

In the appellant's case, several interlocutors of the Court are stated as to the admissibility of female witnesses, to other facts than those within doors, and in their own houses; and as to the allowing of objections to the characters of witnesses: he also uses argument thereon, but these formed no part of the judgment appealed from.

Dr. George Middleton, - - - - - *Appellant*; Case 87.  
 Mr. George Chalmers, Principal, and the  
 rest of the Masters and Regents of King's  
 College, Aberdeen, - - - - - *Respondents*.

9th June 1721.

*Arbitration.*—On a day appointed by two arbitrators for determining a matter, one of them declined to act, and the oversman thereupon pronounced an award; the Court having reduced this award as incompetent, the judgment is reversed.

**T**HE appellant, who had been for many years principal of King's College, Aberdeen, was in 1716, among others, superseded by certain persons having his majesty's commission under the great seal of Scotland, to visit that university; and the respondent Chalmers was appointed to his place.

It being stated to these commissioners, that the appellant had received and had not accounted for certain sums of money, arising from a mortification, or grant of his late majesty King William, and for the *Bibliothek money*, which last consisted of small sums payable towards the college library, by those on whom the degree of master of arts was conferred, the commissioners directed the respondents to sue the appellant for the same.

An action was thereupon commenced, but instead of proceeding therein, on the 5th of October 1719, a submission was entered into between the appellant and the respondents, for referring the matters in dispute to the arbitration of Sir Alexander Bannerman, of Elfick, on the part of the appellant, and of Thomas Forbes, of Echt, on the part of the respondents, and in case of variance or discrepance between the arbiters, to Colonel John Buchan, of Cairnbulg, as oversman or umpire, elected and chosen by both parties: by this submission the parties were bound to stand to the decree to be pronounced under the penalty of 500 merks, and such decree was to be made on or before the 8th of November 1719.

The respondents gave in their charge against the appellant, to which the appellant gave in his answers, and both parties having been several times heard before the arbiters and the oversman, the arbiters appointed the 28th of October 1719, for pronouncing

their decree. When this day arrived, Sir Alexander Bannerman declared his opinion, that the appellant should be absolved from the claim given in by the respondents; but Mr. Forbes declining to pronounce any decree, the appellant by his procurator thereupon took a protest in the hands of a notary under form of instrument; and the oversman being present, in consequence of what passed between the arbiters, appointed the next day for giving his judgment. Accordingly on the 29th of October, Colonel Buchan, the oversman, pronounced a judgment, finding and declaring that the appellant had managed the money belonging to the said mortification and library, honestly and faithfully, and that he had accounted for, and made payment and satisfaction to the master and members of the said college, of all the money he had received, and that there was no balance due to them from the appellant, and therefore absolved him from the said claim.

Of this judgment the respondents brought a reduction before the Court of Session, in which they insisted, that being only trustees, they could not properly submit these matters, which were the property of their college, to arbitration, especially since they had directions from the commissioners of visitation to sue the appellant at law; and that though they had power to submit, yet the judgment was not regularly pronounced, for though one of the arbiters did not at that time incline to pronounce an award, yet he might have done so afterwards, and his declining was not any authority to the oversman to pronounce his decree. After a report from the Lord Ordinary, the Court on the 26th of January 1721, “found that the arbiters not having differed in their  
“opinion as to their determining in the foresaid submission, but  
“only one of the arbiters declining to determine, the oversman  
“was not thereby empowered to pronounce his decree, and  
“therefore found his decree null, and decerned in the reduc-  
“tion.” And to this interlocutor the Court adhered on the 3d of February thereafter.

Entered,  
17 March  
1720-1.

The appeal was brought from “an interlocutory sentence or  
“decree of the Lords of Session of the 26th of January 1721,  
“and also from another interlocutor of the 3d of February there-  
“after affirming their former interlocutor.”

#### *Heads of the Appellant's Argument.*

The arbitrator named on the part of the respondents having declared his disagreement with the other arbitrator, and a protest under form of instrument having been taken thereon, the matter became legally and formally subjected to the cognizance of the oversman, and there was no occasion for a new reference by the arbitrators to him. His being present and fully apprised of the matters in controversy, were sufficient to warrant what he did therein, and his decree must stand good in law. By the regulation act 1695, ratified by act of parliament, no decree arbitral can be reduced, but upon proof of corruption, bribery, or falsehood, nothing of either of which is pretended in the present case.

*Heads*

*Heads of the Respondents' Argument.*

The oversman could not legally determine unless the matter had been remitted to him by the two arbitrators signing a reference, and mentioning their difference. For though the arbitrators might not agree upon an award on the 28th of October, when the appellant's son desired them to pronounce it, yet they might afterwards have agreed before the 8th of November, the time limited for pronouncing their decree. The difference of arbitrators can never be considered to be final, nor can the fact which empowers the oversman to determine be otherwise ascertained, than by a formal deed of the arbitrators declaring their difference: it were otherwise in the power of an oversman to take the determination upon himself when he pleased. The appellant, besides, had a remedy to compel the arbitrators either to pronounce an award, or to remit to the oversman. The decree of the oversman proceeds upon the recital, that the arbitrators met and differed; but of this there is no legal voucher, and there is some appearance of collusion from the good understanding which appears between the oversman and the arbitrator on the part of the appellant.

After hearing counsel, *It is ordered and adjudged, that the interlocutor of the 26th of January, and the interlocutor of the 3d of February 1721, in affirmance thereof, be reversed.*

Judgment,  
9 June  
1721.

For Appellant,     *Tho. Kennedy.   Sam. Mead.*  
For Respondents,   *C. Talbot.       Will. Hamilton.*

In the appeal cases on both sides, the question is agitated if the respondents had power to submit this matter to arbitration; but as there was no cross appeal, this matter was not before the House of Lords, and the argument thereon is not here stated.