral being given by three arbiters proceeding upon a submission, whereby the matter was referred to four, to be null, because it behoved to be supposed to be submitted to them conjunctly, seeing it was not otherwise provided, and that the registration of the submission and decret by compearance and consent of a procurator, could not stay the party to impugn the decret-arbitral of nullity by way of exception.

Fol. Dic. v. 2. p. 387. Haddington MS. No. 790.

1624. January 10. M'MATH against POURE.

No. 123.

IN an action betwixt M'Math against Poure, a commission being given by the Lords to four judges, whereof two were chosen by each one of the parties, to hear the counts betwixt the said parties, and thereafter to report to the Lords their proceedings, the commission not bearing to be given to them conjunctly, but only that it was given to the said four judges, two nominated for the one, and the other two nominated for the other; and the report being returned to the Lords, subscribed only by three of the judges, and not by the fourth, the report was sustained and found sufficient; for it was no reason that the commission and report should be elusory, if any one of the four, either of himself or at the desire of the party, should refuse his concurrence and consent. The four judges were four merchants.

Act. Stuart.

Alt. Larmont & Sandilands.

Clerk, Hay.

Fol. Dic. v. 2. p. 387. Durie, p. 97.

1624. February 13. HUNTERS against M'QUHARS.

No. 124.

IN the action pursued, by Hunters, bairns of John Hunter, against M'Quhars, executors of Thomas M'Mitchell, who was ordained by his defunct wife's testament, to employ 2,000 merks to the behoof of the said Hunters, her oyes, by advice of David Johnston, Mr. John Hay, the said M'Mitchel, John Hunter, and Johnston

- No. 124. his spouse, the Lords found that the money was not lawfully bestowed in the hands of umquhile James Dalziel, William and James Arnets, to the behoof the bairns, because it was not done by advice of all the persons named in the testament; and therefore the Lords decerned M^cMitchell's executors to bestow of new the like sum to the bairns' behoof.

Fol. Dic. v. 2. p. 387. Haddington MS. No. 3009.

* * Spottiswood's report of this case is No. 1. p. 8047. *voce* LEGACY.

1693. February 10. MARY MORE *against* GRIER.

No. 125.

THE Lords found, since one of the four friends, nominated to divide the 1500 merks among the children, was dead, that the division made by the three surviving could not subsist, but that it ought to fall to them as it would by course of law and succession *ab intestato*; especially seeing their distribution was unequal: And when it was urged, that in a tutory the death of one did not evacuate the nomination, but it resided in the rest; it was answered, That was a trust of a current administration, having a tract of time, which this had not, and so could not accresce to the survivors, unless it had borne a power to any of the four, or a quorum.

Fol. Dic. v. 2. p. 388. Fountainhall, v. 1. p. 558.

1694. July 27. RIDDEL and MR. JOHN NISBET *against* RIDDEL.

No. 126.

IN a submission to three persons, that when they found the father was in need, then the sons should pay him such a sum, two of the friends emit their declaration without the third. Alleged, By law it was null, seeing the reference was to all the three, and though two made the plurality, yet it was presumed, if the third had been present he might, by his reasoning, have altered the sentiments of the other two. Yet the Lords *in re tam favorabili* found the determination sufficiently binding.

Fol. Dic. v. 2. p. 388. Fountainhall v. 1. p. 640.

1696. November 18. WATSON *against* MILN.

No. 127.

A DECREET-ARBITRAL was found null, for this reason, That it was referred to four arbiters, (each party having named two) who, in case of discrepancy, were to choose an oversman, and yet the decret was given only by two, who took on them-