1665. *February* 3. FALCONER *against* EARL of KINGHORN.

No. 107.
A writ challenged because the witnesses were not designed, was found null, unless the witnesses were alive, or there were adminicles to instruct the debt.

Falconer pursues the Earl of Kinghorn, for payment of a bond, wherein his father was cautioner. It was alleged the bond was null, as to Kinghorn; because it mentioned in the first place, three witnesses to another party's subscription, *per expressum*, mentioning two, without their designation, or expressing whether they were witnesses to either or both the two cautioners; and therefore the bond was null, by the act of Parliament. It was answered, that according to the ordinary custom, they offered to design. It was replied, that the designation behoved to be of living witnesses; for seeing in it self the bond is null, by the act of Parliament, and that the Lords by custom, have supplied such bonds, *per equivalentiam*, the intent of the act of Parliament is only, that by the designation, the witnesses might be known, and thereby a means of improbation afforded, if the writ were quarrelled; but after the witnesses are dead, the designation of them cannot attain that effect.

The Lords ordained the pursuer to design living witnesses, or otherwise, condescend upon other adminicles, to astruct the verity of the subscriptions of the bond.

Stair, *v.* 1. *p.* 263.

*** Dirleton reports this case:

1666. *January* 4.—The Laird of Drum as principal, and the Earl of Kinghorn and others as cautioners, being debtors to Robert Falconer by a bond granted *in anno* 1640, and the said Robert having pursed this Earl of Kinghorn (as representing his father) upon the said bond; it was alleged the bond was null as to the Earl of Kinghorn, in respect there were no witness designed to his subscription. And it being replied, that two of the name of Lyon were subscribing witnesses, and though they were not designed witnesses to Kinghorn's subscription, but subscribed witnesses *indefinité*; and albeit they were not otherwise designed, as they ought to be conform to the act of Parliament by their dwelling or otherwise; yet they were truly witnesses, and the pursuer may and doth now design them; and this defender had no prejudice, one of the witnesses being yet in life; so that if he thought fit to improve, the means and direct manner of improbation was yet competent.

The Lords allowed the pursuer to design, which they would not have done, if both the witnesses had been deceased.

Dirleton, *No.* 12. *p.* 6.