1777. *March* 6.

DAVID JACK, Merchant in LONGFORGAN, *against* GEORGE CRAMOND, Brewer in DUNDEE, and others his Cautioners.

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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*.

A GENERAL submission had been entered into between these parties to three arbiters, all writers in Dundee. The matters submitted had been multifarious, and intricate, and the arbiters had pronounced a long and articulate decree, of which Jack had instituted a reduction.—Lord Hailes (19th December, 1775) pronounced this interlocutor: "Repels the reason of reduction, that the arbiters determined the claims of the one party, and left the other undetermined, in respect that there is no evidence of this, but on the contrary; repels the reason of reduction that the arbiters decerned for the penalty, by and attour performance, in respect that such decerniture is agreeable to the spirit and true intendment of the submission; repels the reason of reduction founded upon the supposed partiality of the arbiters, in respect that under the particular term *partiality*, the pursuer attempts to set aside the decree arbitral on the head of iniquity, contrary to the express enactment of the regulation 1695. Finds that the arbiters, by decerning £18. 15s. 6d. to be paid for their own fees, for the fees of their clerk, 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, which, if once established by the authority of a court of justice, might tend to grievous oppression of the lieges; but finds that this decerniture for £18. 15s. 6d. is totally distinct from and unconnected with the decree arbitral, and could have no influence thereon, and therefore that the decree arbitral may and ought to subsist in all its other parts, notwithstanding this error and excess, and therefore sustains the reasons of reduction as to the said sum of £18. 15s. 6d. but repels the reasons of reduction *quoad ultra*, and decerns."

On advising a petition for Jack against this interlocutor, with answers, the Court adhered to it.

Jack presented a second petition. The argument, both in it and in the former, as well as in the answers to each, was directed chiefly to the prior grounds of reduction, not to the effect of the decerniture for the £18. 15s. 6d. but the Court themselves considered this of importance, and ordered the account to be produced, from which it appeared, that 12 guineas of the sum was for the trouble of the arbiters themselves.

The Lords pronounced this interlocutor, (18th December 1776): "Find "that the arbiters decerning 12 guineas for their own trouble was *illegal* and "*corrupt*, and therefore sustain the reasons of reduction of the decree arbitral, "find expenses due," &c.

The defenders now in their turn petitioned the Court. They pleaded, that although arbiters are not at liberty to stipulate bribes from the parties, or to receive them whether stipulated or not; and although any species of corrup-

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tion in an arbiter is a relevant ground for setting aside his decree; still a decerniture for expenses, including the arbiters' fees, is not, *in all circumstances*, to be considered as a corruption of the arbiter. There is no authority in the law for maintaining so extensive a proposition. The matter must depend on the circumstances. For if a court is satisfied that there was no wrong intention, that no bad effect upon the determination had followed; on the contrary, that perhaps the situation of the case rendered the measure proper, and it was justifiable in other points of view; in short, if it should appear that there was actually *no corruption of the arbiter*, there was no reason for setting aside the decree *in toto*. The defenders then proceeded, by entering minutely into the circumstances of the case, to endeavour to make out that there was no room for the idea of corruption.

The case of Johnston and Bell, in the act of sederunt 1742, had been founded on, on the other side, where it had been found, that these persons as arbiters, had been guilty of *gross* and *notorious fraud*, in the manner of *inducing* a party to enter into a submission, and in pronouncing decree under circumstances which had come out in evidence in a reduction of that decree. But the defenders pointed out that there was no resemblance between the cases. Fraud was certainly a relevant ground of reduction—but no vestige of fraud had been substantiated in the case at issue.

The defenders gave instances of cases which had occurred in recent practice, of arbiters including their own fees in their decrees, without challenge, particularly in two cases of the division of a forest, and of a ranking of creditors, where lawyers then eminent in practice at the bar had been the arbiters.

It had been said that the Court had reduced a decree arbitral in similar circumstances, viz. the case of Blair, 12th January 1738, No. 67. p. 664. where the arbiters had kept up their decree until their fees were paid. But the defenders argued that the present case was entirely different. The arbiters in the case of Blair had certainly behaved corruptly, by concussing the parties to give them money; but here the arbiters had given out their decree without receiving money. They had not even yet received any. How then could it be alleged that the decree had been obtained by means of bribery and corruption? The expenses were indeed included in the decree, and horning might have been issued upon it, but not at the instance of the arbiters. Their reason for including the expenses was entirely a fair one. They supposed it would be for the advantage of the submitting parties themselves, to ascertain the expense, and by whom it was to be paid.

The pursuer of the reduction answered:—The office of an arbiter is, of its own nature, gratuitous. It does not indeed exclude the idea of honoraries, on account of the trouble and attention which may be bestowed in deciding the rights of parties; but such honoraries are altogether discretionary; and it lies with the parties submitters both to give them, and to determine their extent. If they are not given, no action will lie for them, and there is no rule by which

No. 5. they could be modified or ascertained. *Multa sunt quae honeste accipiuntur, in honeste petuntur.* On this principle was decided the case of Blair in 1738. The decree was reduced *in toto*, as procured by corruption. The Court considered that arbiters, who act from any other motives than those of deciding the rights of parties, and who mean to make gain by their office, as such were to be considered as corrupt persons, upon whose determinations the law would not rely.

In the case of Blair, the arbiters had pronounced their decree before making their demand. In the present case the arbiters had done worse: They had, before decree, stipulated for a sum to themselves. Such a practice might be productive of most pernicious consequences: It might become an instrument of oppression and extortion. Arbiters have it in their power, once a submission is signed, to decide as they please. In a question of considerable value, neither party would venture to hesitate in complying with the demands of the arbiters, however exhorbitant. The very making a demand, indeed, to any extent, is, on the part of the arbiters, a most corrupt piece of extortion. Nor can the ideas of justice and equity be supposed to reside in the breasts of men who make it.

As to precedents in recent practice alluded to on the other side, it might be sufficient to say, that corrupt practice ought never to be permitted to pass into a precedent. The case, however, of the division of a commonty, stands on a different footing from other cases. Any one common proprietor is entitled to bring the action of division. He lays out the whole expense, and he is entitled to reimbursement in the end by the different proprietors, according to the several interests they draw. The division of this expense is a part of the process, as well as the division of the commonty itself; and if the process be submitted, the one must be determined as well as the other.

As to the case of a ranking of Creditors alluded to, it appeared from the record that the fact had been mistated on the other side.

The defenders had contended, that the decree arbitral ought no farther to be annulled than in so far as regarded the clause awarding the expenses. But if the conduct of the arbiters was illegal and corrupt, there is an express ground of reduction under the regulations 1695; and corruption detected in one point must necessarily taint the whole proceedings. In strict law, a decree ought either to subsist altogether, or fall altogether. If any part of it be cut down, it must be equity only that can support the rest; therefore, by cutting down any one part as contrary to law, the parties are let in to investigate the merits of the rest. Thus the matter comes to resolve into a new action.

The Court (6th March 1777) pronounced this interlocutor: "Find that the "award of the arbiters, ascertaining 12 guineas as their own fees, was illegal and "*pessimi exampli*, and unwarranted by the submission, and therefore sustain "the reasons of reduction as to that sum; but find no evidence that the "above-mentioned decerniture for their own fees, proceeded from any corrup- "tion of the arbiters in the sense of the regulations 1695, or from any corrupt

"motives in them; and find that the award of the arbiters for the above sum "as part of the expense of the submission, is totally distinct from and unconnected with the matters submitted and determined by the decree arbitral, and "that the decree-arbitral may and ought to subsist in all its parts, notwithstanding the avoidance of what was so illegally awarded, and therefore repel "the reasons of reduction of the decree-arbitral *quoad ultra*, and decern, and "find no expenses due to either party." No. 5.

In a petition against this interlocutor by the pursuer Jack, after resuming the argument that the stipulation of fees by the arbiters inferred corruption, he contended, that if so, the decree being indivisible, could not subsist in part and fall in part. He quoted various cases in the Dictionary, *voce* INDIVISIBLE, particularly, Lockhart, November 1582, No. 1. p. 6833.; A. *against* B. July 1616, No. 3. p. 6834.

The defenders, in answer, contended, that if the Court remained satisfied, that the decerniture for expenses proceeded from no corrupt motive, and only fell to be set aside as *ultra vires* of the arbiters, it came in reality to be no part of the decree, and being ineffectual, was to be held *pro non scripto*. They quoted, as precisely in point, the case Craufurd *against* Hamilton, 25th Dec. 1702, No. 5. p. 6835. where a decree-arbitral, in similar circumstances, was only partially reduced, and sustained *quoad ultra*.

At this stage of the cause, new parties appeared, viz. certain creditors of Jack, who craved reduction of the submission, as executed by Jack in a state of bankruptcy, to the prejudice of his creditors. This circumstance prevented the case from being finally decided exclusively upon the point of law above agitated; but it is believed the Court would not have swerved from the principle of their last interlocutor.

Lord Ordinary, *Hailes*. For Jack, *Crosbie*. For Cramond, &c. *Ilay Campbell & B. W. M'Leod*.

W. M. M.

1798. *November* 15.

WALTER LOGAN, Superintendent of the Forth and Clyde Navigation, and the Company of Proprietors, *against* ROBERT LANG.

No. 6.
A decree-arbitral reduced, which had been obtained by the fraud of one of the parties.

Act. Reg. 1695. § 25.

THE canal between the Forth and Clyde being to pass through the property of Robert Lang, a submission was entered into, in order to ascertain the amount of the damages to be allowed him, and a decree-arbitral was pronounced, by which the arbiters, after "having heard parties at length, *vivâ voce*," and "taken what proof appeared to them necessary," found him entitled *inter alia* to thirty years purchase of a rent of £5. 5s. Sterling *per* acre, "which "the said Robert Lang brought evidence that he was offered, for six acres of