1707. *March* 12.

ANDREW KNOX, Tenant in Harley, *against* GEORGE HUME of Kames.

No 7.
Arbiters cannot decern that their decrees ſhall take effect by ſummar diligence, unleſs the parties ſubmitters interpoſe their conſent thereto.

GEORGE HUME of Kames being charged at the inſtance of Andrew Knox tenant in Harley, to pay a certain ſum contained in a decreet-arbitral, as the price of ſome corns ſubmitted by them to two arbiters, he ſuſpended upon theſe grounds: 1*mo*, That the decreet was *ipso jure* null, becauſe the blank on the back of the ſubmiſſion in which it was filled up, was not ſubſcribed by the parties ſubmitters; which, according to conſtant cuſtom, is eſſential to a decreet-arbitral, as an evidence that they ſubmit implicitly to the arbiters' determination, whatever it be. 2*do*, Though the decreet ſhould not be found null for want of the party's ſubſcription to the blank it was filled up in; it could not be a warrant for a ſummar charge of horning; becauſe, albeit the ſubmiſſion bears a clauſe for regiſtrating thereof, it bears no conſent to the regiſtration of the decreet-arbitral, to follow thereupon; but only the arbiters do moſt irregularly, in their decreet, conſent to the regiſtration thereof in any competent judge's books: And their conſent to regiſtration can be no ground to raiſe horning againſt the parties who ſubſcribed not the blank in which the decreet was filled up.

Answered for Andrew Knox: Albeit ordinarily ſubmiſſions bear the blank on the back on which the decreet-arbitral is to be filled up, to be ſubſcribed by the ſubmitters, and they actually do ſubſcribe the ſame: Yet that is not eſſential to the validity of a decreet-arbitral, more than the clauſe *renouncing the exception of not numerate money*, and the clauſe *but prejudice of ſuiting execution hereupon*, &c. are neceſſary clauſes in bonds. The decreet is indeed moſt frequently written upon the back of the ſubmiſſion, that it may be inſert in the ſame regiſter with the ſubmiſſion: But *nihil impedit*, why a decreet-arbitral may not be on a paper apart. Since a verbal decreet-arbitral, proceeding upon a verbal ſubmiſſion, hath been ſuſtained; February 7. 1671, Hume *contra* Scot *. And as a teſtament may be validly made up of three words, *Lucius Hæres esto*; any words though never ſo few, importing the acquieſcence of parties in what ſhall be determined by arbiters, are infallibly binding, as if they ſhould ſubmit thus, *Lucius Arbiter esto*.

THE LORDS found the decreet-arbitral was no warrant for ſummar diligence: reſerving the conſideration of the other point anent the annulling of the decreet, becauſe the blank on the back thereof was not ſubſcribed by the parties. But they were generally of opinion that the want of the party's ſubſcription to the blank, was not a nullity in the decreet filled up therein.

Fol. Dic. v. 1. *p.* 49. *Forbes, p.* 142.

1738. *June* 22. LORD LOVAT *against* FRASER of Phopachy.

No 8.
In a caſe, where a ſubmiſſion to arbirers was made of cer-

THE effect of arbiters not determining the whole particulars ſubmitted, is ſettled by a diſtinction, whether it be a ſubmiſſion only of particulars, or only general, or of particulars with a general.

* Stair, v. 1. p. 716. *voce* PROOF, verbal contracts.

No 8.
tain particulars, as alſo a general ſubmiſſion of all other claims, the arbiters having determined only as to the particulars, but not as to the general, the decree was found, notwithſtanding, good.

In the firſt and ſecond caſe, the leaving any thing open, voids the whole: in the third caſe, the particulars being determined, the decree ſtands good, though there be nothing done upon the general; *provided* that no claim upon the general, having connection with any of the particulars determined, be left undetermined.

Accordingly, in this caſe, where the ſubmiſſion was of particulars, with a general ſubjoined of all other claims, the LORDS ſuſtained the decreet-arbitral, whereby all the ſaid particulars were determined, although there were other claims, falling under the general, left undetermined by the arbiters.

Fol. Dic. v. 3. p. 35. Kilkerran, (ARBITRATION.) *No* 1. *p.* 33.

1739. *January* 24.

WALTER GROSAT, Charger, *againſt* HENRY CUNNINGHAM, *&c.* Suſpenders.

No 9.
Arbiters cannot decern for a penalty, other or greater, than is contained in the ſubmiſſion. The penalty will be reſtricted *quoad exceſſum.*

THESE parties entered into a ſubmiſſion, wherein they bound themſelves to obtemper the decreet, under the penalty of 20l. Sterling; and, by the decreet-arbitral following thereon, the ſuſpenders were decerned to pay 200l. Sterling, by equal portions, at Lammas and Martinmas then next, with 20l. Sterling of penalty for each term's failzie; and likewiſe it decerned for a penalty of 20l. Sterling, to be paid by the party failing to obſerve, to the party performing, or willing to perform.

It was *objected*, in a ſuſpenſion of the decreet-arbitral, That the arbiters had acted *ultra vires*, in decerning for 20l. Sterling of penalty for each term's failzie.

Anſwered: Wherever a liquid ſum is found due, or decerned for by arbiters, they can either make it payable by the decreet-arbitral at a certain term, or they can decern the party debtor to grant bond for it, payable at a certain term; and, in this laſt caſe, they would decern the bond to be extended in common form, that is, with intereſt from the date, or term of payment, and a fifth part of the principal, as penalty: And the caſe is the ſame where they decern a ſum to be paid by their decreet-arbitral; the decreet-arbitral is, in that caſe, the bond, and the fifth part for penalty is, of courſe, a part of the bond. There is no abſurdity at all in ſuppoſing two different penalties to be due, one by the bond, and one by the obligation to ſubmit; and both are incurred in caſe of diſobedience, the penalty in this ſubmiſſion by diſobedience, and the other by failure of payment.

THE LORDS reſtricted the penalty in the decreet-arbitral, to the penalty in the ſubmiſſion*.

C. Home, No 117. *p.* 188.

* This caſe in Fol. Dic. v. 1. p. 49. is named, Boquhan againſt Groſſart, and dated 24th February 1739.