No. 145.

be mentioned, that of the filler up of the testing clause is not necessary, as has been frequently decided; November 1683, Watson against Scot, No. 81. p. 16860. 19th June 1722, Laird of Edmonstone against Lady Woolmet, (See APPENDIX;) 11th March 1753, Alexander Durie against David Doig, Sect. 6. *h. t.*

The question was reported to the Court on memorials, by the Lord Ordinary on the bills.

The Lords were unanimously of opinion, that the objection was ill founded; and the bill of suspension was, of course, refused.

Reporter, *Lord Henderland.* Act. *Honyman.* Alt. *J. W. Murray.*

C. *Fac. Coll. No.* 115. *p.* 217.

1804. *March* 8. STEWART *against* WATHERTONE.

No. 146.
A prorogation of a submission sustained, although not attested in terms of 1681.

A similar objection to the nomination of an oversman over-ruled.

A submission was (February 5, 1800) entered into, of some disputed claims, by Peter Watherstone, merchant in Earlston, on the one part, and Robert Stewart, portioner in Gattonside, on the other, to three arbiters, mutually chosen by the parties, with powers to them, in case of variance in opinion, to choose an oversman. Two of the three arbiters executed a prorogation in the following terms; "*Earlston, 3d April,* 1800. According to the powers committed to us by the within submission, we, the said William Hogg and James Kerr, two of the arbiters within named, hereby prorogate the same to 26th May next.

(Signed) WILLIAM HOGG.
JAMES KERR."

Having differed in opinion, they chose an oversman; but the minute of devolution was also informal.

The decree-arbitral was pronounced on 24th May, 1800.

A suspension was brought of a charge upon the decree, as well as a reduction of the decree itself, upon various grounds, one of which was, that the minute of prorogation was not probative, in terms of the act 1681, and that the minute of devolution was also informal.

The Lord Ordinary, (6th June, 1801) at first assoilzied from the reduction, and found the letters orderly proceeded; but afterwards, (December 8, 1801), "in respect of the importance of the points argued in this case, as involving the solidity of decrees-arbitral on the one hand, and the established rules of law respecting the authentication of writings, if these shall be held applicable, on the other, makes avisandum with the cause to the Court."

Stewart

Pleaded: It has never been doubted, that a submission must be attested by all the legal solemnities. Although arbiters thus become something like Judges, yet,

No. 146. the latter being appointed by law, and their proceedings being open to all, their decrees may be authenticated by their clerks. Arbiters, on the other hand, by the special consent of the parties alone, have the power of judging of the case at issue: Still they are merely private persons; and their judgment, which is only the opinion of private persons, cannot bear faith, unless it be duly vouched in a legal manner; Haliburton against Haliburton, 28th July, 1708, Sect. 8. *h. t.* Arbiters, as they have the power of deciding conferred on them, so they have the power of prorogation, and of choosing an oversman. But the question is, Have these powers been duly exercised, and is there legal evidence of their having been used? It is well established, that if a submission is not prorogated, it falls of course. The importance of a prorogation is, therefore, obvious, as it in fact renews the powers of the arbiters to decide. It is similar to a new submission. It is therefore a deed requiring a formal attestation, as it confers a power, which without it could not possibly have existed; Sutherland, No. 50. p. 652.

Answered: Between the deed of submission, which must be legally executed, and the orders which may, from time to time, be pronounced by the arbiters, there is a most important distinction. By the first, the character of arbiters is conferred, the right to determine finally betwixt the parties. When this power is fully vested, no reason can be assigned why the interlocutory orders, which are entirely extraneous both to the submission and decree, should be regularly tested. They are mere steps of procedure, which are resorted to only when occasion requires. If it were true, that a prorogation required legal attestation, every circumstance necessary to validate a decreet-arbitral should be established by a probative deed. But it is not necessary in that manner to ascertain that the arbiters have differed, to make way for the powers of the oversman; Gordon against Abernethy, November 30, 1716, No. 56. p. 652. Nor is it necessary that the minute of acceptance should be tested; yet by this the powers of the arbiters are assumed, and is as essential a proceeding as a prorogation, by which the powers are renewed.

The Court (January 20, 1804) repelled the objections; to which judgment they adhered (March 8, 1804), upon advising a reclaiming petition, with answers.

Lord Ordinary, *Hermand.* Act. *Scott.* Agent, *Wm. Riddell, W. S.*
Alt. *W. Erskine.* Agent, *R. Ayton, W. S.* Clerk, *Pringle.*

F. *Fac. Coll. No. 156. p. 351.*