

No 19.  
 ponent and another party for clearing merchant-dealing betwixt them, conform to a submission, bearing a consent to take their oaths, probative of a ground of compensation therein acknowledged, to meet a debt charged for by the deponent's assignee, altho' the submission broke up without taking effect.

by him to the deceased Alexander Wright, merchant, and assigned by him to the said Martha Wright, his daughter; Alexander Lindsay proponed compensation for the sum of L. 541, acknowledged by the cedent to be due by him to Mr Lindsay, in his oath given before Sir William Calderwood and Mr William Forbes, advocates, arbiters chosen by both parties, for clearing of merchant dealing betwixt them, conform to a submission bearing a consent to take their oaths; which oath is signed by the deponent and arbiters.

*Alleged* for Martha Wright; An extrajudicial oath cannot found a reason of compensation.

*Replied* for Mr Lindsay; *1mo*, It is laid down as a principle by my Lord Stair, B. 4. Tit. 44. § 7, That even extrajudicial oaths of verity afford both action and exception, whether ultroniously emitted, or upon transaction or reference of parties; yea, it is only since the act 19th, Parl. 3d, Charles II., that minors could be restored against their extrajudicial oaths, and *casus omisus habetur pro omisso*; *2do*, This may be termed a judicial oath, being emitted before arbiters authorised by law, and express consent of parties in the submission to take the oath; and there is a great difference betwixt a consent to take an oath of party as in this case, and the taking of witnesses' oaths; *3tio*, Though such an oath of party taken by arbiters were not probative as an oath, it is a sufficiently probative acknowledgement of the debt, being subscribed by the deponent and arbiters, who were as good as witnesses. And if a simple extrajudicial subscribed declaration would be probative against the granter; such a declaration upon oath subscribed by the deponent and two arbiters, cannot be less obligatery.

*Duplied* for Martha Wright; The oath having been emitted upon a view of ending all debates by the submission, and the submission having broke up without taking effect; the oath as *accessorium* must fall in consequence. *2do*, The distinction betwixt taking oaths of witnesses, and the oaths of parties, is groundless; for the taking oaths being *actus jurisdictionis*, such a power granted by private parties is *a non habente potestatem*.

THE LORDS found, That the oath emitted before the arbiters is probative.

*Fol. Dic. v. 2. p. 349. Forbes, p. 217.*

1709. November 30.

Mrs SOCHAN *against* WALTER BOSWELL of Balbarton.

No 20.  
 An oath emitted before arbiters *deferente adversario* sustained to prove *contra deferentem*, as

JOHN SOCHAN and Balbarton having submitted all differences betwixt them in a count and reckoning to two arbiters, and Mr Sochan having died before any decret was pronounced, but after giving in of claims *hinc inde*, by way of charge and discharge, formal minutes of debate upon the articles, interlocutors as to relevancy, and the defunct had deponed *negative* as to some articles refer-

red to his oath by Balbartoun; Mrs Sochan, as representing her husband, brought the matter by a process before the Session; in which it was *objected* for Mrs Sochan against those articles in Balbartoun's charge upon which her husband had deponed before the arbiters, That they ought to be repelled, because, *juratum est*.

*Answered* for Balbarton, All concessions of Parties, minutes, and interlocutors before arbiters are void and null, unless a decreet-arbitral proceed thereon; since the design of a submission is, That final decision be put to all debates and controversies betwixt the parties, in prospect whereof they are frequently induced to make large concessions. These necessarily fall in consequence of the submission's expiring without taking effect by a decisive sentence, and parties are *in statu quo prius*; in the same way as deeds or gifts *intuitu matrimonii*, return *hinc inde*, if the marriage go back. Submissions may expire after the arbiters have determined the claim of one of the parties, or one side of a count and reckoning; and it were absurd to sustain such a constitution thereof, while the other party is left to pursue his right by a tedious process.

*Replied* for Mrs Sochan; Proceedings before arbiters are sustained before other judicatures after failing of the submission, L. 5. § 1. & 2. C. De Recept, Arbitris; and Gothofred upon that text. Because judiciary proceedings before one whose jurisdiction is prorogated by consent of parties, is of the same authority *quoad* the consenter, as that which is done by the ordinary magistrate. And an oath of party taken before arbiters was found probative, January 2. 1708, Kinloch *contra* Lindsay, No 20. p. 14033; *3tio*, A false oath emitted before arbiters, would infer the crime of perjury; *4to*, Balbarton hath homologated Mr Sochan's oath, by founding an allegiance thereon, and therefore cannot quarrel it, Arg. L. 4. § 6. D. De Recep. Arbitr.

*Duplicated* for Balbarton; An oath materially considered, implying a written acknowledgment or declaration of matters of fact, is indeed always probative against the deponent, which is all that was found in the case betwixt Kinloch and Lindsay: But the present question is, If Mr Sochan's oath should be sustained to prove for him? which it cannot be, more than a party having adduced before arbiters witnesses for proving an article of his claim, who prove nothing, would, upon expiring of the submission, be hindered in a process before the Judge-ordinary, to prove the same by new witnesses, or otherwise; in respect the *litis-contestation* upon Balbarton's referring such articles to his oath (which could only support it as probative in his favour), is fallen to the ground by the submission's not taking effect. This is consonant to the Civil Law, L. 5. Pr. C. De Recept. Arbitr, where it is said, That if a decreet-arbitral be duly reclaimed against within ten days, (*multo magis*, if no decreet be pronounced), neither party has any prejudice thereby, but are in the same case as if they had not submitted. And the § 2. bears only, *Si quid attestatum sit, i. e.* The concurring testimonies of witnesses adduced before arbiters are probative before

No 20.

well as against the deponent, although no decreet-arbitral followed on the submission; but neither concessions of parties, interlocutors, nor minutes before the arbiters were found probative or binding.

No 20. the Judge-ordinary ; but not that *si quid Juratum sit* should be equally probative, and *exceptio firmat regulam in non exceptis* ; 2do, An oath taken *ex officio*, or any extrajudicial oath, as well as an oath taken before arbiters, would infer perjury ; but that is still an effect against the deponent, and so *non probat elenchum*, viz. That any such oath doth operate in his favours ; 3tio, Balbarton's charge being *articulatus libellus*, wherein *quot articuli, tot libelli*, he may found upon Mr Sochan's oath as to any article acknowledged by him, and repudiate the same as to other articles.

THE LORDS found, that neither interlocutors, concessions, nor minutes before the arbiters, were probative or binding ; but that Mr Sochan's oath doth prove *contra deferentem*, as well as against the deponent, because of the sacredness of an oath.

*Fol. Dic. v. 2. p. 349. Forbes, p. 357.*

\* \* \* Fountainhall reports this case :

By contract betwixt Walter Boswell of Balbarton and Magnus Prince, on the one part ; and Sochan, a leadshot-caster, on the other ; Boswell is bound to furnish him so many tons and fadders of lead yearly, and he is obliged to deliver it back manufactured to them ; and they having failed in giving him the full quantity, he pursues them, and recovered a decret for the L. 1000 of penalty ; and then they entered into a count and reckoning as to what was received. To facilitate the work, they entered into a written submission to two arbiters, who made a great progress therein by sundry minutes, interlocutors, concessions, and oaths taken on sundry articles ; but the day of submission expiring before any decret-arbitral followed, without any new prorogation, the same came to be deserted, and they returned back again to count and reckon before the Lords. Socshan, during the dependence, dies, having assigned the process to his wife ; and Boswell charging her with sundry articles, it was *answered* for her, That some of them were clearly determined by interlocutors in the arbitration, and others of them being referred by Boswell to Sochan's oath, he had deponed thereto, and so she was *tuta exceptione rei jurate*. THE LORDS found minutes, interlocutors, and concessions, made in a submission, which did not end in a decret-arbitral, were binding on neither party ; but as to the oath emitted, they thought, if it had been taken *ex officio judicis arbitratoris* only, it could not be obtruded as probative in a judicial process ; but it being taken *parte deferente*, and at the party's own desire, they heard the lawyers debate this point in their own presence, how far such an oath could be sustained as probative here. It was *contended* for Boswell, that it was null, *imo*, Because the scope and design of all submissions was, by one decisive stroke to put an end to all the controversies betwixt them ; but if no decret follow, their intention is to be *in statu quo prius* ; for parties will go a great length in yielding things in an arbitration,

which, in strict law, they would debate; and arbiters take a greater latitude *secundum bonum et æquum* to terminate pleas, than they legally do *more judiciario* in process; and therefore, if no decreet-arbitral follow, whatever steps or advances were made towards the agreeing of the parties, all vanish into smoke and air with the submission; *2do*, If it were otherwise, many absurdities would follow: What if one of the parties' claims were determined, but nothing done in the objections or discharge, shall that stand as binding, and the other party be sent to a tedious and expensive process: This were to discourage persons from entering into submissions, though a most excellent and useful medium for settling of pleas; and litiscontestation in such cases bears a resolute condition, that, unless the arbiters agree and pronounce a decreet-arbitral, the whole falls to the ground, even as gifts *spe futurarum nuptiarum* return, *hinc inde*, if marriage follow not; and the Emperor Justinian in L. 5. C. De Récept. Arbit. determines, That in arbitrations, by mutual concessions, *nihil sit inde prejudicii*, unless there be a liquid *professum et attestatum*. (*Professum* is acknowledgments of matters of fact in writ under the party's hand. *Attestatum* is the depositions of witnesses taken before arbiters, for both these are probative before the Judge-ordinary.) But there is no mention, that party's oaths taken in arbitrations can be used elsewhere. *Answered*, That oaths are as authentic proofs when given *parte deferente*, as either subscribed acknowledgments, or testimonies of witnesses; if this oath had been in favours of him who deferred it, no question it would have militated against him; why should there be such an inequality as to reject it when it proves for him; since, by your delation and election of his oath, you intended the benefit of it, you must not divide it, but take it precisely as it stands; and the LORDS found so, on 2d January 1708, Wright *contra Lindsay*, No 19. p. 14033.; and if any writ contrary to this oath could be produced, would not that subject him to the pains of perjury? And it is a received maxim, that *acta et deducta in uno judicio probant in alio*, and the testimonies taken before the Sheriff, or other inferior courts, will prove before the LORDS. See 16th Jan. 1628, Finlayson *contra Lookup*, No 7. p. 14024. THE LORDS having balanced all the inconveniencies, they sustained Sochan's oath in this case as probative, though it was assoilzieing him from an article charged on him, and so in his own favours; though some doubted if this will determine the general case of oaths emitted *parte deferente* in arbitrations, where no decreet-arbitral has followed.

Fountainhall, v. 2. p. 532.

1710. January 13.

JOHN RUSSEL of Braidshaw *against* JAMES BAIRD of CHESTERHALL.

LORD Prestonhall reported John Russel of Braidshaw *contra* James Baird of Chesterhall. Russel being a creditor to the deceased Bailie Baird, he pursues

No 20.

No 21.

An oath taken not in a formal process, but in the course of an