claiming compearance either by the party or advocates, so as to loose decreets *in foro*, was of the highest importance, and most dangerous to the security of the lieges; and therefore was not decided at this time. See the 11*th December* 1678, *Grant* against *Mackenzie*. *Vol. II. Page* 582.

1710. *July 5.* SIR WILLIAM LAURIE of MAXWELTOUN *against* JOHN GIBSON of GLENCROSH.

LAURIE of Maxweltoun against Gibson. Sir William Laurie of Maxweltoun pursues John Gibson of Glencrosh on an old decreet-arbitral pronounced in 1673, decerning his father to pay 1300 merks to Maxweltoun's father.

ALLEGED,—This being a decreet thirty-seven years ago, and never heard of till now, and being a sum modified to be paid by Gibson, vassal to Maxweltoun, for an entry to his lands, and for discharging bygone non-entries; and it being asserted that Maxweltoun gave him a charter, and performed his part of the decreet-arbitral, law presumes the other mutual prestation has been *simul et semel* performed; seeing a superior will not readily enter his vassal till he pay the composition. But, whatever be in this, the decreet-arbitral is null, being founded on a prorogation; the sole warrant of which is only subscribed by the arbiters, and wants both writer's name and witnesses.

ANSWERED to the *first*,—Anent the prestations enjoined by the decreet, that can import nothing, unless he have a discharge. And, as to the nullity, they had, by the submission, power to prorogate; and the Acts of Parliament requiring writer's name and witnesses relate only to probative writs betwixt parties, but not to writs of persons acting by virtue of an office and trust, such as arbiters; and was so found in a notary's seasine, 26*th June* 1634, *Lord Johnstone* against *the Earl of Queensberry;* and 9*th December* 1635, *Earl of Rothes* against *Leslie;* where the Lords sustained a decreet-arbitral, though it wanted witnesses: and the like, 10*th December* 1632, *Hunter* against *Haliburton*.

REPLIED,—Their faculty of prorogation was but a delegated power, and so they could do no more by virtue of it than the parties themselves could have done; and, as they could not prorogate by a writ wanting writer's name and witnesses, so neither could the arbiters. And as the submission would be null without witnesses, so will the prorogation be in the same way, it being upon the matter a new submission, and the immediate warrant of the decreet-arbitral following thereon. And, as to the decisions cited out of my Lord Durie, they cannot influence this case; for the solemnities of writs were not come to a consistency at that time, but were fluctuating, and can be no rule now.

Several of the Lords thought the prorogation null; but, being of importance, they took hold of the first allegeance, and allowed probation, before answer, what implement or performance had been made of the prestations *hinc inde*, contained in the decreet-arbitral; and recommended to the Ordinary to hear the parties thereupon. For the Lords thought, if the superior had fulfilled his part in granting a charter, it was a strong presumption that the vassal had also paid the entry; especially seeing his house, since that time, had been burnt, where the discharge might have been lying.

There was another point started, That the prorogation was signed on the 20th

of October, to last betwixt and the 15th of November thereafter; and the decreet-arbitral is pronounced on the said 15th day, which is without the limits of the submission, and so null: for though, in other cases, a day prefixed in favours of one of the parties, includes the day, so that, till it elapse, there is room for performance; but it is not so in submissions, which run *de momento in momentum.* But, this not being fully debated, it was not decided at this time. It was suggested, That the parties compeared before the arbiters on the said 15th day, and gave in their claims; which was a plain acknowledgment and homologation of the prorogation. But this being only faintly alleged, it was not regarded; unless it had been proponed *peremptorie,* and offered to be proven.

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1710. *July* 11. GILBERT GRIERSON of CHAPPELL *against* JOHN NEILSON, Writer, Dumfries.

GILBERT Grierson of Chappell having contracted many debts near to the value of his estate; and adjudications being led for the same, and purchased in by John Neilson, writer in Dumfries; upon a stated account betwixt them, Gilbert grants an absolute irredeemable disposition of his lands to Neilson; but, afterwards, he grudging that there was nothing given to himself, there is a second transaction, by which Gilbert and his wife of new ratify the former disposition, and Neilson gives him a liferent-bond of pension, for paying him yearly £20 sterling during his lifetime. Gilbert, being advised by some that he was overreached in this bargain, raises a reduction and improbation both of the disposition and ratification, on the grounds of law after-mentioned. And because such processes came not quickly to be terminated; therefore he raises a summons of aliment against the said John Neilson, for modifying a sum to him in the interim, till he could bring his reduction to a conclusion; and insists, on this ground, that, by the Act of Sederunt 1690, no aliments are to be granted to debtors, but when there is a probable view of a superplus estate, more than will pay all the debts; and Gilbert subsumes, in thir terms, that Neilson, a man very cautious and circumspect, would never have granted a bond for £20 sterling *per annum,* had he not seen a plain visible fund out of which he could pay it. Next, reductions being, by their astrictions to many forms of process, very tedious, he craves only an interim aliment, till his reasons of reduction be determined, which are both relevant and pregnant in themselves, *viz.* 1*mo,* The dispositions were in trust, he being his agent, writer, and sole doer. 2*do,* They were not for an onerous cause, as is evident from his granting the £20 sterling bond. 3*tio,* He stands interdicted, as being a simple facile man, imposed upon by every body.

ANSWERED,—There was never a more groundless process of aliment raised before the Lords than this, and he might as well crave it from any of his creditors as from Neilson the defender; for if this practice were once allowed, then a bankrupt heritor had no more to do, after he has sold his lands, but to raise a reduction, and crave an aliment in the meantime, though he knows he can never prevail. And the bond of aliment can never prove there is a superplus to come in after all the creditors are paid; for it bears expressly to be granted for love