1736. *December* 1.

JOHN HEPBURN of Humbie *against* JAMES HEPBURN, younger of Humbie, his Son.

No 41.
An informal decree-arbitral was found capable of homologation.

THE said James Hepburn, as heir to the entailed estate of Humbie, intented a process against his father for an aliment; during the dependence whereof, he offered, that in case the defender would make over to him, during their joint lives, the growing woods upon the estate, he would find security to pay him a certain sum yearly, and content himself with the superplus profit in lieu of any other demand. Humbie accepted the offer, and the Court interposed their authority to the agreement; however, some differences having arisen thereafter betwixt them, they submitted the same to an arbiter, who pronounced a decreet-arbitral pretty much on the same plan with the decreet of the Court of Session, and which, *inter alia*, contained the following clause: 'That, if two 'terms payment of the money should remain unpaid, then the son was to lose 'his right to the whole woods, *ipso facto*, without need of any declarator.' In virtue whereof, the son obtained possession; and having run two terms in arrear, Humbie elder applied by petition to the Lords, craving, that the wood already cut might be sequestrated; which being remitted to an Ordinary, the son *objected*, That it was altogether irregular to seek implement by way of summary petition, seeing every claimant in the Court must follow out some known method of process, such as charging on the decreet-arbitral, or raising a declarator; but surely a sequestration could not be awarded, it being contrary to the rules of law to strip any person of his right upon a bare allegation in a summary petition. 2*do*, The decreet-arbitral is void, one of the witnesses to the submission being only designed Esquire, which, by the law of Scotland, is no designation.

Answered for Humbie elder; That, as the irritancy was incurred, it was competent for him to apply for a sequestration, the subject being perishable by embezzlement, &c.; more especially, as the decreet-arbitral expressly provides, that the son shall lose his right in case of an irritancy without declarator: a clause that would be effectual in the case of a tack or contract, though perhaps a right of fee to lands, could not be irritated without a declarator; but, *ex super abundanti*, he has likewise executed one, which he herewith repeats. And, as to the objection touching the designation, it is believed the same can infer no nullity; but, to supersede the necessity of determining that point, it is sufficient to observe, that his son has homologated the decreet-arbitral by repeated acts; whereupon the Ordinary found, that if the irritancy is incurred, it is competent for Humbie elder to apply for a sequestration; and, before action to the objection to the submission, allowed a proof of the homologation; which, when it came to be advised, the Lords found relevant and proven.

No 41.

Against this interlocutor Humbie younger reclaimed, insisting again upon the objections moved before the Ordinary; and particularly, that, as the submission was void, in respect of the witness not being duly designed, so, unless the proof of the homologation imported some acts or deeds of his (which it did not) equal to, or of the same force with the submission, it could not avail in order to establish a compromit betwixt them; therefore the question behoved to be considered as upon the footing of the submission alone, which being void, could bear no faith in judgment; and, of course, no decreet-arbitral could follow thereon. Indeed, where the writing is executed according to form, although it may be liable to some exceptions, the question admits of a different consideration; seeing, in such a case, the party to whom the exception is competent may wave it by some act or deed which may be pleaded as an homologation thereof; but it is not so obvious, how a deed, absolutely void, and which can bear no evidence in judgment, is a proper subject of homologation.

Humbie elder *answered*; That he admitted there were no acts of homologation proved, sufficient by themselves to make a submission, unless the writing which is called informal, is taken along; but, after the different acts that have been proved, his son cannot now be heard to plead that the submission is informal; seeing it does plainly appear from the evidence, that he acquiesced in the designation; therefore he is barred from objecting. To illustrate which, it was *observed*, That there were some solemnities introduced by law for universal utility, so essential, that it was not in the power of parties to dispense with them; but, as to other formalities, which are only calculated as checks for the security of parties against frauds, particularly against forgery, such being solely provided for the use of private persons, the general law is not concerned with them, it is not *pars judicis* to take notice of them, seeing the private parties may insist upon, or wave them at pleasure; and of this sort are all objections to the designation of witnesses, such regulations being introduced by the act 1681, for their benefit allenarly.

THE LORDS adhered.

C. Home, No 38. *p.* 71.

1739. *January* 10.

BROWN of Cairntown, and COLVILL of Brunton *against* GARDNER of Northtarrie.

No 42.
Found that a party may accede by facts and deeds to a submission betwixt others, respecting land-

NORTHTARRIE having inclosed a piece of muir, which his two neighbours, Cairntown and Brunton, alleged they had been immemorially in use to pasture, he, in order to settle their differences, wrote a letter to both of them, signifying, that the properest way to adjust their marches, was to refer the affair to an arbiter, whom he named. To this Cairntown returned an answer, declaring, he was pleased with the proposal, and that he had likewise spoken to Colvill about