

1776. December 18; and March 4, 1777. DAVID JACK *against* GEORGE CRAMOND and OTHERS.

[*Fac. Coll. VII, 396; Dict. App. I; Arbitration, No. 5.*]

ARBITRATION.

Arbiters had included in their decree a sum for their own trouble. It was not reduced *in toto* on this account, but only *quoad hoc*.

GARDENSTON. Arbiters are not clear of *corruption* when they are capable of settling a sum of money to be paid to themselves, and *that* not by both parties, but by one: this clause of their decret is sufficient to set aside the decret-arbitral altogether.

KAIMES. This clause in the decret-arbitral is *ultra vires*: a decret-arbitral must stand or fall altogether; for the *common law* makes no distinction. In equity, indeed, decreets-arbitral have been sustained to a certain extent, while reduced as to the rest; but this decret is null at common law, and there is no equity to support it.

PRESIDENT. That a sum should be awarded to the arbiters by their own authority, and *that* sum taxed at whatever they please, is monstrous.

MONBODDO. A sum decreed by arbiters to themselves may be recovered at common law, but gratuities are not actionable: *here* the arbiters went out of the common road decreed for a gratuity to themselves, and laid the whole expenses of it on one of the parties.

On the 18th December 1776, "The Lords found, that the arbiters decerning for a sum to themselves, was an illegal and corrupt act, and therefore reduced the decret *in totum*, and found expenses due;" varying Lord Hailes's interlocutor, and their own of the 20th July 1776.

Act. J. Boswell, A. Crosbie. *Alt.* B. W. M'Leod, Ilay Campbell.

N.B. Lord Hailes found, "that the arbiters, by decreeing the sum of L.18 : 15 : 6d sterling to be paid for their own fees, for the fees of their clerks, and for incidents in the course of the submission, exceeded the powers conferred on them by the submission, and did a thing of evil example; and which, if once established by the authority of a court of justice, might tend to the grievous oppression of the lieges. But found that this decerniture for L.18 : 15 : 6d sterling is totally distinct from and unconnected with the other parts of the decret-arbitral, and could have no influence thereon; and therefore, that the decret-arbitral may and ought to subsist in all its other parts, notwithstanding this error and excess, and therefore sustained the reasons of reduction, as to the said sum of L.18 : 15 : 6d sterling, but repelled the reasons of reduction *quoad ultra*." To this judgment the Court adhered without a vote, on the 20th July 1776, but altered it, without a vote, on the 18th December 1776, being moved with a generous indignation against the arbiters.

1777. *March 4th.*—COVINGTON. I cannot consider this clause as the result of any corrupt bargain; nor would I, on account of it, reduce the decret *in totum*. I should be inclined to allow the parties to be heard *tanquam in libello*, were it not that this might in effect reduce the decret-arbitral.

PRESIDENT. The consequences would be fatal, were arbiters to be allowed, without consulting the parties, to award a sum to themselves; but still I would not set aside the whole decret-arbitral.

ALVA. It is but a guess whether this was innocent or not. We cannot see into people's hearts.

JUSTICE-CLERK. I was not present when the former interlocutor was pronounced; but I saw that it proceeded from a just sense of the dangerous consequences arising from such practices in arbiters. Yet I think that the words of the interlocutor go farther to ruin the characters of three men of business, and to deprive them of their livelihood. I cannot say that this was a corrupt bargain, when it does not appear that the arbiters meant to take any undue advantage.

KAIMES. This part of the decret-arbitral cannot stand: the question is, Whether the rest can subsist? I would presume in favour of the decret-arbitral, but I would allow the other party to object, as against the sentence of an inferior judge.

JUSTICE-CLERK. When arbiters determine on questions altogether distinct from the subject submitted, the practice of the Court has been to reduce *that* part, leaving the rest to stand.

On the 4th March 1777, The Lords altered their interlocutor of the 18th December 1776, and returned to the interlocutor of the Lord Hailes, Ordinary, with this addition, that the decerniture was *illegal*, and that it did not appear that the arbiters had acted corruptly, or from bad motives.

Act. J. Boswell, A. Crosbie. *Alt.* B. W. M'Leod, Ilay Campbell.

1777. *March 7.* JAMES CRAIG *against* ANNE RATTRAY.

EXECUTOR.

An executor found liable for a greater sum than the amount of the valuation put upon the defunct's goods in a judicial inventory, a creditor having offered that higher value.

[*Faculty Collection*, VII. 402; *Dictionary*, App. I., *Executor*, No. 1.]

BRAXFIELD. As to the form of confirming *ad male appretiated*, Whatever might have been the rule *formerly*, it is not absolutely necessary *now*. The creditor has a direct action against the executor to account: the value put on the goods at the appreciation is no more than a presumptive value: the fair way is to sell by public roup. Whenever there is an appearance of a short-