

No. 303. null upon this act, as being subscribed only by one witness, was found suppliable by referring the verity of the subscription to the party's oath.

Fountainhall.

* * This case is No. 11. p. 10039. *voce* PENALTY.

1699. *November 23.* GRIERSON and MACKIE *against* SCOTS & HAIR.

No. 304.

In the suspension of a decret-arbitral by Grierson and Mackie against Scots and Hair, the point was, that the decret was null, being in a matter of importance, and the submission only subscribed by one notary contrary to the 80th act of Parliament in 1579. Answered, You have homologated the decret by accepting payment of 1200 merks conform to their discharge of the same. Replied, The discharge *laborat eodem vitio*, and is only signed by one notary. Duplied, The discharge was only null in so far as it exceeded £100 Scots, but was valid being restricted thereto; which being granted, then the acceptance of £100 in part payment of a sum decerned by a decret-arbitral is as good a homologation as payment and discharging of the whole. The Lords found it a sufficient homologation.

Fountainhall, v. 2. p. 69.

1704. *November 21.* KIRKPATRICK *against* FERGUSON.

No. 305.

By act 5, Parl. 1681, it is enacted, " That all writs subscribed by any party, wherein the writer and witnesses are not designed, shall be null, and not suppliable by condescending upon the writer, or the designation of the writer and witnesses." Upon this clause a bond was found null, which wanted the name of the writer, though a most pregnant proof was offered, that a person condescended on wrote the bond, and who was also produced in Court to depone upon the fact.

Fountainhall.

This case is No. 151. p. 12061. *voce* PROCESS.

1707. *July 15.* WALTER ABERCROMBY *against* INNES of Dunkintie.

No. 306.

An error of the christened name of a subscribing

Walter Abercromby, as assignee by his father to a bond due by Innes of Coaldwats, pursues Innes of Dunkintie, as representing his debtor, for payment. The defender alleged that he was discharged by the pursuer's father; and albeit that

discharge was posterior to the pursuer's pretended assignation, yet the assignation was null, as having but one subscribing witness, being granted since the 5th act, Parl. 1681.

It was answered : The assignation is opposed, having two subscribing witnesses duly designed in the writ, conform to the said act ; only there is a mistake in the christened name of one of the witnesses as inserted in the body of the writ, viz. it bears " John " instead of " Robert Farquharson in Loch ; " and it is duly subscribed by " Robert Farquharson, " and another witness designed, which is only *error nominis*, the designation otherwise sufficiently demonstrating the person of the witness, there being no other either " John " or " Robert Farquharsons " in that place.

It was answered : Nowise acknowledging that the subscribing witness was the only person of that name in Loch, the nullity is clearly founded in the words of the act of Parliament, which bears, That only subscribing witnesses should be probative, and not witnesses inserted and not subscribing ; and further, that all writs, wherein the writer and witnesses are not designed, shall be null, and not suppliable by condescending upon the designations of writer or witnesses. But so it is, " Robert " is not inserted, nor is " John " subscribing ; and the offer to condescend now, that " Robert " who subscribes, is the same person that by mistake is designed " John " in the body of the writ, is to supply an omission which the law declares not to be suppliable ; and whatever ground may be offered to persuade the Lords that there was nothing but a mistake in the case, yet it is more safe for the lieges, and just for the Lords, to walk by the rule of the express words of the act of Parliament, than to break in upon it, and thereby introduce the supplying or rectifying of other or greater mistakes.

" The Lords found the assignation null."

Dalrymple, No. 82. p. 104.

Fountainhall reports this case :

Walter Abercromby, as assignee by his father, pursues Dunkintie on his predecessor's bond, as representing them ; and he founding on a discharge, it was replied, that the granter, being a very weak person, stood interdicted before subscribing thereof, which necessitated Dunkintie to recur to another allegiance, viz. That Abercromby's assignation, was null, because though it bore two witnesses in the body, and likewise two subscribing, yet they did not agree, in so far as the body of the assignation bears one John Farquharson in Loch to be one of the two subscribing witnesses, yet that John Farquharson does not subscribe, but one Robert Farquharson ; so that the witness designed is not subscribing, and the witness subscribing is not designed, and so is doubly null by the 5th act of Parl. 1681. Answered, This is merely *error scriptoris nomine*, and it were hard to annul his right in such an obvious and palpable mistake ; for it is known there were two men in Loch called Farquharsons, the one's Christian name was Robert, and the

No. 306.
witness,
found to have
the effect of
annulling the
deed, as strictly
speaking
the witness
was not at
all mentioned
in the document.

No. 306. other's John ; and the writer by mistake inserted John for Robert in the body of the writ. Replied, *Non constat* whether it was done by a mistake, or not ; and though it were, it cannot be now rectified, because the foresaid act of Parliament expressly declares such defects unsuppliable and null without remedy ; whereas, before that act they might condescend and prove. Next, if this were allowed, a great door might be opened to all fraud and deceit, by inserting men with a wrong designation, and causing another subscribe ; and *esto* it were a neglect and oversight, *culpa cuique sua sibi non alteri nocere debet*, and he cannot make it subsist, without proving there were two Farquharsons in that town ; the one John, and the other Robert at that time, which is a manifest supplying, and if once allowed, overthrows the design of that good act, and it is better he suffered than to introduce so dangerous a preparative ; and he needs not lose the sum ; for though the assignation fall, yet he can either confirm the same in his father's testament, or take his escheat, if denounced. Some proposed *quod juris*, if it had borne ——— Farquharson ? It was thought the subscription would have applied better than that where it varied in the Christian name ; and it was clear, that John did not subscribe, and Robert who did subscribe is not designed in the body of the writ. The Lords, *nemine contradicente*, found the assignation null and unsuppliable ; for, though it was hard, yet they resolved to make it a general rule to adhere to the precise tenor of the law.

Fountainhall, v. 2. p. 381.

* * Forbes also reports this case :

In the reduction and improbation at the instance of Walter Abercromby writer in Edinburgh, as assignee constituted by Alexander Abercromby his father, against Innes of Dunkintie ;

Alleged for the defender, That the assignation which is the pursuer's title is intrinsically null, in so far as, albeit it be of a date since the act of Parliament 1681, one of the two witnesses inserted, viz. John Farquharson in Loch, doth not subscribe.

Replied for the pursuer, There are two witnesses subscribing, whereof Robert Farquharson is one, who is wrong inserted in the body of the writ under the name of John : For at that time there was no such man as John Farquharson in Loch, but Robert Farquharson did live there ; and the error by inserting John for Robert, ought not to prejudice the pursuer, *ubi constat de persona*. And such a nullity in executions of summonses is never sustained ; albeit the same act 1681 declares executions, as well as bonds and assignations, to be null where the witnesses are not designed.

Duplied for the defender : It is impossible that the nullity can be thus supplied ; for if Robert be taken for the witness, then he is not specially inserted and designed in the body of the writ, as the act 1681 expressly requires under the pain of nullity. And how can it be alleged with any countenance that Robert is John ? Or since condescending is expressly excluded by the foresaid act, How

can the condescence upon one man for another be admitted? Again, though in the interpretation of writs formal as to the solemnity, an error in one part may be explained or corrected by another; if the substantial solemnity of a writ were allowed to be corrected by a condescence, and probation of extrinsic facts not contained therein, our security by the act 1681 is at an end, at least altogether precarious. The designations of persons in executions or libels are in a different case; for these may be drawn over again, if wrong at first; but a *jus quæsitum* through the nullity of a voluntary conveyance cannot be taken away from parties interested, by a subsequent condescence. And a messenger may more easily mistake the names of witnesses, than the granter of a bond or assignation will mistake the persons subscribing to his deed.

The Lords unanimously sustained the nullity, and found it not suppliable, now after the act of Parliament 1681; and declared they would decide so in all time coming.

Forbes, p. 179.

1708. February 20.

MARGARET BOSWAL and WILLIAM HAMILTON of Grange Breich her Husband,
against CORNET GEORGE BOSWAL.

No. 307.

In the action at the instance of Margaret Boswal and her husband, against Cornet Boswal her father, the Lords sustained a marginal note upon the pursuer's contract of marriage in favours of the Cornet; albeit no witnesses were subscribing thereto, and the contract did not bear that the witnesses to it, were also witnesses to the marginal note; in respect the pursuer's double of the same contract produced by themselves bore the very same marginal note, and they did not disown the verity of their subscription thereof.

Forbes, p. 248.

1709. June 7. HAY of ARNBATH against The DUKE of GORDON.

Sir Patrick Ogilvy of Boyne holding some lands as vassal to the Duke of Gordon, and having sold them to Arnbath, he agrees with the Duke, and grants bond for 1600 merks, as a year's rent of these lands for an entry, and obtains the Duke's charter to himself, and a bond from him, whereby the Duke obliges himself, that how soon Arnbath shall present a charter to him of the lands sold by Boyne to Arnbath, containing the old *reddendo*, he shall grant a charter of confirmation thereof in favours of Arnbath. The Duke being pursued by Arnbath upon his bond, to confirm his right; it was alleged for the Duke, his bond was null, because it wanted the date, place, and designation of the witnesses, which are *inter essentialia*

No. 308.

An informal writ supported as being relative to other writs, which possessed the forms requisite at the time they were executed.