

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-

to nominate an oversman, the other two dissenting, although one of these two was the pursuer's own arbiter. No. 127.

Fol. Dic. v. 2. p. 387.

* * * This case is No. 47. p. 648. *voce* ARBITRATION.

SECT. XXI.

Quorum of Commissioners.—Managers.

1672. January 13.

MR. JOHN STRACHAN *against* The LAIRD OF TOLQUHON.

IN a process at the instance of Mr. John Strachan and his wife against Tolquhon, there was a commission granted to two persons jointly to take the pursuer's oaths anent writs they were to deliver, whereof either party named one; but the parties were examined only by one of the commissioners, advertisement having been given to the other named by Tolquhon, who, by his letter, showed, that upon the Sabbath he was advertised to meet upon Tuesday, but refused to meet, the advertisement being so short, and not having seen the commission; yet the oath was taken clear by the other; but it was alleged no respect to the oath, because it was not taken by the two jointly, so that one had no commission. It was answered, That the allegiance was relevant to any one who were not *in culpa*, but Tolquhon having named that person who was absent, should have procured him to come, and so he could make no objection upon his own fault. It was answered, That though he were *in culpa*, yet that could not make a null act valid, albeit the Lords might modify expenses of the new commission upon his fault.

The Lords considering that the oath was clear, and nothing objected that could have been further interrogated, they sustained the commission and advised the oath; but if the suspender would pay £.500 of expenses to the charger, they would renew the same commission to the same persons, or either of them, both being advertised.

Fol. Dic. v. 2. p. 388. Stair, v. 2. p. 45.

No. 128.

A commission being granted to two persons to take an oath, the report was sustained, though one of the commissioners did not attend.