

No 11. It is of no consequence, therefore, that the price was not named, in this case, by the arbiters, till after the death of one of the parties. The contract of sale was concluded by the nomination of these arbiters.

The authorities brought to shew, that submissions, are not binding on the heirs of the submitters, apply only to submissions, as separate deeds, unconnected with any other contract or transaction implying an obligation on heirs. But a reference, such as the present, is part of the contract of sale, and must go along with it. From the moment that contract is concluded, it is binding on the heirs of the contractors; and the parties having in view a transaction that is to affect their heirs, cannot be supposed to intend that these heirs should not be equally obliged to submit to this reference of the price, as to every other part of the contract.

The Court were of opinion, That the reference was binding on the heir, and that he was obliged to admit the price fixed on by the arbiters after the death of the referrer; therefore, found 'That there was sufficient evidence of a completed bargain.' (See SALE.)

Aët. Crobie.

Alt. Craig.

Fol. Dic. v. 3. p. 36. Fac. Col. No 4. p. 9.

1794. February 4.

WILLIAM WODDROP against JOHN FINLAY.

No 12.

Arbiters cannot be examined, in order to explain the meaning of an ambiguous expression in their decrees-arbitral. See No 3. p. 624.

JOHN FINLAY possessed a farm on a lease, in which it was stipulated, that he should lay a certain quantity of manure on the lands each year of his possession, and that the proprietor might remove him at any period of the lease, on giving him a year's premonition, and paying him 'for what manure he shall recently have laid on the said lands, in so far as he shall not have got the just benefit of it at his removal;' and that the sum to be allowed him on that account, should be ascertained by arbiters mutually chosen.

William Woddrop, the proprietor, having warned Finlay to remove, in terms of the lease, arbiters were named to fix the amount of his claim.

Finlay produced a claim not only for manure, but for other improvements on the farm, such as straightening ridges, summer fallowing, &c. for which no allowance was stipulated in the lease.

The arbiters, by their decree, modified to him a certain sum 'for meliorations made on the said farm, and manure laid thereon,' of which he had not got the full benefit at his removal.

In a suspension and reduction of this decree, as *ultra vires* of the arbiters, brought by Woddrop, he contended that they had taken into their consideration the other meliorations claimed by Finlay, besides the manure, for which alone he was entitled to deduction.

Finlay, on the other hand, asserted, that the arbiters meant only to give him an allowance for the meliorations occasioned by the manure; and craved that they might be examined, in order to ascertain this fact.

THE LORD ORDINARY, before answer, ordained the arbiters to declare, by a writing under their hands, which of the two meanings they had in view, in using the expression in question.

In a reclaiming petition, the suspender

Pleaded: A submission is an agreement to act as the persons therein named shall direct. The decree pronounced by them is equally binding on the parties, as a mutual contract framed by themselves; and if the arbiters do not exceed their powers, it is equally free from objection or review.

The decree of an arbiter, like the final sentence of a judge, admits of no extrinsic explanation; Bankton, v. 1. p. 457. § 22. It is the subject of construction, not of evidence. It is acknowledged that an arbiter cannot alter or amend his decree, and there is the same reason against allowing him to explain it. For not only is there no accurate distinction between ambiguity and error, but there are infinite degrees of both; and what appears clear to one person, may appear ambiguous to another; so that, if an explanation can be admitted in one case, it must be so in every one where any objection can be started: And danger will result, not only from want of recollection in arbiters, but from their corruption, and particularly where their decree is challenged as *ultra vires*, from the temptation of giving it that explanation which they find is necessary to support it.

Besides, the power of arbiters is at an end whenever their decree is pronounced; and if it is afterwards to be affected by extrinsic evidence, there seems no reason why they alone should be examined, or why a proof at large should not be allowed.

It is true the proof granted in the present case is *before answer*; but although a judge will not determine the *relevancy* of the random allegations of parties, but will require their averments to be established by evidence before giving a judgment, wherever the *competency* of the mode of probation is disputed, that point must be decided, before the parties are put to the expence of a proof; 22d June 1763, Norvel against Ramfay, (Fac. Col. No 114. p. 266. *voce* PROOF.); 11th March 1786, M'Donald against Callender, (Fac. Col. No 270. p. 417. *voce* PROOF.); 26th February 1787, Wilson and Corse against Kay, (Fac. Col. No 325. p. 499. *voce* PROOF.)

Answered: Although an arbiter cannot carry his judgments into execution, like an ordinary judge, he has the same powers with him, in the determination of the cause. And it is entirely owing to positive statute, that his judgments are not liable to be reviewed in the same manner; Art. of reg. 1695, c. 25. Acts of Sed. p. 215.

The object of the Lord Ordinary's interlocutor is not to cut down a regular written document, but merely to obtain an explanation of a doubtful expression in it. Whenever such ambiguities occur, the natural mode of removing them, is to have recourse to the judge or arbiters, by whom it has been pronounced. Accordingly, it is not unusual for the Court of Session to explain their judgments, after they become final.

No 12.

The danger resulting from such explanation, is imaginary. Arbiters are chosen by the parties, from a confidence in their probity; and they have no temptation to mislead them. They are not to be asked their present opinion, but, merely in point of fact, what sentiments they formerly entertained.

Doubtful expressions in other writings are frequently allowed to be explained by extrinsic evidence; Gilmour, February 1662, Laird of Fairny against Lord Melvill, (p. 26. *voce* PROOF.); Dalrymple, 17th June 1714, Arbuthnot against Pyper, (p. 149. *voce* BILL OF EXCHANGE.); 28th February 1754, Duncan against his Majesty's Advocate, (Fac. Col. No 103. p. 152. *voce* PROOF.); 24th January 1755, Crawford against Macfie, (Fac. Col. No 131. p. 195. *voce* PROOF..). And so may such as occur in decrees-arbitral; Balf. Pract. v. Arbitrie, p. 415.; Huber, lib. 4. tit. 8. *De rec. et qui arbitrium rec.*; Voet in eund. tit.; 16th July 1773, Arthur against Callin and Smith, (WALLACE, p. 205. *voce* WRIT.)

The practice of allowing a proof, before answer, has been introduced in order to put the judge in possession of the real state of the case, before determining abstract points of law; and there seems the same reason for allowing it, when the competency of the mode of probation is disputed, as when the relevancy of the fact is controverted.

The Court, (28th November 1793,) influenced by the circumstance, that the proof allowed was only *before answer*, refused a petition, reclaiming against the Lord Ordinary's interlocutor, without answers; but, on advising a second reclaiming petition, with answers, it was

Observed on the Bench: The powers of arbiters are at an end the moment they pronounce their decree, which then becomes the only legal evidence of their meaning. Even their minutes cannot be taken into consideration, any more than the prior communings of parties, after a written obligation (the result of the whole) has been made out. In general, where writing is essential, extrinsic evidence cannot be admitted. It would be extremely dangerous, to allow arbiters to be afterwards examined for the purpose of explaining their meaning.

THE LORDS almost unanimously found, 'That in this case it is not competent to examine the arbiters;' and remitted to the Lord Ordinary to proceed accordingly *. (See No 3. p. 624.)

Lord Ordinary, *Craig*. For the Suspenders, *Dean of Faculty Erskine, John Millar, jun.*
Alt. *Fletcher*. Clerk, *Sinclair*.

Fol. Dic. v. 3. p. 38. Fac. Col. No 100. p. 221.

Davidson.

* Besides arguing the general point, parties had recourse to the special circumstances of the case; but the Court went upon general grounds.