"*N. B.* I have often observed the President favour the opinion, that, in general, where a nullity is objected to a writ, the writ might be supported by the party's oath; but in that I always differed from him, and I dare say it was upon that general ground that he gave his casting vote in this case; for that distinction of its being a notar's subscription was not so fully opened by ARNISTON, who moved it, as it is here noted, as to have been adverted to: it was a small case, and the reasoning very short."

1739. *July* 20. ANNABEL EWING, relict of PATRICK GLEN, *against* JOHN SEMPLE.

THE defender's father became bound, as cautioner, along with William Ferrier, as principal debtor, in a bond, dated 16th May, 1732, to the said Patrick Glen, the husband of the pursuer. After the death of the defender's father, and of Patrick Glen, the pursuer, as having right to the bond, by a general disposition from her husband, raised an action upon the passive titles, against the defender, as representing his father, for payment of the sum in the bond.

In defence, it was PLEADED, 1*mo*, That Glen, the creditor in the bond, having been a bastard, the pursuer had no sufficient title to insist for payment, she having no particular right to the bond, but only a general disposition, which could avail no more than a testament would have done. 2*do*, That the bond was null, in respect that the writer was not designed before inserting of the witnesses; and that, though it were not necessary for the writer of a deed to be designed before inserting of the witnesses, it is at least necessary that he should be someway or other certainly described, which he is not in this case, the bond only bearing in the end of it to be subscribed before these witnesses, John Buchanan, maltman in Dumbarton, *and Adam Colquhoun, servitor to James Duncanson, writer hereof*, which leaves it uncertain whether Adam Colquhoun or James Duncanson was the writer.

3*tio*, That the defender was free of the cautionary obligation, under the Act 1695, there having been no diligence done on the bond within seven years from the date.

It was ANSWERED for the pursuer, that her title not being revocable, was not of a testamentary nature, but was a deed *inter vivos*: that the Act of Parliament requiring the designing of the writer, before inserting of the witnesses, was in desuetude; and that it was plain here that Colquhoun, one of the witnesses, was the writer; and, *lastly*, that the septennial prescription had been sufficiently interrupted by the present summons, raised within the seven years.

The Lord Ordinary repelled the defences.

A reclaiming petition was presented by the defender, containing an argument on each of the above points. The argument upon the two first defences may be seen in C. Home's report of the case, (*C. Home*, p. 213, *Mor.* p. 1352.) to which reference is therefore made. Upon the third defence of prescription, it was maintained, that nothing except what comes under the name of *legal diligence*, can in-

terrupt the septennial prescription; and that a mere summons, such as the present, could not come under that denomination.

The Court *adhered.* Lord KILKERRAN has the following note of what passed on the Bench upon each of the three defences.

"*July* 20, 1739. On moving this bill, it was observed by the President, upon the first point, touching the disposition by a bastard, if it was alterable by the granter, and so ineffectual without a confirmation, whether it was any better than a testament. But the Ordinary having informed the Court that this disposition was not alterable, but a mutual disposition between man and wife to the longest liver, the petition as to this point was refused.

"I do not know but I should have been of the same opinion, though it had been a common general disposition, to take effect at death; because still the confirmation necessary in such case is *qua* creditor.

"The President also demurred on the next point in this bill, that the writing was not in terms of the act of parliament, before the inserting the witnesses; but on this point the whole other Lords differed, because of the universal practice; so that that part of the statute was in desuetude, or rather had never been in observance.

"As to the third point in this bill, viz. the designation of the writer, which, for certain, is ambiguous, whether Adam Colquhoun or James Duncanson be said to be the writer, here also the PRESIDENT, and some others, doubted if the designation of the writer was so uncertain, that it needed a condescendence and proof, which of the two was writer, if the writ, as it stands, came up to the terms of the Act of Parliament. But, in answer to this, it was observed, that whether the one or the other be supposed to be the writer, the terms of the Act were complied with; for all that was intended by the Act was, that in case of improbation, the writer might be known, which intention is answered, whether one or the other in this case be the writer; take the matter as it was before the Act, it was sufficient to support the deed, by condescending that one or other of two or more was the writer; therefore, if one or more be designed as writer, it might equally answer the design of the law. And whereas it was said, that whatever was the design of the law statuting upon a solemnity, the precise terms of the law must be observed, which seemed to exclude all condescendence to ascertain the writer, it was ANSWERED, that down to this hour, a condescendence might be admitted necessary in some cases, *e. g.* should the writer be said to be A B, writer in Edinburgh, and that there were two or more of that name. Upon a vote, the petition was also refused, as to this article.

"The last article of this petition was also refused;—the PRESIDENT *solus* doubting, whether a process on the passive titles, though raised within the seven years of the date of the bond, was such a diligence as preserved what fell due within the seven years; which appeared an odd doubt, when that process on the passive titles was not fallen, but the very process now insisted in."