Against this interlocator 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. No 41.

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

No 42.
rights, without signing the submission.

it, who agreed to the same; in consequence whereof, the arbiter came to the ground, and asked the parties, if they had agreed to the submission? To which all the three *answered*, That they had bound themselves by mutual letters to stand to his determination, touching the marches and boundaries referred to him; whereupon the arbiter took the depositions of the witnesses adduced for each of them, and thereafter pronounced his decreet-arbitral, finding Cairntown and Brunton had a right to pasture on the muir, and ordaining Northtarrie to open a passage in his dyke, in order that they should have access thereto. After which, a decreet having been likewise obtained before the Sheriff against Northtarrie, to implement the decreet-arbitral, he suspended, insisting, amongst other grounds, on this objection, that the decreet-arbitral was void, as Colvill, one of the parties, had not signed the letter agreeing to submit; so that it could be considered, with regard to him, in no other view than a verbal submission.

THE LORDS sustained the objection against the decreet-arbitral in question, that it proceeded upon a verbal submission, as to the right of lands, in so far as concerned Thomas Colvill, one of the parties, and therefore is null.

But, upon a reclaiming petition, and answers, the LORDS found the decreet-arbitral was binding upon Thomas Colvill, in respect of his compearing and adducing witnesses before the arbiter.

C. Home, No 112. *p.* 181.

*** This case is reported by Kilkerran, *voce* LOCUS PÆNITENTIÆ.

1743. *February* 18.

DAVID LOGAN *against* GEORGE GLASGOW of Nethermains.

No 43.
The son of an heritor, had attended, for his father, a meeting of heritors, relative to a stent for repairing a manse, which had been imposed by decree of the presbytery. Found that the presence of the son, without objecting to the decree, barred suspension of it at the father's instance.

THE manse of Kilwinning needing repairs, the presbytery of Irvine imposed a stent on the heritors for repairing the same. Nethermains, one of the heritors, suspended the presbytery's decreet.

For the suspender, it was *observed*, That, at the transportation of the former minister in the 1718, he was burdened with the payment of L. 3 : 11s. Scots at his removal; and, upon payment thereof, the presbytery declared it sufficient; which they never would have done, if it had not been declared a sufficient manse at his entry, although the suspender can bring no direct proof thereof. In March 1721, the day before Mr Ferguson the present minister's ordination, sworn visitors were appointed by the presbytery to visit it, who reported, that it would take L. 87 Scots to repair it; upon this they applied to the patron for his assistance, who had three year's vacant stipend in his hands. Accordingly he laid out above L. 500 Scots on the repairs. These facts premised, it was *pleaded*, in point of law, That it was a natural burden on every possessor to uphold and repair the house he dwells in, where there is no paction to the contrary;