alleged, This was the peculiar form of examination in that Commissariot, and that the Lords had formerly sustained their depositions, they forbore till that interlocutor should be sought out.—It may be very unfit to allow various forms in adhibiting oaths, and that is what the Quakers plead for, that their declaration, 'as in the presence of God,' may be accepted in place of the oath, and which the English Parliament has allowed lately. (*See solidum et pro rata.*)

No 47.

Fol. Dic. v. 1. *p.* 50. *Fount. v.* 1. *p.* 733.

1699. *January* 4. EARL of CRAWFORD *against* ALEXANDER BRUCE.

No 48.
Found in conformity with No 42. p. 645.

ARBRUCHALL reported the Earl of Crawford and Alexander Bruce, son to Broomhall. It was a reduction of a decreet-arbitral as subscribed of a false date, in so far as it was not signed till after the day to which the submission was confined was elapsed, yet it is made of an ante-date.—*Answered, Esto,* That were true, yet *primordium habet veritatis;* for the minute, which is the warrant, was truly subscribed by the arbitrators within the time prefixed.—THE LORDS found the minute being subscribed within the time, was sufficient, though extended thereafter, providing there was no more in the extension than in the minute, and the date at the head of the minute must be presumed to be the date of the subscription, unless it were redargued; for *omnia præsumuntur solemniter acta, et interpretatio sumenda ut actus valeat. See* 27th March 163[illegible] Forrester *contra* Gourlay, No. 42. p. 645. It was here also debated, but not determined, whether a decreet-arbitral opened upon a nullity, falls *in toto,* or be like an *articulatus libellus* only *quoad* that article, as is provided for securities of decreets *in foro* by the late regulations in 1695; and though decreets-arbitral are there exempted from being reduced upon iniquity, but only upon corruption and falshood, yet if that will exclude nullities.

Fol. Dic. v. 1. *p.* 51. *Fount. v.* 2. *p.* 31.

1714. *July* 30. COLONEL ERSKINE *against* LADY MARY COCHRANE.

No 49.
Arbiters may ordain all writs in implement, and prosecution of their decree, to be extended at their sight, after expiring of the submission.

THE Lord President of the Session and Lord Dun having pronounced a decreet-arbitral, upon a submission made to them by Colonel Erskine and Lady Mary Cochrane and her Husband, concerning their differences, and several claims to and upon the estate of Kincardine: The Colonel raised a suspension and reduction of the said decreet, upon this ground, that the same is entirely *ultra vires compromissi.*—1*mo,* As to the subject matter of it, in so far as the arbiters have determined things not submitted to their judgment. For, 1*mo,* By the submission nothing is referred to them but the parties differences concerning the estate of Kincardine; and yet they are decerned to grant general discharges of all actions or claims competent to each other. 2*do,* The parties are decerned to ratify others

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rights, and not to quarrel the ſame, either upon rights then ſtanding in their perſon, or ſuch as they ſhould acquire afterwards: Whereas they ſubmitted only claims and controverſies preceding the date of the ſubmiſſion. *3tio*, The arbiters prorogate their own power after the ſubmiſſion was expired, by ordaining all writs in implement and proſecution of the decreet to be extended to their ſight.—*2do*, The decreet is *ultra vires* as to the form thereof, the arbiters having been limited to determine one way, and no otherways, viz. point by point *in jure*; and yet all is done in the decreet by ſlump, and no particular determination given upon any one point pleaded by the ſubmitters. V. G. Ochiltree is preferred to the houſe of Culroſs, yards, parks, and lands thereof, whereof a great part are not ſo much as named in his rights and infeſtments. They find, that certain parts of the eſtate of Kincardine were omitted out of Earl Alexander's rights; and that therefore the chargers were preferable thereupon; and yet it is not told what theſe particulars were. The chargers are preferred to the haill bygone mails and duties of the houſe, yards, and others, to which they are found to have right for above 30 years, without any reaſon given. The arbiters appoint a communication of rights; that was no point of law, but of mere conveniency; and the Colonel is ordained to pay L. 30,700 Scots, whereof L. 23,563 for the bygones of the Counteſs's annuity, the other L. 7136 in contemplation of all the charger's other rights; and of 80,000 guilders, one of 12,000 guilders with annualrents, one of 30,000, and 16,000; over and above a general clauſe of all other claims they have or can pretend to; where L. 7136 is to be paid by way of ſlump, for rights extending to fifty times as much, without preferring any of them in particular.

Answered for the chargers in general: Suppoſe the decreet were *ultra vires* in the particulars mentioned, yet that is not relevant to reduce it *in toto*, but in ſo far only as the arbiters decided in their deciſion from the power given them by the ſubmiſſion, as was decided 26th February 1709, Stewart of Innernytie *contra* Mercer of Aldie, (Forbes, p. 327. *voce* INDIVISIBLE.) And by the act of regulation, decreets-arbitral are only reducible upon corruption, bribery, or falſehood, alleged againſt the judges.

Answered in the particular: The arbiters have in no part exceeded *vires compromissi*. For, *1mo*, The ordaining a general diſcharge to be granted, was not *ultra vires*; becauſe it being ſubjoined to a reſtricted ſubmiſſion, it muſt be underſtood in the terms thereof, viz. a general diſcharge with reſpect to the things ſubmitted; juſt as in other caſes a general ſubjected to particulars is not underſtood to extend to things of another kind, than the particulars to which it is adjected. Beſides, there is no difference betwixt the parties, but what, in reſpect of the difference ariſing from the ſubmiſſion, came in to be determined: For Ochiltree having demands as a creditor againſt the Colonel as a purchaſer, all kinds of claims that the Colonel had againſt Ochiltree, were brought in by way of compenſation or payment. *2do*, The decreet did moſt juſtly decern the Colonel to communicate to Ochiltree, not only the rights he then had, but alſo ſuch as he ſhould acquire afterwards. For the Colonel had ſubmitted not only for himſelf,

but alſo as taking burden for the whole creditors on the eſtate of Kincardine, in ſo far as they do or may come within the price, or any manner of way whatſoever; and he had not yet acquired in the whole debts. *3tio*, As to the arbiters continuing a power to themſelves beyond the time to which the ſentence was reſtricted, It is *answered*, *utile per inutile non vitiatur*. Beſides, this was no extenſion of their power; becauſe they had given already their deciſion, which might well hold to expedite the writs at their ſight, the day and modes of implementing might be after the decreet. *4to*, The quality in the ſubmiſſion, that the arbiters ſhould decide point by point *in jure*, did not require that upon every point there ſhould be a ſpecial interlocutor ingroſſed in the decreet-arbitral, which would have been an endleſs and ſuperfluous labour. But the clauſe was only adjected for directions to the arbiters, how they were to determine, not by ſlump, but upon a full cognition and hearing of the cauſe; and in the manner of an legal, not an arbitrary deciſion, which accordingly was done. For there is not one point that was not, by both parties, and their lawyers, *viva voce*, and in printed informations, laid before the arbiters; and every ſeveral intereſt has got a deciſion in the decreet arbitral. And it is well known, that in the caſe of a judicial decreet, where every thing is decided point by point *in jure*, one word by the judges preferring a right, is in law a deciſion point by point, of the whole allegations, although every particular argument have not a particular interlocutor, *applicando singula singulis*. For wherever a judge or arbiter prefers ſuch a right, it implies a ſuſtaining the allegations for it, and repelling thoſe made againſt it, as much as if every one of them had a ſpecial interlocutor.

Replied for the ſuſpender in general: Decreets-arbitral are of the ſame import, and have the ſame effects that the decreets of public judges have, and have no greater force, except in ſo far as expreſs ſtatute has altered their nature. For though, by a late law, decreets of Seſſion, labouring under a nullity, are not to be reduced, except in ſo far as parties are prejudged by that nullity, that privilege is not extended to any other decreets, which muſt ſtand or fall according to the former law, which for one nullity opens the whole decreet. Therefore, decreets-arbitral which are null, and *ultra vires* as to one point, cannot ſtand good as to the reſt. The caſe of Innernytie doth not meet; for there the arbiters did not go beyond their powers in determining what was not ſubmitted, but omitted to determine a point which they ought to have determined; and inſtead of doing ſo, remitted the ſame to another: Which defect was ſupplied by the party intereſted in the undetermined article, his paſſing from the ſame ſimpliciter; and if Ochiltree will paſs from the articles quarrelled in this decreet, he may make of the reſt what he will.

Replied in particular: *1mo*, It is inconſiſtent to ſay, that ſuppoſe parties be decerned to grant a general diſcharge, yet it is only to be underſtood a particular diſcharge. Nor is it to the purpoſe, ſuppoſe it were true, that a general clauſe ſubjected to particulars, does not extend to things of a different kind, for ſtill ſuch a general clauſe extends to other things of the ſame kind, yea it would extend to other things of a different kind, provided they were not of a greater import; and

No 49. it is thought the arbiters had no power to ordain parties to discharge any thing, though of the same kind, and of no greater moment, than what was referred to them. *2do*, The Colonel submitted only as taking burden for the creditors that came within the price; whereas he is decerned to communicate to Ochiltree all rights he shall acquire, whether they come within the price or not, which was plainly *ultra vires*. *3tio*, An arbiter, that minute he gives his sentence, is *functus*, and hath no power to meddle in the execution or implementing thereof; and indeed, the framing of the writs was a most material part of the transaction, such as should have been perfected before expiring of the submission, the whole, in effect, depending upon it. *4to*, It is not sufficient that there be such an interlocutor or decerniture, as virtually repell or sustains every interest, or every allegation: For indeed, a slump decerniture does that; but it ought to be expressly done. So that the argument from the method of the Lords of Session, is not to the purpose; for indeed, they are not bound to determine point by point; but one interlocutor sustaining a libel, or sustaining defences in general, is sufficient.

THE LORDS found, That the general discharge is understood to extend no farther than the particulars which concern the lands and estate of Kincardine, expressed in the submission and decreet-arbitral; as also, that the rights to be acquired, decerned to be communicated, are understood to be such rights only as fall within the price of the said estate: And repelled the reasons founded on the prorogation; and found, That the decreet-arbitral has decerned the subject submitted point by point *in jure*, according to the meaning of the submission; and therefore repelled the reasons of reduction, and assoilzied.

Fol. Dic. v. 1. p. 51. Forbes, MS.

1744. SUTHERLAND of Cambusavie, Suspender.

No 50.
The Court were of opinion that a prorogation of a submission required to be attested by witnesses.

THE reason of reduction of a decreet-arbitral, That the prorogation which continued the power of the arbiters beyond the time limited, was not signed before witnesses, having been repelled by the Ordinary; on advising a petition, the Court were of different opinions.

Some were for refusing; for that the proceedings upon a submission were *instar judicii*, and needed not the solemnities of private deeds; that, for example, interlocutory orders for adducing witnesses needed no witnesses, and that as little did prorogations.

But the more general opinion was, That it was no less necessary formally to attest the subscriptions of the arbiters to a prorogation, than the subscription of the decreet-arbitral itself; that there was a plain difference between interlocutory orders and a prorogation; for that the decree could subsist without these, but not without the prorogation. And one of the Lords remembered a case between the town of Ayr and Bailie Maxwell, where a decreet-arbitral was reduced on that very ground, that the prorogation had not been signed before witnesses.