upon exception to the report. The only question here was, Whether there was any ground for inquiry? and he thought there was.

June 14, 1813.

QUESTION OF COMPETITION BETWEEN CREDITORS.

It was accordingly ordered and adjudged, that the decree of the Court of Chancery, 14th November, 1806, varying the decree of the Master of the Rolls, 23d October, 1805, be reversed, &c.

made on exception to Master's Report. It was no reason against inquiry.

Agents, ODDIE, ODDIE, and FORSTER.

SCOTLAND.

APPEAL FROM THE COURT OF SESSION.

SHARP and others—*Appellants.*

BURY and others—*Respondents.*

Instrumenta noviter reperta not a ground for setting aside a decree arbitral; especially if the want of timely discovery has been owing to the negligence of the party desirous of setting it aside.

May 17, 1813.

FORCE AND EFFECT OF A DECREE ARBITRAL.

THE Appellants, merchants in Glasgow, purchased from the Respondents, calico-printers in Manchester, goods to the amount of 6704*l.* 13*s.* 11*d.*, to be paid in bills at nine months. The goods were made up in two parcels, and the one sent to Liverpool for the purpose of being shipped for New York, the other to Glasgow to be sent to the West Indies. An invoice and box of patterns

August, 1799. Goods furnished by Respondents, to order of Appellants.

May 17, 1813.

FORCE AND EFFECT OF A DECREE ARBITRAL.

was sent with each of the parcels. The destination of the parcel sent to Glasgow was altered, and that, likewise, was exported to New York. In the mean time, the affairs of the Appellants having become embarrassed, a sequestration was awarded against them. The trustee upon their estate refused to rank the Respondents as creditors for the full price of the latter parcel of goods, in consequence of a representation from the agents for the Appellants at New York, that these goods were deficient, both in quantity and quality, to the description of goods ordered; and specimens were sent home, in confirmation of this representation. The whole matter was submitted to arbitration, and the arbiters, conceiving that the specimens were not properly authenticated, pronounced their decree arbitral in favour of the Respondents; who were in consequence ranked for the invoice price of the goods, and paid some dividends. The Appellants, thinking that their affairs began to wear a better aspect, proposed to their creditors to give them bills payable at four different dates, at the rate of twenty shillings in the pound, if they would consent to a recal of the sequestration. The creditors agreed, and the sequestration was recalled.

Sequestration of the estate of the Appellants. Refusal to rank the Respondents as creditors for full price of the goods, on the ground that they had been found deficient in quantity and quality.

The matter submitted to arbitration, and a decree arbitral in favour of the Respondents.

March, 1802. Recall of sequestration.

Two of the bills given to the Respondents were paid, but payment of the other two was refused; and letters of horning having been consequently raised, and a charge given, the Appellants presented a bill of suspension, and raised an action of reduction of the decree arbitral. The ground upon which the Appellants rested their case, was that of *instrumenta noviter reperta*; and these consisted of the

Feb. 1805. Appellants refuse to pay the two last bills given to Respondents, and endeavour to set aside the decree arbitral, on ground of new evidence discovered in boxes which

box of specimens originally sent by the Respondents with the goods, which box had been all along in the possession of one of the Appellants; and two boxes, containing patterns taken from the goods in New York, and certified by the magistrates of that place, which had been in the possession of one who acted as assistant to the trustee upon their estate, for nearly six years (as the Respondents alleged) before they were brought forward. The tin boxes sent from New York contained authentic certificates of the goods being overcharged; the patterns in the other box, it was stated, corresponded with the invoice prices. The Lord Ordinary, and the Court of Session, decided in favour of the Respondents, and the Appellants appealed to the House of Lords.

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had been for several years before in their own possession, and that of the assistant to their trustee.

Lord Ordinary and Court of Session decide in favour of Respondents.

The Respondents contended, that this decision ought to be affirmed principally on two grounds: (always, however, denying the equity of the Appellant's case:) 1st, That the plea of *instrumentum noviter veniens ad notitiam* was not admissible to the effect of setting aside a decree arbitral. 2d, That, even if the decree had been less powerful in its nature, the conduct of the Appellants and the trustee, who had acquiesced under it for a long time, and acted upon it, would have had the effect of completely establishing it by homologation.

In regard to the first point, it was stated, that, by the law of Scotland, a decree arbitral was regarded in the light of a judicial sentence, proceeding upon the consent of the parties who entered into the submission, to acquiesce in the final determination of the arbiters. Such decree arbitral may be set aside, if, proceeding upon a limitted and special

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Argument as to the power of a decree arbitral.—Articles of Regulation, 1695, sect. 25.

submission, it travels beyond that authority, *ultra vires compromissi*; in the present case the submission was of the most ample latitude, comprehending all matters in difference betwixt the parties; and, accordingly, it is not pretended against this decree, that the arbiters have in any respects exceeded their authority: but it is no ground for setting aside by reduction a decree arbitral, that it may be shown, upon the merits of the question in dispute, to be an erroneous or unjust adjudication. This has been settled in the law of Scotland by express enactment. Among the Articles of Regulation of 1695, which were settled by Commissioners appointed by the King, under the authority of an Act of Parliament, and which have therefore the full authority of a statute, there is one upon the subject of decrees arbitral, sect. 25, in the following terms; viz. "That, for the "cutting off of groundless and expensive pleas and "processes in time coming, the Lords of Session "sustain no reduction of any decree arbitral that "shall be pronounced hereafter upon a subscribed "submission, at the instance of either of the parties "submitters, *upon any cause or reason whatsoever*, "*unless that of corruption, bribery, or falsehood,* "*to be alleged against the Judges Arbitrators who* "*pronounced the same.*"

The Act of Regulation has received complete effect from the Court of Session, wherever any question has arisen upon it. Thus, in the case of

1724, Dec. 13. Dict. Vol. I. p. 51.

Hardie v. Hardie, it was found, that to allege that the arbiters had decided upon grounds which were not true in fact, was no relevant ground of suspension; the exception of falsehood in the act,

regarding only the falsehood or forgery of the submission, or decree arbitral. And again, on 12th December, 1739, it was decided, that a minor being capable, with consent of his curators, to enter into a submission, may not, when of age, plead, that facts were held to be true by the arbiters when they were not so.

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Williamson v. Fraser. Dict. Vol. III. p. 37.

2d, Of homologation, it was observed by Mr. Erskine, that, "as to all obligations arising from "contract, that though they labour under legal "nullities, they may become effectual by the poste-"rior approbatory acts of the granter, or, in the "style of our law, by acts of homologation; for, "since it imports not whether the consent essential "to contracts be expressed by word, writing, or "facts, nor whether it be given at the time of enter-"ing into them, or afterwards, every act done by "the granter, after their date, which implies appro-"bation, supplies the want of an original legal "consent;" and that this doctrine is applicable to the present case, their Lordships would at once be satisfied, from an ancient decision precisely in point.

Erskine, b. 3. Tit. 3. § 47. As to effect of acts of homologation.

"Ane decrete-arbitral beand given be Jugeis Arbiteris "chosen betwix twa parties, gif efter the geving "thairof, ony of thame has ressavit ony thing con-"tenit thereintill, or done ony deed by virtue "thaiof, he may not thairefter reclame thairfra; "because he homolgatis and ratifyis the haill de-"crete, be fulfilling of ony pairt thairof, albeit the "samin be never so littill." Dict. Vol. I. p. 377. Balfour, *voce* Arbitrie, No. 30. p. 416.

Dict. Vol. I. p. 377.

On the part of the Appellants, it was admitted, that a decree arbitral could not be opened up *merely*

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on the ground that a wrong decision had been given on the merits; but, in the present case, they contended, that there was a point upon which it was obvious that the arbiters had been completely misled, or deceived, by the Respondents, in regard to the quality and quantity of the goods, as clearly appeared from the certificates sent from New York; and that this was a ground for opening up the decree. The Appellants had recovered evidence which, as they alleged, fully proved the inferiority of the goods furnished, as compared with the specifications in the invoice, and the patterns originally sent; and *instrumentum noviter repertum* had always been considered as sufficient ground for opening up the most solemn and final judicial procedure. The Appellants likewise denied the homologation. They had, indeed, granted bills to the Respondents, for payment of the balance; but that they had been obliged to do, by the terms upon which the sequestration had been recalled.

The *Lord Chancellor*. The Appellants' case appeared to him to amount to this,—That they had not chosen to make use in proper time of evidence which they had in their own possession.

Judgment of the Court of Session affirmed, with 100*l*. costs.

Adam and *Leach*, Counsel for Appellants; *Romilly* and *Horner*, for Respondents.

Agents for Appellants, SPOTTISWOODE and ROBERTSON.
Agent for Respondent, RICHARDSON.