1773. *July* 16.

ROBERT ARTHUR, Merchant in Irvine, *againſt* JOHN CALLIN, Merchant in Drogheda, and MUNGO SMITH of Lochmark, his aſſignee.

No 69.
In a reduction of a decree-arbitral, found competent to prove, by the oaths of the arbiters, and their clerk, that it was at the ſolicitation of one of the parties, the award was conceived, ſo as to give him acceſs to the oath of the other, upon an article of his claim, which otherwiſe it was the intention of the arbiters to have cut down.

IN May 1767, Callin and Arthur went into a ſubmiſſion to two arbiters for ſettling their mutual claims.

Amongſt other claims againſt Callin, Arthur had produced before the arbiters two bills drawn by him, in 1759, upon, and accepted by Callin, one for L. 200, and the other for L. 250 Sterling. Theſe were objected to, as not being good documents of debt againſt Callin. And the arbiters, by one branch of their decree-arbitral, pronounced in Auguſt 1768, found that theſe bills are not ſubſiſting debts againſt Callin, unleſs Arthur prove, by his oath, that he received value from him, Arthur, for the ſaid bills, and never accounted to him therefor; which they reſerved power to the ſaid Robert Arthur to do, having allowed him no credit therefor in fixing the ſum owing by him to Callin. This ſum was upwards of L. 1000 Sterling.

Arthur brought a reduction, and *contended*, that not only was the award iniquitous, in cutting down theſe vouchers, but it was alſo totally void, in reſpect that it had not finally determined the whole claims of the parties, but left the article of the foreſaid two bills undetermined, and open to after altercation.

THE LORD ORDINARY, before anſwer, allowed Callin and Smith a proof, *omni habili modo quo de jure*, of their allegation, that it was the intention of the arbiters to cut down the bills without any reſervation; but that the giving acceſs to Callin's oath was done upon the ſolicitation of Arthur himſelf. And they having offered to prove the fact by the oaths of one of the arbiters, and of the clerk to the ſubmiſſion, this produced a reclaiming petition upon the point, How far that proof was competent?

Argued for the purſuer: As the arbiters have not finally determined his claim reſpecting the two bills, but have left the ſame to be followed out by an action at law, that the decree-arbitral is liable to a clear ground of challenge upon that account; in which view of the caſe, it is not competent for the defenders to reſort to evidence other than the writing itſelf, in order to ſupport it againſt that ground of challenge.

By the ſubmiſſion it is expreſsly agreed, that the decree-arbitral ſhould be in writing; and the ſubmiſſion contains a clauſe of regiſtration; that, therefore, it was the agreement of parties, that the written decree-arbitral, and that alone, ſhould be binding upon them: That it is a general rule, without exception, that, where writ is eſſential, whether to the conſtitution, or *in modum probationis*, or where it is rendered ſuch by the agreement of parties, the law has repudiated parole evidence, even for explaining any clauſe of doubtful meaning; whereas the tendency of the proof, that is now offered, is to make the arbiters ſpeak a different language than what appears upon the face of the decree-arbitral itſelf.

No 69.

Answered: The proof, the competency of which is diſputed by the purſuer, was at firſt allowed *ex proprio motu* of the Lord Ordinary, the fact having been ſtated in the courſe of the proceedings; and although the defenders have endeavoured to ſupport the juſtice of that judgment, which was very properly calculated to remove any doubt in the queſtion, How far the decree-arbitral ought to be ſupported? yet, even independently of any proof, there is no juſt or relevant ground upon which this decree-arbitral could be ſet aſide or opened. At the ſame time, the facts admitted to proof were juſtly viewed as material by the Lord Ordinary, becauſe, if proved, it will eſtabliſh a *personalis exceptio* ſufficient to bar the purſuer from objecting to the decree-arbitral, as ſuppoſed defective or imperfect on the foreſaid account.

The purſuer's reaſoning, in oppoſition to the competency of this proof, is totally inapplicable to the preſent caſe. The tendency of the proof that has been allowed, is not to alter the decree-arbitral in any one article, or to put a conſtruction upon it different from what the words of it, as now conceived, do naturally import; but it is to eſtabliſh a fact, which, in the nature of the thing, can only be eſtabliſhed by parole evidence, and which, if proved, muſt have the effect to bar the purſuer from pleading the objection that is now offered againſt the decree-arbitral under challenge. If the fact be, that it was at the earneſt requeſt of the purſuer himſelf that the decree-arbitral was conceived in the terms it now ſtands, it would be contrary to good faith, and both to law and reaſon, to allow the purſuer to lay hold of that circumſtance for overturning the decree-arbitral altogether.

THE LORDS adhered to the Ordinary's interlocutor.

Act. *Dean of Faculty, R. Cullen.* Alt. *R. M'Queen, W. Wallace.* Clerk, *Gibson.*
Fol. Dic. v. 3. *p.* 37. *Wallace, No* 81. *p.* 205.

1789. *December* 15. THOMAS ELLIOT *against* JOHN ELLIOT.

No 70.
An arbiter, in a ſettlement of accounts, having involved, with the ſubject of the ſubmiſſion, a ſimilar ſettlement between himſelf and the parties-ſubmitters, the decree, though from thence the tranſaction did not appear, was found null.

JOHN ELLIOT and THOMAS ELLIOT entered into a ſubmiſſion to Elliot of Whitehaugh, and two other arbiters, the object of which was to ſettle accounts betwixt the parties-ſubmitters. It appeared to the arbiters, that the ſum of L. 74 was due by Thomas to John; but in their decreet-arbitral they decerned for L. 62 only.

It happened that Whitehaugh was creditor to John for L. 12, and debtor to Thomas for a larger ſum; and the deſign of the arbiters was, that John's debt to Whitehaugh ſhould be deducted from the ſum to be awarded in his favour againſt Thomas, while the amount of the debt by Whitehaugh to Thomas was proportionably diminiſhed. Accordingly Whitehaugh granted to John a receipt for the L. 12, and to Thomas a bill for the balance due to him. Of this tranſaction, however, no notice was taken in the decreet-arbitral, though ſtated in minutes formed by the arbiters.