the witnesses to the subscription attested by the granter to have been made. Accordingly, this point was so decided in express terms in the case of Doig against Kerr.* April 19. 1825.

The House of Lords ordered and adjudged, 'that the appeal 'be dismissed, and the interlocutors complained of affirmed; and 'it is further ordered, that the cause be remitted back to the 'Court of Session to proceed therein upon the points not de- 'cided by the interlocutors hereby affirmed, as shall be just.'

Appellant's Authorities.—1681, c. 5.; 1540, c. 17.; 3. Ersk. 2. 11.; Bell on Testing Deeds, p. 45.; 1. Jur. Styles, 13. and 24.; 1. Bankton, p. 333.; 1. Ross, 142.; Graham, Dec. 26. 1752, (16,902.); Archibalds, Nov. 17. 1787, (16,907.); Douglas, Heron and Company, Nov. 28. 1787, (16,908.)

Respondent's Authorities.—Duke of Douglas, Jan. 6. 1747, (Kilk. p. 610.); 1579, c. 80.; 3. Ersk. 2. 11.; 1593, c. 175.; 1681, c. 5.; Dronnan, July 26. 1716, (16,869.); Ewing, July 30. 1739, (1352.); Gray, July 5. 1710, (16,892.); Durie, March 9. 1753, (16,936.); Doig, Jan. 9. 1741, (16,900.); Clarke, July 17. 1752, (3806.); Paterson, Jan. 16. 1784, (3807.)

J. RICHARDSON—J. CHALMER,—Solicitors.

DAVID MORRISON and Others, (TURNBULL'S Trustees), Appellants. WILLIAM ROBERTSON, Respondent. No. 17.

Submission.—Circumstances under which (affirming the judgment of the Court of Session) a decree-arbitral, alleged to be ultra vires, and containing an error calculi, was sustained.

GEORGE TURNBULL, merchant in Perth, and William Robertson, merchant in Blair-Gowrie, entered into a joint adventure April 26. 1825.

2D DIVISION. Lord Cringletie.

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* It is stated by the respondent, that recently before the death of the granter he consulted Mr M'Queen, afterwards Lord Braxfield, as to whether the clause was objectionable, and that he received an opinion recommending a new deed as a prudent measure; but 'as to the second objection, which is an objection to the "testing 'clause," in so far as it wants the words, "before these witnesses," I do not think that 'the objection is relevant to annul the deed, because, as is very properly observed in the 'memorial, the enactment of the statute 1681 is literally complied with. The instru- 'mentary witnesses do, in reality, subscribe the deed, and subscribe themselves as 'witnesses, and those who subscribe as witnesses are likewise named and designed 'in the deed itself, which is all that is required by the foresaid statute.' He also stated, that a similar opinion had been given by Mr Campbell, afterwards Lord President; and that the entailer was only prevented, by being then on deathbed, to execute a new deed; and that although Lord Robertson was at first against the validity of the clause, he afterwards was satisfied that it was unobjectionable.

April 26. 1825. for the purchase and sale of three parcels of linen. In order to pay the price, amounting to L.1840. 3s. 9d., Robertson drew bills upon Turnbull, who accepted them, and they were then indorsed by Robertson to the sellers, or discounted with banks, and the proceeds applied in extinction of the price. In bleaching the linen, an expense was incurred of L. 328. 2s. 4d., making the total price or value of the goods L. 2168. 2s. 1d. Two of the parcels after being bleached were delivered to Turnbull, the one of which he sold for L. 880. 10s. 4d., out of which he paid bills to the amount of L. 729. 13s. 4d., leaving a balance in his hands of L.150. 17s. 0½d. The other he sold for L. 301, for which he received and discounted bills. In this state of matters he became bankrupt in October 1810, and thereupon Robertson took possession of the third parcel, which he sold for L. 579. 7s. 1d., out of which he paid L. 328. 2s. 4d. of debts due by the joint adventure. Turnbull executed a trust-deed for behoof of his creditors in favour of Morrison and others, the appellants, and it was there stipulated, that in the event of any claim being disputed, it should be laid before the Sheriff-depute of Perthshire, whose decision should be final. To this deed Robertson acceded; and claims were made upon the estate for the outstanding bills of the adventure, to the extent of L.1110. 10s. 5d., in which was included a bill of L.198. 17s. 5d., which had been retired by Robertson, and on which he was ranked. He also claimed on another bill for L.198. 16s. 9d. which he had retired; but this was rejected by the trustees, and it was ultimately found by the Sheriff that he was not entitled to make this claim. Robertson also became insolvent, and the bill-holders claimed upon his estate, which paid a dividend of 12s. per pound, while that of Turnbull paid 8s. 3d. Turnbull died. A dispute afterwards arose between his trustees and Robertson as to their claims against each other, and a submission was entered into, expressed in these terms:—'That some differences have arisen relative to some transactions between the said William Robertson and the said deceased George Turnbull, which the parties are desirous of terminating by arbitration. Therefore, they have submitted and referred, as they do by these presents submit and refer, all questions, disputes, differences, and demands competent to the one party upon or against the other, upon any account, or for any cause whatever preceding the date hereof, to the amicable decision, final sentence, and decree-arbitral to be given forth and pronounced by William Bett, banker in Cupar Angus, and George Brown, merchant there, arbiters mutually

'chosen by the parties submitters.'' Mutual claims were lodged and answered by the parties, on considering which the arbiters issued the following notes:—'The late George Turnbull and 'William Robertson had a copartnership concern in the pur- 'chase, bleaching, and sale, of three parcels of cloth. Mr Turn- 'bull granted acceptances for the price, which were discounted, 'and the proceeds applied by Robertson, the drawer and in- 'dorser of the bills, to pay the price. The whole expense of the 'purchase of these parcels of goods amounted to L.1840 3 9 'And the bleaching to - - - - 328 2 4

L.2168 6 1

April 26. 1825.

'Mr Turnbull failed, and executed a trust-deed on 5th Oc- 'tober 1810; and at this time the goods forming the second ad- 'venture had been consigned by Mr Turnbull for sale at Glasgow, 'and were then unsold. The goods forming the third adven- 'ture were at Claverhouse Bleachfield, and were taken posses- 'sion of by Mr Robertson for sale. The proceeds of both these 'parcels of goods, the arbiters conceive, should have been ap- 'plied in paying the debts of the copartnership, and must still 'be so applied; for they understand it to be the law and the uni- 'versal rule in mercantile transactions, that the funds of every 'copartnership must be applied, as far as they go, in paying the 'copartnership debts, before a third party can have any interest 'therein.

'The second adventure brought to Mr Turnbull's trustees 'L. 301, and the third to Mr Robertson L. 579. 7s. 1d., and he 'paid L. 328. 2s. 4d. for bleaching.

'At the time of Mr Turnbull's failure, the bills accepted by 'him to Mr Robertson, and discounted, and the contents ap- 'plied by the latter in paying the price of the second and third 'parcels, amounted to L.1110. 10s. 5d., and they were in the 'hands of third parties, who discounted them. They were wholly 'unpaid, and, with the expense of bleaching, formed the undis- 'charged debt against the copartners, and which should have 'been defrayed from the joint stock, so far as that would go.

'Soon after the failure of Mr Turnbull, Mr Robertson also be- 'came insolvent. The creditors in the bills above-mentioned 'ranked, as they were entitled to do, on Mr Turnbull's funds for 'the whole amount, and received a dividend amounting to L.457. '17s. 6d. from his trustees. They also ranked on Mr Robert- 'son, and received from him dividends amounting to L. 660. 5s. '10d., which paid these bills in full. The statement by Mr

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'Turnbull's trustees, that they paid dividends on bills, where 'Mr Robertson was drawer and Mr Turnbull acceptor, to the 'amount of L.1222. 1s. 8d. is thus explained: Mr Robertson is 'admitted to have been a private creditor to the extent of L.111: '11s. 3d., which being deducted from the L.1222. 1s. 8d., leaves 'the amount of the copartnership bills L.1110. 10s. 5d. as above 'mentioned.

'The state of the whole copartnership concerns have this re- 'sult. The whole expense of purchases and bleaching 'amount to - - - L.2168 6 1

'SALES.

'1st adventure, -	L. 880	10	4
'2d ditto, - -	301	0	0
'3d ditto, - -	579	7	1
		1760	17 5
'Total loss,		407	8 8
'Half to each partner, - -		203	14 4

'The whole debts have been discharged by the parties, but in 'different proportions.

'At the date of the failure, Mr Robertson had received no part 'of the copartnership's funds, but Mr Turnbull had received 'from the sale of the first adventure, - L. 880 10 4

'But he paid the original cost, - 729 13 4

L.150 17 0

'This sum being in the hands of Mr Turnbull when he failed, 'Mr Robertson could only have been entitled to rank on his 'funds for one-half had the copartnership been closed; but as 'this was not the case, he had a preference in law on Mr Turn- 'bull's interest in the goods then undisposed of, which, as the 'then solvent partner, he was entitled to retain till he was reim- 'bursed in a future accounting.

'COPARTNERSHIP ACCOUNT *continued.*

'Balance, as above, in Mr Turnbull's hands when he fail- 'ed, - -	L.150	17 0
'His trustees received for the second adventure, 'sold after the failure, - -	301	0 0
Carried forward,	L. 450	17 0

	Brought forward,	L. 450	17 0	April 26. 1825.
'The trustees paid dividends on copartnership bills, - -		457	17 6	
'So there is due them on receipts and disbursements,		L. 6	0 6	
'William Robertson, on the other hand, paid compositions or dividends on copartnership bills, to the amount of - -		666	5 10	
'And he paid for bleaching copartnership cloth, - -		328	2. 4	
		L. 994	8 2	
'Deduct, received by him, proceeds of third adventure, - -		579	7 1	
		L. 415	1 1	
'Deduct the above over payment by Mr Turnbull's trustees, - -		6	0 6	
		L. 409	0 7	

'Mr Robertson, therefore, on these copartnership concerns, 'has advanced L. 409. 0s. 7d. more than Mr Turnbull or his 'trustees; and the copartnership funds being exhausted, it ap- 'pears to the arbiters at present, that Mr Robertson is now en- 'titled to rank on Mr Turnbull's estate for the above sum, and 'to draw a dividend therefor equal to the other common creditors.

'Mr Robertson makes an additional claim for L. 120 of in- 'terest and expenses received and paid by him on the copartner- 'ship bills. The arbiters are of opinion, that if he could instruct 'such payment previous to Mr Turnbull's failure, he would be 'entitled to rank on Mr Turnbull's estate for one-half; but as 'no evidence of this has been shewn, the arbiters cannot sus- 'tain the claim.

'The arbiters appoint their clerk to furnish the parties with 'copies of these minutes, and to intimate their orders, that they 'will be ready to hear any observations thereon within ten days 'from this date. (Signed) 'W. BETT.

'GEORGE BROWN.'

A representation was then lodged by the trustees, in which they denied that they had received the proceeds of the second parcel of linens, being L. 301, and offered to prove that such was the fact. On considering that representation, the arbiters

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notified through their clerk, that they were not inclined to alter their opinion. A letter was then written to them by the trustees, in which they again offered to prove that that money had never come into their hands; but the arbiters caused an answer to be returned by the clerk, stating, 'They do not think it of any 'importance, whether Mr Turnbull's trustees received the pro-'ceeds of the second adventure, because the goods forming this 'adventure were consigned for sale at Glasgow; and if Mr 'Turnbull's trustees did not receive the proceeds, Mr Turnbull 'himself must have done so, or got credit for them; and in 'either case, the result, so far as Mr Robertson is concerned, 'must be the same, in making up the copartnership account." Accordingly a decreet-arbitral was pronounced, by which they found, 'That the late George Turnbull and William Robertson 'entered into a joint adventure in the purchase and sale of three 'parcels of cloth; and being of opinion that this concern must 'be kept separate and distinct from any other concern of these 'parties, or those acting for them, and having made up an ac-'count of the receipts and expenditure respecting the said joint 'adventure, we find that the said William Robertson has ad-'vanced in the payment of the debts of said adventure the sum 'of L. 409. 7d. more than the said George Turnbull, or his 'trustees; and therefore we find him entitled to rank for that 'sum as a common creditor on the funds of the said George 'Turnbull, and to draw a dividend therefor corresponding to the 'amount, equal to the other common creditors of the said George 'Turnbull, and that being at the rate of 8s. 3d. per pound ster-'ling. We decern the said David Morrison, James Inches, jun. 'and Robert Hepburn, trustees for the creditors of the said 'George Turnbull, to pay to the said William Robertson 'L. 168. 14s. 9d. being the amount of the dividend to which 'we think him entitled, and that within fourteen days from this 'date, with interest thereafter till paid.' Of this decree the trustees brought a reduction, on the ground, 1st, That the object of the submission was not to decide any claim by Robertson against them, (which, under the trust-deed, fell to be decided by the Sheriff), but only the claim made by them against Robertson. 2d, That they had not been allowed a proper opportunity of being heard. 3d, That the arbiters had authorized a double ranking, seeing that although the estate had already paid dividends to all the bill-holders, yet they had found that Robertson was entitled to be ranked and draw dividends in virtue of the same bills. 4th, That they had assumed facts to be true which

had been offered to be disproved. And, lastly, That on the principles assumed by the arbiters, they had brought out too large a sum, which, being equivalent to an error calculi, the decree was liable to be set aside. On considering the pleadings, the Lord Ordinary reported the case to the Court, and at the same time issued the following notes of his opinion:— April 26. 1825.

'The Lord Ordinary has advised this cause, and will shortly 'notice the reasons urged for setting aside the decree-arbitral.

'First. It is said that the arbiters exceeded their powers, in 'so far as the parties never intended to authorize them to de- 'cide on any claim to be made by the defender against the pur- 'suers; but on the contrary, the sole end of the submission was 'to enable them to consider a claim by the pursuers against the 'defender, and which only was made before the submission was 'proposed and entered into.

'On this the Lord Ordinary will observe, that whatever 'might have been the state of the claims before the submission 'was entered into, it is quite clear that it was in the view of 'parties that mutual claims might be made; and accordingly the 'submission is of all claims and demands competent to the one 'party against the other. Had one claim only been in view, 'that claim alone would have been submitted, but that is not the 'fact; reciprocal claims were in contemplation, and were referred 'to the arbiters.

'Reciprocal claims and answers were made and judged of; so 'that there is nothing in this objection.

'Secondly. It is said, that the arbiters determined without 'hearing the pursuers. But this appears equally unfounded, as 'the very statement of the pursuers proves; for they made re- 'peated representations against the opinions of the arbiters, 'which were communicated to them.

'Thirdly. It is said that, by the judgment of the arbiters, 'they have authorized a double ranking; and there is no sort of 'question that this is true: neither does it seem to be disputed 'by the defender, and there is as little question that this is illegal. 'But what then? Had the point been tried in this Court, the 'double ranking would not have been allowed. The creditors 'in the bills would have ranked upon the bankrupt or trust-estate 'of George Turnbull, and also on Robertson; but as their claim 'on Robertson was in virtue of these bills, it is impossible that 'he could be allowed to rank a second time on them on Turn- 'bull's estate. But the arbiters, in allowing this second rank- 'ing, have erred in law and principle: technically speaking, they

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'have committed iniquity, which is no ground for setting aside 'their decree.

'Fourthly. It is pleaded, that they have assumed facts to be 'true when proof of the reverse was offered, in so far as they 'held that L. 301, as the price of the second parcel of yarn sold 'by Turnbull, came into the hands of the pursuers as his trus-'tees, when the latter offered to prove that Turnbull had uplift-'ed the money previously to the trust.

'The Lord Ordinary considers this plea to be ill-founded. 'The arbiters did not assume the fact that the trustees had re-'ceived the money: They declared their opinion, that it was of 'no consequence in which way the fact stood. They knew, and 'laid down as established, that Turnbull had uplifted

L. 880 10 4

'as the price of the first parcel of yarn sold by him;

'And sold - - - - 729 18 4

'Whereby he had in his hands a balance of - L. 150 17 0

'And this they held to be a fund, which, though not ear-marked, 'was one on which Robertson was entitled to a preference, and 'of course was to be applied in payment of the bills pro tanto; 'and, consequently, when they laid down that as law, it is of 'no consequence whether Turnbull or his trustees received the 'L. 301 as the price of the second parcel, since, even admitting 'him to have drawn the money, the same principle which govern-'ed the former applied to the latter. The arbiters, therefore, 'did not require to, and did not, assume any fact without proof, 'that was any way material in regulating their opinion.

'Lastly. It is said that they have found Robertson entitled to 'rank on Turnbull's estate for L. 409. 7d., in which they have 'committed an error calculi. And here the Lord Ordinary con-'fesses that he feels much difficulty what to do; for to him it 'seems as plain as arithmetic can make it, that, on the principle 'assumed by the arbiters themselves, viz. that accounts should 'be adjusted between the parties on the same principle as if 'both had been solvent, no such balance as L. 409. 7d. would 'have been due.

'Had Turnbull sold the whole three parcels, and received their 'price, he would have been liable to pay the bills which he grant-'ed for these goods and the bleaching of them, except Robert-'son's share of the loss, being L. 203. 14s. 4d. The account 'would then have stood thus:—

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'Original price of goods L.1840. 3s. 9d., bleach-			
'ing L.328. 2s. 4d. -	L.2168	6	1
'Off Robertson's share of the loss, -	203	14	4
	L.1964	11	9
'Of this Turnbull paid L.729. 13s. 4d. and divi-			
'dends L.457. 7s. 6d. - -	1187	0	10
'Remains	L.777	10	11
'But deduct what Turnbull did not receive, Ro-			
'bertson having uplifted it, - -	579	7	1
'Due by Turnbull,	L.198	3	10

'In this way Turnbull would have been owing Robertson, or, 'in other words, Robertson would have had to receive L.198. '3s. 10d.; and by a different mode of calculation the pursuers 'bring out a sum of L.203. 5s. 6d.; and in whatever way it is 'stated, it is impossible to bring out L.409, if Robertson's share 'of the loss, which he was bound to bear, be taken into compu- 'tation. The arbiters themselves state the accounts so as to 'bring out a loss to each party of L.203. 14s. 4d.; but they fail 'to deduct it. The Lord Ordinary believes the true balance to 'be as he has stated it, L.198. 3s. 10d. as may be proved by mak- 'ing Turnbull pay back to Robertson the proportion of money 'that he drew over half of the price of the goods, and then 'making each pay his half of the prime cost and bleaching. 'But the Lord Ordinary sees a difficulty in correcting the 'decree, without setting it altogether aside; and as the case is 'new, and the decree-arbitral has so many exceptional parts, he 'thinks that it is worthy the consideration of the Court.'

On advising the cause, the Court, on the 14th June 1822, repelled the reasons of reduction, sustained the defences, and found the trustees liable in expenses; and to this judgment they adhered on the 5th June 1823.

The Judges were unanimously of opinion, that the arbiters had not gone ultra vires; and Lord Robertson observed, that there was no proper error calculi, which must be an error in arithmetic, and not resolvable into an error in point of principle; but that here the arithmetical calculation was perfectly correct.

The Trustees appealed.

Appellants.—1st, Although the deed of submission is expressed in general terms, yet it was truly intended to apply merely to the

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claim which the trustees had against Robertson; and accordingly a special provision was made in the trust-deed (to which Robertson acceded) for having any claim against the trustees settled by the Sheriff. 2d, But assuming that the arbiters were entitled to entertain a claim against the trustees, and supposing the principles upon which they had proceeded to be correct, still there is such an error calculi as vitiates the decree. An error calculi does not consist merely in an arithmetical mistake. Although the mere arithmetic may be accurate, yet if some of the admitted elements of the calculation are by accident omitted, there is as evident an error as if, when all these elements were taken into view, there had been some mistake committed in addition or subtraction. But, according to the calculations of the arbiters themselves, Robertson owed to the joint adventure L.454. 19s. 1d., and Turnbull owed L.655. 11s. 4d.; and they held Robertson liable in one-half of the loss upon the adventure. Now, Turnbull's estate paid dividends on the above two sums to the amount of L.452, which, when deducted from the sum of L.655 due by him, left only about L.203 as the balance of full payment; whereas the arbiters had found him debtor to Robertson in L.409; an error arising from omitting to charge Robertson with one-half of his share of the loss; so that it was manifest that this was an error calculi. 3d, The arbiters were not entitled to act on the principle of Turnbull's estate being solvent, seeing that the submission was entered into on the principle of its being insolvent; and, therefore, they have gone ultra vires. But further, in consequence of their acting on the footing of the estate being solvent, they have authorized a double ranking.

Respondent.—It is settled law, that a decree-arbitral can only be challenged on the ground of corruption, bribery, or falsehood; and in this case no such allegations are made. It is true, that if there be an error in arithmetic, it may be corrected at any time, but the error must be in arithmetic, and not an error in point of principle. In the present case, however, there is no error in arithmetic; and therefore, supposing all the statements of the trustees were true, they are utterly irrelevant. The submission was not confined to a claim by the trustees against the respondents. On the contrary, it was perfectly general, embracing claims against each other, and accordingly mutual claims were lodged and answered; and it was not till a late stage of the cause that this plea was brought forward. The objection, that the arbiters have erroneously allowed a double ranking, is not true in fact; and at all events it is irrelevant, because it resolves into a plea of error in judgment, or iniquity.

The House of Lords 'ordered and adjudged, that the appeal 'be dismissed, and the interlocutors complained of affirmed.' April 26. 1825.

LORD GIFFORD.—My Lords, In the case of Morrison against Robertson, which was heard before your Lordships in the course of the last week, I intimated my intention of moving your Lordships to proceed to judgment on the present morning. I have since considered that case, and the arguments adduced at your Lordships' Bar, to which reference was made; and after very anxious consideration of this case, I must confess it does appear to me that the question is reduced to this, whether or not this award can be impeached on the ground of an error on the part of the arbitrators, or a point of law in the principle on which they have decided? It does not appear to me that the mistake they have committed is one which ranks with what are denominated errors of calculations, but that, if there be an error, it is that which has arisen in their minds on the application of the law to the principles on which they have decided; and as I find that it is a fixed principle in the law of Scotland, that an award of arbitrators cannot be impeached on that ground, it would therefore be very dangerous for your Lordships to come to a decision which would at all touch upon that principle, which is so fully established. Having come therefore to the conclusion that the interlocutors of the Court of Session are right, I would move your Lordships for an affirmance of those interlocutors; but it is not my intention to propose in this case the giving any costs. I shall merely propose to your Lordships the affirmance of the interlocutors.

Appellants' Authorities.—Steele, June 22. 1809, (F. C.)

Respondent's Authorities.—1. Bankton, 23.; 22. Reg.; 1695, 25.; 4. Ersk. 3. 35.; Hardie, Dec. 18. 1724, (664.); Williamson, Dec. 12. 1739, (665.); Heddrington, June 21. 1771, (No. 3. App. Arb.); Kirkaldy, June 10. 1809, (F. C.); Grant, June 23. 1820.

MONCREIFF and WEBSTER—J. RICHARDSON,—Solicitors.

JOHN AITCHISON, Appellant.

MAGISTRATES of GLASGOW, Respondents. No. 18.

Landlord and Tenant—River—Advertisement.—A landlord of several mills on a stream of water having advertised them for lease, and represented that they had an abundant and regular supply of water; and a party having taken one of the inferior mills, without any special stipulation as to the water; and the landlord having let the upper mill, under the condition that the tenant of it should keep his sluices open at least three hours in the day;—Held, (affirming the judgment of the Court of Session),