1716. *July* 26.

JANET DRONNAN and her Husband, *against* QUINTIN MONTGOMERY.

No. 87.
It is no nullity that the writer is not designed in the body of the writ.

Janet Dronnan's first husband having nominated his said wife executrix and universal legatrix, failing his children; Quintin Montgomery quarrels the testament, and insists upon this nullity, that the writer of it is not designed in the body of the writ, as is provided by the act of Parl. 1593, and again by the 5th act Parl. 1681.

It was alleged for the defender: That the old act of Parl. 1593, having gone in desuetude in several particulars, it was revived in part by the act 1681, which is now the standard, establishing the form of writs as to the inserting of writer's name, and witnesses; for, before the year 1681, writs. to which witnesses subscribing were adhibited, were sustained by the Lords, albeit neither writer nor witnesses were designed in the body, if the user could condescend upon their names and designations, whereof a very slender probation was admitted for supporting the writ; but the act 1681 provides, that in time coming, writs, wherein the writer and witnesses are not designed, shall be null, and that in all cases the witnesses shall be designed in the body of the writ; but does not provide, that the writer's name shall be in the body of the writ; and in this case, all is observed that is required by that law; for the witnesses are designed in the body of the writ, and the writer, who is also one of the witnesses, adjects to his subscription, [*Witness and writer hereof.*] So that, without any condescendence upon the writer *ex post facto*, when the writ is quarrelled, the writ itself does sufficiently point out and design the writer; which is done with as good effect and certainty, by adjecting these words, *and writer hereof*, to his subscription, as if it were in the body of the writ.

It was answered: The pursuer oppones the old act of Parliament, which is a standing law; and though custom had prevailed so far as to allow a condescendence of writer and witnesses not designed, yet that being found an abuse, was corrected by the act of Parliament 1681, which did fully redintegrate the ancient law, and left no place for equipollencies: Besides, it would be very unsafe to allow adjections to witnesses subscriptions to supply that defect; because such adjections might be *ex post facto*, and are so presumed to be.

It was replied: That the old law was undoubtedly in desuetude as to the present question before the act 1681; and that act does carefully provide for inserting the witnesses in the body of the writ, and does not mention the writer in that clause; because indeed the material security to prevent frauds and forgery of writs, is by the witnesses, because the writer is oft-times not present, and writs are framed conform to common stile, and sent to remote places, and a matter altogether indifferent who be the writer; 2*do*, The old act provides, that the writer shall be inserted before the witnesses, otherwise to be null; yet, since 1681, writs have been sustained where the designation of the writer has been after the witnesses, in the very last words of the paper, after the designation of the writer as a witness, adjecting these words, *writer hereof.* And it would be of dangerous consequence

No. 87. to creditors to annul all bonds of that stile; and the adjection of these words, *writer hereof*, to the subscription, is fully equivalent to the adjection of the same words at the end of the bond; *3tio*, The writer is even designed in the body as a witness, and then as writer he is designed at his subscription; which answers the very letter of the law, as the pursuers would interprete it. And it appears, by inspection, that the adjection to the subscription has been at the time of subscribing.

"The Lords repelled the nullity, and sustained the testament."

Dalrymple, No. 158. p. 221.

1761. *June* 16.

ALEXANDER DUKE of GORDON and his CURATORS, *against* JAMES GORDON of Cocklarachie.

No. 88.
Charter, wanting the name and designation of the writer, null.

In the year 1617, George Marquis of Huntly disponed his three quarters of the davoch lands of Cocklarachie to George Gordon, redeemable for the sum of 6,000 merks, and to be holden of the Marquis for payment of £26 Scots yearly, during not redemption.

In the year 1642, George Gordon, the grandson of the original wadsetter, having advanced the further sum of 3,000 merks to the Marquis, the parties entered into a new contract referring to the wadset 1617, and declaring this sum of 3,000 merks to be an eik to the original wadset sum, so as that it should not be lawful to redeem the lands without payment or consignation of the whole sum of 9,000 merks.

In the year 1645, George Gordon entered into a second marriage with Elizabeth Fraser; and, by his contract of marriage, he became bound to infeft his wife in life-rent, and the eldest son to be procreated between them, heritably and irredeemably, in the said three quarters of the davoch lands of Cocklarachie; as also in the other fourth quarter of said lands, which George Gordon held of the Crown. This contract contained a precept, but no procuratory; and it did not appear that any infeftment had followed upon it.

In the year 1668, George then Marquis of Huntly, with consent of his curators, granted a feu-charter to John Gordon then of Cocklarachie, whereby, upon a recital of the foresaid marriage-contract 1645, and of the said John Gordon's being the eldest son of the said marriage, and for certain other good causes and considerations, he not only ratified and confirmed the foresaid marriage-contract, with the obligation therein contained in favour of the said John Gordon, the eldest son and heir-male of the said marriage, but of new gave, granted, disponed, and confirmed to the said John Gordon, his heirs, &c. heritably and irredeemably, not only the three-fourths of the lands of Cocklarachie, but also the other fourth, to be holden of him the said Marquis, and his heirs, &c. in feu and heritage for ever,