

1738. *July 13.* MACILHOSE *against* GARDENER.

A general submission was entered into between the above parties, (December 11, 1731,) to John Giles and Allan Glen, as arbiters, bearing that, whatever the said arbiters, in one voice, or, in case of variance, any of them, with John Graham, as oversman, should determine, betwixt and the 1st of January thereafter, the parties became bound to fulfil, under the penalty of L.100 Scots. At the close of the deed, and after the writer's name and witnesses were filled up, there was subjoined a power of prorogation; but the writer of this part of the deed is not designed.

On 30th December, 1731, the last day of the term of the submission, a prorogation was signed by the two arbiters for one month; but here again the writer was not designed.

On 29th January, 1732, Giles, one of the arbiters, and Graham, the oversman, pronounced a decree, finding the pursuer liable in L.38, with L.7 Sterling of penalty, in case of failure.

A reduction of this decree having been brought, Lord Newhall, Ordinary, "sustained this reason of reduction, and found the prorogation of the submission null, in respect it does not bear the name and designation of the writer thereof, and found the decree arbitral depending thereon, and being pronounced after the particular day limited by the submission, the said decree is therefore null."

The defender having pleaded that the pursuer had homologated the proceedings, the Lord Ordinary, before answer, allowed a proof of the alleged acts of homologation.

The following account is given by Lord Kilkerran of the subsequent proceedings, when this proof came to be advised by the Court.

"A proof coming this day to be advised which had been allowed, before answer, to either party in the reduction of a decret arbitral, the following points occurred. The objection made by Macilhose to the decret was, *imo*, That the prorogation of the submission was null, as wanting the writer's name: this objection the Lord Newhall, Ordinary, had sustained in 1732; and, before answer, allowed a conjunct probation upon alleged homologations, which came now to be advised, after hearing the procurators at the bar.

"ARNISTON observed, that he should have much doubted whether prorogations by arbiters did require writer's name and witnesses, and seemed to be of that opinion, had it been entire, as it was not, being fixed by the Ordinary's interlocutor; but had that been the question, I could not have been of his opinion. I cannot see why the usual solemnities of law should not be as much necessary to a prorogation, as they are to the signing of the decret; and, *de praxi*, the solemnities are always adhibited to prorogations. So I remember a case where a decret arbitral was reduced upon this very ground, that the prorogation was not signed before witnesses. It was a decret arbitral pronounced by Sir John Ferguson and Mr. Robert Alexander, between the Magistrates and Town Council of Ayr, and Maxwell, postmaster there.

"This said, he next proceeded to the homologations; which consisted of appearances and arguings before the arbiter, to which the pursuer's procurators had ob-

jected, that it did not appear the pursuer knew of the nullity, without which there could be no homologation; that however such appearances before arbiters may have been found to homologate a null submission, yet here the case was different: the submission is the party's own act, the regularity or irregularity of which he is supposed to know; whereas the prorogation is the act of the arbiter, which he is not supposed to know any thing about. As to this, *Arniston* was of opinion, his knowledge was presumed; that he must have known there was a prorogation, the term of the submission being elapsed, and therefore was presumed to know the tenor and contents of it, and nobody was of a different opinion; but upon this occasion he observed that, but for the Lords' decisions in former cases, he should have thought that a deed, null in point of solemnity, could not be homologated: however, as the Lords had now, in many cases, sustained such homologation, as in the case of the decret arbitral pronounced by Sir Ja. Ferguson and Mr. Ja. Graham, between Hamilton of Little Eornock, and Hamilton of Grange, and the decret arbitral pronounced by the Lord Milnton, between Hepburn elder and younger of Humby, he therefore gave up his own opinion upon that point; and as there was no disputing the acts of homologation, concluded that the defence was proven, and none having offered a contrary opinion, interlocutor was pronounced accordingly.

“This is settling a great point, that null deeds *ob defectum solemnitatis* may be homologated; and, I confess, I had the same scruple; but neither I, nor any other, spake. After the Court rose, Elchies and I talking upon what had fallen from *Arniston*, upon the relevancy of the objection to the prorogation as wanting the writer's name, and which we are agreed was a nostrum, but which there was no occasion to oppose, as being out of the present question; but he seemed to have no scruple upon the point of homologation, in so much that he thought paying of annual rent on a bond wanting writer's name, would homologate that bond.

“A separate objection was made to the decret arbitral, viz. that it was only signed by the oversman and one of the arbiters, and it did not appear that the arbiters had differed. As to this, when the decret arbitral was looked into, it bore a long narrative of the two arbiters differing. The submission also was of a singular style, viz. Whatever the said arbiters, or any one of the arbiters, with the oversman, should determine, they obliged themselves to stand thereto. However, without putting the matter upon any of these specialties, *Arniston*, who having begun to speak, went through the whole case, was of opinion, from one of the arbiters and oversman signing, it was presumed the arbiters had differed, unless the same should be redargued by contrary proof; and no one was of a different opinion, and interlocutor was so pronounced.”

*July 14, 1738.* The interlocutor was—“Find the homologation of the prorogation of the submission relevant and proven, and find it presumed, that there was a variance betwixt the arbiters, unless the contrary should be proven; and restrict the penalties in the decret arbitral to the penalty contained in the submission; and repel the nullities proponed on these grounds, and assoilzies from the reduction.”

A reclaiming petition against this interlocutor was refused without answers.