

fary, but this gave a handle to any of the arbiters to blow up the submission, and, by the stile of the present one, the overfman and one of the arbiters, in case of their variance, was authorised to determine: Now either they varied, and then it was the case proper for the overfman's interposition; or they agreed, and the decret was the opinion of all the three.

As this question depended on the tenor of the submission, there could be no arguing from the decisions, unless the tenor of the several submissions were fet forth, and that in Dr Middleton's case was reversed; and the LORDS found otherways in a case between Mr Thomas Rigg and Mr Hugh Baillie advocates.\*

It appeared by the proof, that the suspender, having been sent for to meet with the overfman and arbiter, was not at home, and that the overfman never saw Lecky's remarks.

A good deal was said in the argument concerning the equity or iniquity of the decret, but the LORDS agreed they could not reduce nor suspend solely on iniquity.

THE LORDS, 27th June, sustained the reasons of suspension.

On a bill and answers, they altered and repelled the reasons.

A&S. *Ferguson & W. Grant.*

Alt. *Lockhart & Hamilton-Gordon.*

Clerk, *Murray*

*Fol. Dic. v. 3. p. 36. D. Falconer, v. 1. p. 125*

1748. July 21.

MACBRYDE and LOGAN *against* The EXECUTORS of GOVERNOR MACRAE.

MR HUGH BAILLIE of Monkton disposed his estate to four persons, for payment of his debts to themselves and his other creditors; and Hugh Roger, merchant in Glasgow, one of them, in virtue of powers from the rest, made a bargain with James Macrae, sometime Governor of Madras, and a minute of sale was signed, which not being sufficiently determinate of the conditions of the bargain, it was agreed, that any dispute which might arise should be adjusted by two indifferent persons to be mutually chosen; and in case of their disagreeing, by an overfman to be chosen by them: And disputes having arisen, a submission was entered into, 'obliging the parties to stand and abide at whatever the said arbitrators, and in case of their variance, the overfman, should determine, conform to their decret-arbitral to be pronounced by them, and subscribed by them betwixt and the — day of — next, or any other day to which they should prorogue that present submission.'

The submission was continued, by several prorogations, till 1st October 1739; and the arbiters, 5th September, had pronounced a partial decret, and referred the remaining questions to the Lord Cathcart as overfman, who prorogated it to 31st October, the date of the prorogation bearing 27th October, and 10th October

VOL. II.

40

\* This is probably the case which is alluded to by Lord Bankton, B. 1. tit. 23. § 9. Neither it, nor those of Maver, and Middleton, above-mentioned, have been yet found. Examine Appendix and General List of Names.

No 58.  
Question upon a clause in a submission, whether the overfman alone had the power of prorogation.

No 58.

pronounced his decret, which was registrate, with the prorogations, 11th October 1739.

Hugh Macbryde of Baidland, and David Logan, writer in Kilwinning, two of the trustees, the other two being deceased, raised a reduction of this decret-arbitral, upon this, amongst other reasons, that the oversman was not, by the submission, impowered to prorogate, and if he had been, the prorogation was in date after the former prorogations were expired, and indeed after pronouncing his decret, which in date was after expiration of the preceding prorogations. To which it was *answered*, That it were absurd to suppose the oversman was not impowered to prorogate, who had power finally to determine; and the plural word, *they*, might, without impropriety, be understood of the arbiters before reference, and after that the oversman: The prorogation was certainly made 27th September, and October was a mistake in the writer, as was evident from the decret and prorogations, being registrate 11th October, immediately after pronouncing.

THE LORDS, 19th July, 'repelled the objection, that the oversman had not by himself power to prorogate the submission, and found the said prorogation was valid; and also repelled the objection to the prorogation, that, according to its date, it appeared to have been made after the expiration of the submission; and found there was sufficient evidence to prove that it was dated before the 1st of October 1739, to which day the submission was prorogated by the arbiters.' And this day refused a bill, and adhered.

Act. *W. Grant.*Act. *R. Craigie.*Reporter, *Elchies.*Clerk, *Forbes.*

*Fol. Dic. v. 3. p. 36. D. Falconer, v. 1. p. 375.*

\*.\* The same case is thus mentioned by Kilkerran:

1748. *July 8.*—A SUBMISSION bore a power of prorogation in these words: 'And whatever the said arbiters, or, in case of their variance, the said oversman, shall determine in the said matter, conform to their decret-arbitral, to be pronounced by them, and subscribed by them betwixt and the day of next, or any other day to which they shall prorogate this submission, which they are hereby impowered to do; both parties oblige them to stand and abide at, &c.'

The last prorogation made by the arbiters bore date the 20th October 1738, and prorogated the submission to the 1st October 1739. On the 5th September 1739, the arbiters having differed, subscribe a reference to the oversman, and the oversman, on a recital of the reference to him, and in regard the submission stands prorogated only to the 1st of October, which would be too short a time for determining the differences, therefore prorogates the submission to the 31st of October.

On this submission, decret-arbitral followed on the 10th of October 1739; which, in a suspension, being objected to as null, in respect the oversman had not

by the submission power by himself to prorogate, the LORDS repelled the objection.

They considered the power of prorogation, by the above recited clause in the submission, to be given to the same parties to whom the power of determining was committed; that is, to the arbiters, and in case of variance, to the overfman.

*Kilkerran, (ARBITRATION.) No 6. p. 35.*

No 58.

1773. *January 19.* ANDREW GARDNER *against* ROBERT EWING.

EWING being charged with horning at the instance of Gardner, for payment of certain sums awarded by a decreet-arbitral, pronounced by an overfman, in consequence of a submission the parties had entered into, referring the matter in dispute, which was relative to their marches, to William Millar and Patrick Dun as arbiters, with power to chuse an overfman; he suspended, upon alleged informalities and irregularities in the decreet and previous procedure, which, he contended, did render the decreet-arbitral void and null; and, particularly, *1mo*; That there was even no deed of acceptance, by the arbiters, of the submission; nor, *2do*, Any minute of their having differed in opinion; and, *3tio*; That even the decreet-arbitral itself did not bear that they had differed, and, on that account, had proceeded to name an overfman; which last objection had been found fatal to a decreet-arbitral; November 30. 1716, Gordon *against* Abernethy, No 56. p. 655.

THE LORD ORDINARY at first pronounced an interlocutor in general, repelling the reasons of suspension. And, by a subsequent interlocutor, adhered thereto, 'in respect, that the decreet-arbitral charged on does bear, that the arbiters could not agree in the decision to be pronounced, and had chosen an overfman.'

Ewing reclaimed upon his former grounds, referring to the authorities of Erskine, B. 4. tit. 3. § 29.; and of Bankton, tit. Arbitration; and the foresaid decision in the case of Gordon *against* Abernethy; That there the objection to the decreet-arbitral was, that it did not appear from the decreet itself, that the arbiters had differed before choosing an overfman; to which it was answered, (as in the present case), that the decision of the overfman did of itself afford complete evidence that the arbiters had differed: And, although this fact was farther offered to be instantly instructed by the oaths of the arbiters, yet the court were of opinion, that the assertion of the overfman was not a sufficient document that the arbiters had varied; and they therefore 'found the decreet-arbitral, not bearing the arbiters to have varied, null, and that the nullity could not be supplied by an after probation.'

Answered, The submission to Millar and Dun, with power to chuse an overfman, was signed by the parties on the 8th November 1771. On the 6th December, the arbiters, one of whom, Dun, had been brought from Paisley, met upon the ground; and, as they did not agree in opinion, it was necessary to chuse an overfman. This was a matter of some difficulty; but, having at length agreed on

No 59.  
Found that the *res gesta*, in a submission, proved, by implication, that the arbiters had differed in opinion, which had occasioned them to chuse an overfman, so that there was no necessity for a special minute to that effect.