

No 72.

Wallace, Gardyne, and Co. agreed to the condition, by letter of the 17th, adding, ' You may compute the amount, and send us your acceptance, payable in 4 months;' with a postscript in these words: ' Since writing, we have made out an invoice of the linens, amount L. 426 : 18 : 11; for which, if found without error, you may send us your acceptance.'

Upon the 23d of May, Messrs Miller and Gibson and Balfour protested and registered certain bills due by John Weir. Upon the 24th, a meeting of his creditors was held; and that same day, Weir wrote to Wallace, Gardyne, and Co. explaining the situation of his affairs, and asking their directions as to the bleaching of the linens, which he now declined purchasing.

These linens were pointed by Messrs Miller and Gibson and Balfour, upon the 1st of June, as creditors to John Weir, and claimed by Wallace, Gardyne, and Co. as their property.

Pleaded for the defenders; The contract of sale is completed by mutual consent, and, in sales of moveables, writing is unnecessary. This consent was signified by the letter of 16th May on the one hand, and the letter of 17th May on the other. Nor is it of any consequence, that Weir had not transmitted an acceptance for the price; that cannot be considered as a circumstance essential to the bargain; the pursuers demanded no additional security, but had betaken themselves to the credit of Weir alone.

Answered; When it is agreed that a contract shall be completed by writing, there is *locus poenitentiae*, till that writing be delivered. The contract, therefore, was never completed in this case, as the acceptance was never granted. But, even allowing the contract to have been completed, and the property transferred, Weir was bound in justice to give up the bargain, when he knew himself to be utterly insolvent. Accordingly, he did give it up by his letter of 27th May; and the protesting and registering his bills the day before, did not make him a notour bankrupt, or invalidate that act, even supposing it to have been necessary for the security of the pursuers.

' THE LORDS found, That the sale of the cloth to Weir was never completed, and repelled the defence.'

Act. Dav. Græme.

Alt. Wight.

G. F.

Fol. Dic. v. 3. p. 396. Fac. Col. No 34. p. 256.

1773. June 24.

JOHN FRASER Tenant in Tranent *against* ROBERT WILLIAMSON, and Others,
Representatives of the deceased JOHN WILLIAMSON.

No 73.
Not competent to prove a verbal submission, even by the oaths of the arbiters.

JOHN FRASER brought an action against the defenders, as representing the deceased John Williamson baker in Tranent, to make payment of L. 93 : 17 : 6d. Sterling, as the balance of an account of wages for work done by the said John Fraser to the said John Williamson preceding July 1771, 'according as the

‘ same was settled and ascertained by decreet-arbital of John Rannie in Myles, and Archibald Scott in Tranent, to whom the said deceased John Williamson submitted the same.’ THE LORD ORDINARY found, ‘ that the alleged submission cannot be proved by parole-evidence; and, in respect the pursuer offered no other evidence, therefore sustained the defences, and assoilzied.’

Fraser reclaimed, praying, at least, to find, that the verbal submission is competent to be proved by the oaths of John Rannie and Archibald Scott the arbiters.

Pleaded; A verbal submission is not a simple promise, the nature whereof is to create an obligation on one of the parties only. It is a contract, or bargain containing reciprocal obligations on both parties, to pay or deliver, as the arbiters shall determine, in favour of the one or the other. And that such mutual agreements may be proved by witnesses, appears from what is laid down by Erskine, B. 4. T. 2. § 12.

Neither is there any analogy between a verbal submission and that sort of promise which the law does not allow to be proved by witnesses.

Parole-proof is only repudiated in promises merely gratuitous; and the reason of the law in that particular is solid and just, namely, that the constitution of obligations may not depend on the imperfect conception of by-standers. But mutual treaties, in which a *quid pro quo* does intervene, are not gratuitous, and may therefore be proved by parole evidence; and, if they have come the length of a final agreement, will be binding on both parties.

On the same principles, a verbal submission must be binding, if it comes the length of a final reference; and the obligation must be proved by parole evidence. Neither is the decision in the case of Home against Scot, No 11. p. 8402, sufficient to redargue this doctrine. It appears indeed from the decision, that, in that case, the decreet-arbital was proved by the oaths of the arbiters; and, so far the decision establishes the competency of a parole proof as to the nature of the award. It further appears from the decision, that the party submitter was alive and his oath was the mean of proof resorted to. But it is not from thence to be inferred, that, had the party been dead, the parole proof would have been rejected; and no subsequent proof is to be found in the books, where the proof of a verbal submission was confined to the oath of the party. In the present case, the pursuer proposes to establish the submission by the oaths of the arbiters; and, as they had good access to know the circumstances, and are persons of irreproachable character, if in any case faith can be given to parole evidence of a verbal submission, it is in the present.

Answered; A verbal submission, in its nature, is a mandate or commission, authorising arbiters to hear and determine, and which infers a promise, to stand to the award on the matter submitted; and, in the next place, that this mandate can only be proved *scripto vel juramento* of the parties submitters; as the award itself can only be proved by the oath or writ of the arbiters.

No 73.

The genius of the law of Scotland rejects the testimony of witnesses in matters of importance, or where writing is essentially necessary, or usually adhibited. The only exception admitted is in bargains of moveables, for encouragement of commerce, where parties depend on mutual good faith; and writing is seldom adhibited. Here the line is drawn; and in other cases a proof by witnesses is inadmissible.

This is held to be a clear principle of the law, in questions of mandate, order, or direction; and is supported by an uniform tract of decisions.

A verbal submission is evidently a mandate, or commission to common friends to take away a difference, having indeed implied in it a promise to stand to their award; and, if one shall acknowledge, or depone, that he did submit, then, *ex bono et æquo*, he is bound to stand to the decreet-arbitral, but if he shall depone *negative*, then the decreet-arbitral being without warrant, necessarily falls to the ground.

The present question has already received the judgment of the Court, Nian Home *contra* Scott, No 11. p. 8402. Home charged Scott upon a bond of 350 merks; Scott suspended upon this reason, that both parties referred the matter verbally to an arbiter, who had determined 220 merks to be paid in full. It was *answered*, That verbal submissions and decreets-arbitral are not binding; but either party may resile before writ be adhibited. 'THE LORDS found, that the reason of suspension was relevant to be proved thus; by the charger's oath, that he did submit; and, by the arbiter's oath, that he did accordingly determine.'

The pursuer objects to this decision, that it is not in point; because the party was alive, and his oath was resorted to; but it appears from the decision, that the Court, according to the form of process then prevalent, gave a particular interlocutor on the relevancy. It must therefore be held to be a decision on the general point of evidence in a question of this nature; and, as such, it has been received, and the point is now *tritissimi juris*.

'THE LORDS adhered to the ORDINARY'S interlocutor, and found the pursuer liable in expenses.' See PROOF.

Act. Cosmo Gordon.

Alt. D. Dalrymple.

Clerk, Campbell.

Fol. Dic. v. 3. p. 396. Fac. Col. No 76. p. 184.

1773. December 15.

JOHN BUCHANAN *against* ANDREW BAIRD, EDGAR, BUCHANAN, and Others,
Merchants in Glasgow.

No 74.
Possession for
two years of
a shop, in
consequence
of a verbal
treaty with
its owner,
which he al-

THE point here was, if Baird and certain other persons were entitled to plead *locus poenitentiae*, in defence against an action instituted against them in May 1773, before the Magistrates of Glasgow, at the instance of Buchanan, as proprietor of a shop in that town, for the purpose of having them decreed to execute a five years lease of it, in terms of a verbal treaty in March 1771, between