1784.

COLQUHOUN v. CORBET.

enough then, it is so now. It is expensive in Scotland; I wish it were less so, that it might be more frequently administered. But who shall say at what the communion elements were rated? All the circumstances prove there is no limitation, and consequently they should have looked into it.

"It appears to me great inconvenience must arise in allocating a stipend, where victual is given by the Court, though none paid as tithe. The statute said that it could no way exceed the tithe; in this way it may. If the tithe 800 merks, the stipend four chalders victual and 100 merks, the value must clearly exceed the tithe.

"The Court have no reason in expediency or authority in law, to say they will not look into it. I therefore move your Lordships to reverse the two interlocutors complained of, and to remit to the Court to proceed on the merits."

It was ordered and adjudged that the interlocutors complained of be reversed, and that the cause be remitted back to the Court of Session in Scotland to give the necessary directions for carrying this judgment into execution.

For Appellant, *Henry Dundas, William Adam, William Robertson.*

For Respondents, *Ilay Campbell, T. Erskine.*

JOHN COLQUHOUN, - - - *Appellant;*
JOHN CORBET, Esq. - - - *Respondent.*

House of Lords, 27*th July* 1784.

LEASE—ARBITRATION—CONSTRUCTIVE CORRUPTION—OVERSMAN—PAROLE.—Disputes having arisen between a landlord and tenant, regarding a breach, and not implement of the stipulations of the lease on the part of the landlord. Actions were raised to have the tenant's rights ascertained, which were submitted to two arbiters, mutually chosen by deed of submission. There was a clause in the submission, providing, that in case of a difference of opinion, the oversman named was to be called in. A decree arbitral was pronounced, setting forth, that in consequence of a difference of opinion, the oversman was called in, whereupon the arbiters, along with that oversman, pronounced judgment.—A reduction being brought of the decree on the ground of corruption,

and also of falsehood, under the act 1695, and that the decree arbitral had stated falsely that there had been a difference of opinion between the arbiters, when there was none. The latter reason of reduction repelled by Court of Session. In the House of Lords affirmed, without prejudice to the discussion of the other reasons, in respect the decree arbitral appeared so partial as to amount to constructive corruption in the arbiters, and therefore reducible under the act 1695. Also held, that parole was competent to expiscate whether a difference of opinion took place, although the decree arbitral set forth that fact.

A lease was let by the respondent to the appellant on 20th July 1768, of the lands of Gartcosh, *as then lately possessed by Robert Thomson*, for the period of 38 years. The term of entry was at Whitsunday 1769, the landlord becoming bound to erect and build complete houses and offices on the farm, before that term, the tenant binding himself to pay £65 sterling for the first nineteen years, and £80 for the remaining nineteen years; and likewise to keep the houses and fences in proper tenantable and fencible condition, during the whole years of the lease, and leave them so at his removal.

The landlord, instead of building the houses and offices before the term of entry, only began to build these at that term, and, in consequence of his circumstances and inability, the building even then went on slowly. The tenant, on his part, subdivided the farm, fenced and enclosed, and laid out a great deal of money in enclosures. Before the rent fell due, the landlord had generally received part payment in advance, for the purpose of forwarding the buildings. Several payments of this nature were even not so applied, but to other purposes; and the houses and offices were still unfinished. Disputes thus arose between them. The tenant resolved not to perform his part, namely, pay his rent, until the landlord had performed his—the nonperformance of which, for the last ten years, had occasioned the tenant great damage, besides the illegal and oppressive diligence of poinding, &c. raised against him. These disputes, including an attempt of the landlord to take twenty acres of land from him, became the subject of arbitration in 1776, but no award was pronounced. Thereafter actions were resorted to, and these actions, embracing these disputes, were submitted to arbitration " of Robert Gray, Esq., and James " Carse, arbiters mutually elected by the parties, all claims

1784.

COLQUHOUN v. CORBET.

" controversies, and debateable matters preceding this date, " and particularly the two processes of suspension de- " pending before the Court of Session, and also the process of " damages at the instance of the tenant. And whatever " the said arbiters, or in case of their varying in opinion, " whatever they, or either of them, with David Muir, por- " tioner in Gartferry, hereby elected umpire or oversman, " shall give forth and pronounce as their final sentence and " decreet arbitral."

The award which followed this submission sets forth, " That I, the said Robert Gray, and the said James Carse, " having, in consequence of our acceptance of the foresaid " submission, met with the parties submitters, received in " their claims and answers, and taking some steps towards " determining the matter submitted, *but having differed in* " *opinion as to some points*, called in to our assistance me, the " said David Muir, as oversman foresaid; and me the said " Robert Gray, and David Muir, having fully considered the " claims, answers, replies, &c., and other productions given in " by the parties—the processes mentioned in the submission, " met upon the grounds of the farm of Gartcosh, belonging " to the submitter, John Corbet, perambulated the marches, " viewed the fences, and many times met with the said James " Carse and the submitters, when they were heard *viva voce*, " as well as with the said James Carse by ourselves."

The appellant brought a reduction of this decree arbitral, on the ground chiefly, 1st, That the award asserted *falsely*, that the arbiters had differed in opinion. 2d, No difference having taken place, the umpire had no right to interfere. These were further amplified in the argument as follows. That there was no difference of opinion between the arbiters—that the arbiter and oversman who signed the decreet arbitral, had not before them the processes therein mentioned, nor many of the papers essentially necessary to enable them to form a just opinion on the merits of the case, and therefore, what the award sets forth on these subjects is false; and falsehood being averred against the arbiters, it was reducible under the act 1695. That the arbiters not having differed in opinion, the oversman had no right to interfere, and acted without any power or authority. That the decreet or award, was made after the submission or arbitration bond had expired, and the decreet was therefore void. That it was *partial* and unjust, and ought to be set aside. It had

awarded what was not submitted. And also because, though the appellant had covenanted to pay 10s. per acre for his whole farm, the award allowed him only a deduction of 3s. per acre, for want of the thirty-nine acres taken from the farm let, and also had omitted to give allowance for twelve acres seized by the landlord to plant firs on. In defence, it was stated, that the arbiters had differed in opinion with respect to the extent of the appellant's claim for damages. That Mr. Carse insisted this should be taken up at the commencement of the lease; whereas Mr. Gray was of opinion they could not go beyond January 1776. It therefore became necessary to call in the umpire. That the arbiters had essentially differed in opinion therefore, before the umpire interfered. That the award expressly sets forth this, and finally, that it was a mere mistake in reckoning the time, to say that the submission had expired before the award was pronounced. The submission expired on 26th January 1781, and the award is dated 22d January. The whole discussion was afterwards confined to the point of a difference of opinion in the arbiters, so as to support the interference of the oversman.

After the arbiters were examined by order of Court, the Lords pronounced this interlocutor: "The Lords having ad- Dec. 5, 1783.
"vised this petition with answers, and the depositions of
"James Carse, Robert Gray, David Muir, and George Smith,
"taken in consequence of a former interlocutor in this cause,
"repel the reasons of reduction of the decreet arbitral chal-
"lenged, assoilzie the defender, and decern; conjoin the
"three several suspensions brought by the pursuer against
"John Corbet the charger, with the process of reduction;
"find the letters orderly proceeded in these processes, and
"decern; find John Colquhoun, the pursuer and suspender,
"liable in full expenses of this process." On reclaiming Dec. 29, ——
petition the Court adhered.

Against these interlocutors the present appeal was brought.

Pleaded for the Appellant.—The decree arbitral is void and null, being only pronounced by one of the arbiters and the oversman, without the intervention of the other arbiter, and without any regular devolution of power upon the oversman. There could be no regular devolution of the powers of the arbiters upon the oversman, unless by writing under the hands of both arbiters. The common law of Scotland on this subject, as ascertained by a multiplicity of decisions,

1784.

COLQUHOUN v. CORBET.

declaring that no other species of evidence but written evidence was admissible to prove a difference of opinion between arbiters, and that the testimony of witnesses, or parole evidence, is wholly incompetent. But, supposing parole evidence competent, yet there was no proof of that kind brought. He offered in the Court below, that if they allowed a proof by parole, he was prepared to bring forward a proof by witnesses to establish what he averred, namely, that there was no difference of opinion. The only witness examined was Carse, by order of the Court. Gray, Muir, and Smith, were examined, notwithstanding the appellant's objections to them on the ground of interest; yet even upon the evidence of these, if competent, it was clear that there was really no difference of opinion. Besides, the arbiters had exceeded their powers. They had decided on damages incurred after the date of the submission, whereas that was confined to all claims prior thereto. They had also prorogated the submission without a proper power to prorogate. The decreet arbitral is full of partiality and injustice towards the appellant, in regard to the acres of the farm let, of which he was unlawfully deprived, and in the many other particulars set forth in the case.

Pleaded for the Respondent.—The only doubt which the Lord Ordinary or the Court ever entertained in regard to this cause, was in regard to the statement that there was no difference of opinion on the part of the arbiters, and therefore that the umpire had no right to interfere. But as that point has been fully and satisfactorily expiscated by the examination of the witnesses, the Court had no hesitation in pronouncing the judgment to which it came. No doubt the decreet arbitral set forth this fact, but this did not, and could not exclude parole evidence where the truth of that fact was questioned. And the want of written evidence to establish that difference of opinion between the two arbiters, does not render parole proof by witnesses incompetent to establish that fact, because no such rule of evidence is established by any law or practice in Scotland, and assuredly there is no decisions supporting such a doctrine. Even if there were, the particular circumstances of this case would justify parole. Mr. Carse, one of the arbiters, positively refused to sign any opinion in writing. Looking therefore to the circumstances, that during this litigation the respondent gets no rent for his farm, which the appellant keeps in possession, and has so

exhausted and mismanaged the culture of the lands, that, supposing him to quit it at this moment, it would take, at least, some years to put it again in good condition, fit to be let, it is clear, that the interlocutors of the Court below are right, and ought not to be disturbed.

After hearing counsel,

LORD CHANCELLOR THURLOW,

" My Lords,

" I am of opinion that, in the circumstances of this case, the umpire had a right to interfere; at sametime, I think Carse was right in insisting that the damages should have been considered from the beginning of the lease. That the decreet appeared so partial that it amounted to constructive corruption in the makers of it; and therefore it was reducible, in terms of the act and regulation 1695. I therefore move that the interlocutor be affirmed, without prejudice to Colquhoun's impeaching the decreet, upon any head, but want of power in the umpire."

" It was therefore ordered and declared that the case provided for in the submission, viz. the case of the two arbiters, Robert Gray and James Carse, varying in opinion, is sufficiently established, and that thereupon David Muir and Robert Gray had competent authority, according to the terms of the said submission, to give forth and pronounce a decreet arbitral between the parties to the submission. And it is ordered and adjudged that the interlocutors complained of be affirmed, without prejudice to the pursuer insisting on his summons of reduction upon any other head of objection to this decreet arbitral, or other proceedings under the said submission."

For Appellant, *Andrew Crosbie, W. Cha. Little.*
For Respondent, *Ilay Campbell, Ar. Macdonald.*