

1708. July. HALIBURTON of Pitcurr, *against* HALIBURTON of Millhall.

No. 222.

A decreet-arbitral is not a privileged writ, and therefore null if wanting witnesses.

There being sundry differences of neighbourhood, feu-duties, and services, betwixt Haliburton of Pitcurr and Haliburton of Millhall; and having submitted them to some country gentlemen, there is a decreet-arbitral pronounced, whereby Pitcurr conceiving himself enormously lesied, and that the late article of the regulations 1695 gives no redress on iniquity and lesion; therefore he raises a reduction craving to be reponed on sundry intrinsic nullities, as *first*, the prorogation of the submission did not design the writer, contrary to the act of Parliament 1681, and so is null. Answered, It was a pure mistake, bearing to be wrote by John Gray, instead of saying "John Master of Gray;" *2do*, This was abundantly supplied and supported by posterior prorogations formal in all points. Replied, Condescending on the writer now *ex post facto* is not receivable since the foresaid act of Parliament; and as to the subsequent prorogations, if the first be null, and after the day was expired, they can never convalesce by a posterior deed; for that were to make a miraculous resurrection of a *non ens*. The *2d* nullity was, that the arbiters had decerned him to cause the chaplain of Kettines to enter him by a precept of *clare constat*, which is *factum alienum*, and imprestable by him. Answered, You Pitcurr are patron of that Chaplainry, and present him to the erected benefice; and being your own creature, can oblige him to enter the vassals at your pleasure. Replied, He being already *in officio* I cannot compel him, except you say I have him obliged by back-bond. The *3d* nullity was, that the subscription of the arbiters to the decreet was null, as wanting witnesses. Answered, That only takes place as to private writs, but not in judicial acts and sentences; for the interlocutors of the Lords and other Judges require no witnesses thereto, like to princes their *teste me ipso*. Replied, Decree-arbitral had no such privilege, and on a less nullity the Lords reduced a decreet-arbitral betwixt Charles Row and Marjory Row, his sister, within these two years, No. 219. p. 16971. The Lords laid no weight on the first two nullities, but reduced this decreet-arbitral on the third, that it wanted witnesses.

*Fountainhall, v. 2. p. 459.*

1709.

DR. ALEXANDER PENNYCUICK of Romano, *against* ANNA CAMPBELL and CAPTAIN DAVID SCOT her Husband, and ANNA EDGAR and ROBERT SWINTON, Chirurgion, her Husband.

No. 223.

A holograph testament sustained, though want-

In the action against Anna Campbell, and Anna Edgar, and their Husbands, at the instance of Dr. Pennycuick, for reducing a testament made by Captain Robert Pennycuick his brother, in favours of the defenders, upon this ground, that the