1708. *July.* HALIBURTON of Pitcurr, *against* HALIBURTON of Millhall.

No. 222.
A decree-arbitral is not a privileged writ, and therefore null if wanting witnesses.

There being sundry differences of neighbourhood, feu-duties, and services, betwixt Haliburton of Pitcurr and Haliburton of Millhall; and having submitted them to some country gentlemen, there is a decreet-arbitral pronounced, whereby Pitcurr conceiving himself enormously lesied, and that the late article of the regulations 1695 gives no redress on iniquity and lesion; therefore he raises a reduction craving to be reponed on sundry intrinsic nullities, as *first*, the prorogation of the submission did not design the writer, contrary to the act of Parliament 1681, and so is null. Answered, It was a pure mistake, bearing to be wrote by John Gray, instead of saying "John Master of Gray;" *2do*, This was abundantly supplied and supported by posterior prorogations formal in all points. Replied, Condescending on the writer now *ex post facto* is not receivable since the foresaid act of Parliament; and as to the subsequent prorogations, if the first be null, and after the day was expired, they can never convalesce by a posterior deed; for that were to make a miraculous resurrection of a *non ens*. The *2d* nullity was, that the arbiters had decerned him to cause the chaplain of Kettines to enter him by a precept of *clare constat*, which is *factum alienum*, and imprestable by him. Answered, You Pitcurr are patron of that Chaplainry, and present him to the erected benefice; and being your own creature, can oblige him to enter the vassals at your pleasure. Replied, He being already *in officio* I cannot compel him, except you say I have him obliged by back-bond. The *3d* nullity was, that the subscription of the arbiters to the decreet was null, as wanting witnesses. Answered, That only takes place as to private writs, but not in judicial acts and sentences; for the interlocutors of the Lords and other Judges require no witnesses thereto, like to princes their *teste me ipso*. Replied, Decreets-arbitral had no such privilege, and on a less nullity the Lords reduced a decreet-arbitral betwixt Charles Row and Marjory Row, his sister, within these two years, No. 219. p. 16971. The Lords laid no weight on the first two nullities, but reduced this decreet-arbitral on the third, that it wanted witnesses.

Fountainhall, v. 2. p. 459.

1709.

DR. ALEXANDER PENNYCUICK of Romano, *against* ANNA CAMPBELL and CAPTAIN DAVID SCOT her Husband, and ANNA EDGAR and ROBERT SWINTON, Chirurgeon, her Husband.

No. 223.
A holograph testament sustained, though want-

In the action against Anna Campbell, and Anna Edgar, and their Husbands, at the instance of Dr. Pennycuick, for reducing a testament made by Captain Robert Pennycuick his brother, in favours of the defenders, upon this ground, that the

No. 223. ing date, place, writers name and witnesses, in respect there was no testament of a particular date in competition with it.

same was intrinsically null, for want of date and place, writer's name, and witnesses, and also the granter's designation;

Alleged for the defenders: They offered to prove that the testament is holograph, and neither date, nor place, nor writer's name, are essential to a holograph writ; it being more easy to forge three subscriptions, and adject a date or place, than to counterfeit exactly the body of a writ; for the act 5, Parl. 1681, concerns only writs requiring witnesses, and holograph is a surer test of the verity of a writ, than all the statutory solemnities in other writs put together. Yea, in a late case betwixt Dr. Pitcairn and Dr. Trotter, an address upon the back of a holograph letter to the writer's niece, wanting date and place, was sustained to carry a legacy in favours of the Lady Pitcairn; so an indenture for succession betwixt Brigadier and Colonel Cunninghames, bearing no place, was sustained to afford action and affect subjects in Scotland; and other writs equivalent to holograph, as bills of exchange, subsist without either date or place; *2do*, Holographum nec probat datum, nec locum, though expressed, therefore these cannot be thought necessary to a holograph writ, seeing nec lex, nec natura facit quidquam frustra; *3tio*, Proving holograph, doth more ascertain the writer, than if he had been designed in the writ itself, July 1, 1631, Inglis against M'Cubine, No. 207. p. 16962. and Elliot against Ellies, No. 114. p. 2649.; *4to*, It is in vain to dispute the designation of the granter of the writ, cum constat de persona, by his subscribing Captain Robert Pennycuick, and designing his effects and relations in the body of the short testament.

Replied for the pursuer: For preventing falsehood, date and place are necessary solemnities in all writs in general, by immemoral custom; Craig, p. 156*. and Stair, Lib. 4. Tit. 42. are of opinion, That date and place are de substantialibus of a writ. This is agreeable to the civil law, Nov. 47. Cap. 1. Nov. 107. Cap. 1. L. 14. C. De contrah. et Commit. Stip.; and Mornacius ad L. 30. De Pig. et Hypoth. finds it to be so, not only in his own country, but even among the old Grecians, Covarruvias Pract. Quest. Cap. 20. N. 5. Gudelinus de jure novissimo, Cap. 11. N. 23. *2do*, Holograph writs can plead no privilege, they deserving less faith than others. The civil law indeed allows them, but with much caution and circumspection, L. 20. C. De Fide Instrument; and upon further experience rejects them in all cases above £30 Sterling value, Nov. 73. § Oportet. Our law cuts them off by a shorter prescription than other writs, and doth not allow them to prove their date, nor the granter; and what proveth least, must be of less faith. Take away date and place from writs, there are effectual means left to detect forgery, whereof there have been notable artists in all ages; as Priscus Emesemus mentioned by Suidas, Baptista Illico, cited by Mascardus De Probationibus, Conclus. 330. N. 3. Conclus. 720, N. 21. Not to mention the repeated instances of counterfeiting Exchequer notes, malt-tickets, lottery-tickets, &c. *3tio*, Holograph testaments require more caution than other writs, being made use of after the decease of the supposed testator, who best could discover the imposture. The testaments of such as die abroad, are therefore liable to the more suspicion; upon which

* First Edition.

No. 223. account the Dutch law requires such to be written, and signed in a book, kept aboard of ships for that purpose. The practique betwixt the two Doctors doth not meet, for the letter no doubt had a date, and the indorsed direction was a part of the letter. The indenture betwixt Colonel and Brigadier Cunninghames had a date, and the form of the writ in some measure determined the place; besides, being a mutual indenture, each copy was a check upon the other. *4to*, Though holographs prove not their date, to the prejudice of any person hurt by them, the date supports the verity of them against reduction; for he that quarrels the date of a writ, impugns not to the writ, but the legal effect of it; whereas he that reduceth a writ for want of a date, impugns the verity of the writ.

Duplied for the defenders; If a writ be not null by law, some accidental difficulty in improving thereof, is no sufficient ground to reject it, otherwise no faith should be given to bills of exchange; but proving holograph excludes all pretence of forgery. Craig, page 180, says, In jure de loco quod necessario exprimendus sit non reperio. And of so great credit is holograph with us, that it is sufficient to prove the substantials of a writ to be holograph, though the body thereof be written with another hand, No. 112. p. 16885. A date is indeed necessary in writs that depend upon it, such as dispositions or assignations in competition with others, or conveying subjects that cannot be made over on death-bed, or writs, capable of prescription: But neither date nor place are essential to a holograph testament, which hath no dependence on either, if another testament of a particular date be not competing. As to the allegeance, that a testament requires more solemnity than other holograph writs, it is not agreeable to our constitution, where holograph testaments are not only authorised by custom, but more generally used than others, for secrecy sake.

The Lords repelled the reason of reduction, and sustained the testament, though wanting date, place, writer's name, and witnesses, the defenders proving it holograph; in respect there was not any more formal testament produced to compete therewith.

Forbes, p. 306.

Fountainhall reports this case:

Captain Robert Pennycuick, Captain of the Saint Andrew that went to our Darien colony in the year 1700, makes a testament, wherein he leaves all his moveable goods to Captain Stephen Pennycuick, his brother, and failing of him to Campbell and Edgar his nieces. Stephen being dead, and the substitutes confirming the testament before the Commissaries of Edinburgh, Dr. Alexander Pennycuick of Romano, his only brother now in life, raises a reduction of the testament, as depriving him of his *jus sanguinis* as nearest of kin, on these heads; 1*mo*, It labours under all the nullities that any writ is capable of, viz. it wants the writer's name; 2*do*, There are no witnesses; 3*tio*, It mentions no date, neither day, month, nor year; 4*to*, It does not bear the place where it was wrote or

signed. Answered, That *regulariter* these solemnities are required by our law and custom to writs, but the exception to this rule is, if the deed be holograph, all written by the party's own hand, especially in the case of a testament; and here it is positively offered to be proved, that the whole body of this paper is wrote by the Captain's own hand, though he has not said so in the testament itself, being a soldier, and unacquainted with these niceties of law. 2*do*, If there were another testament produced competing with this, and more formal, there might be some reason to reject it; but here none can quarrel it but the nearest of kin, who is plainly secluded by the will of the defunct; 3*tio*, The use of date, place and witnesses, is to afford means of improbation, in case of falsehood; but there can be no suspicion here, when it is offered to be proved, that it is all written with the testator's own hand, which excludes all pretence of forgery; and the comparing it with other writs of the defunct will clear this. Besides, that in proving the will at Doctors Commons, his landlord with whom he lodged when at London, and his wife, have made affidavit that they verily believe it was his hand-writing; and it must have the privilege of a military testament, which require fewer solemnities than others; and the laws of most nations have receded from the precise scrupulous niceties required by the Romans in their testaments, which conveyed their whole inheritance, whereas ours are restricted to moveables only; likeas, the Doctor had homologated the same by granting a discharge relative thereto. Replied, The rule is confessed that writs should bear writer, date, and place; and the exception of holograph is proved by no law; for all the privilege that such a writ enjoys with us, is, that it is good though wanting witnesses; but no decision ever sustained them without either date or place; and Craig, page 156. and 180. seems to make the date essential; and Bartholus reckons locum contractus inter substantialia; and this is no military testament, being neither in acie nec in procinctu; and comparatio literarum to prove holograph is a most fallacious lubric probation; and the homologation founded on is frivolous, for what he did was merely nomine tutorio, which will never infer, that he renounced his own right; and L. 40. D. De militari Test shows even such testaments must be legitimis probationibus confirmata; and the learned Voet in his commentary there, shows the States of Holland by their ordinance have appointed the testaments of all going to the Indies to be recorded in a book kept for that purpose, and attested by two witnesses. Anent holographs, see 1st July, 1631, Inglis, No. 207. p. 16962.; and 15th January, 1662, Grant, No. 176. p. 11497.; 11th July, 1662, Renton, No. 563. p. 12652.; and 18th January, 1678, Gray, No. 193. p. 16296.; and Stair, Lib. 4. Tit. 42. shows what is the nature of holograph writs, and that non probant datam against the heir, and prescribe in twenty years; but if they bear no date, then the prescription runs from the testator's death, till which time a testament is not valid. The Lords finding no other testament in competition with this, sustained it, notwithstanding the nullities objected, the same always being proved to be holograph. Some thought this of a dangerous consequence, as removing the great checks on falsehood. I find sundry sorts of imperfect testaments among

No. 223.

No. 223. the Romans, which in privileged cases had some relaxation as to their forms, where the defect was ratione solennitatis, non voluntatis, as to allow fewer witnesses, and the like; but none of them totally dispensed with writer, witnesses, time, and place.

Fountainhall, v. 2. p. 482.

1710. *December* 22.

GEORGE GORDON of Buckie *against* WILLIAM M'INTOSH of Borlam.

No. 224.
Payment of a bond found not to have been instructed by a missive letter, not holograph nor *in re mercatoria.*

George Gordon of Buckie as representing John Gordon of Buckie his father, having charged William M'Intosh of Borlam, for payment of 900 merks of principal, and annual-rents thereof, contained in a bond granted by him in the year 1677, to the said John Gordon; he suspended upon this reason, That the bond was paid; and offered to instruct payment by a missive letter subscribed by the charger's father, and directed to the suspender in November 1675. The Lords found, that the missive letter not being holograph, not in re mercatoria, instructed not payment of the bond charged on, and therefore decerned.

Forbes, p. 466.

*** Fountainhall reports this case:

1711. *January* 11.—Gordon of Buckie pursues William Mackintosh of Borlam for the sum of 900 merks, contained in bond granted by Borlam to Buckie's father in 1675, which he had confirmed. Alleged, Paid and discharged by a letter under Buckie's hand shortly after it, containing an apology and excuse why he had sent back his principal bond, because it was lying in Glastyrum's hand, where it should be taken up and sent him. Answered, That a bond could not be taken away but *scripto vel juramento;* and the writ must be as solemn and formal as the bond; whereas here there was nothing produced but a missive letter, acknowledged not to be holograph, and so can never be probative of the payment, there being no exceptions allowed from this excellent rule by our law, save only three, viz. bills of exchange, letters among merchants relating to their trade, and masters' discharges to tenants, which we allow, though neither holograph nor before witnesses. The Lords found the letter produced, not being holograph, could not instruct payment of this bond, not being *in re mercatoria*, nor betwixt strangers, but a bond of borrowed money betwixt two country gentlemen. Then Borlam alleged, that though the letter *per se* might not be relevant to take away the bond, seeing it was not holograph, yet the same might be fortified, adminiculate and astructed by several pregnant qualifications he condescended on; such as, that he offered to prove there was delivery of bags of money to Buckie, about the time he wrote that letter containing the discharge; 2*do*, That it was in Glastyrum's