would undertake to supply the same, and what evidence may be offered to support any condescendence that may be made." No. 322.

Another topic was here slightly touched for the Duke, that the docquet being subscribed by a number of persons, the Marquis's curators, as well as by Littlegil, witnesses were unnecessary; for which the words of Sir George M'Kenzie, in his Observations on the act 1579, were referred to, "That where there is a tripartite contract subscribed by the parties, they are in place of witnesses to one another." But this was treated by the Court as untenable in any case; for no writ bears all parties to be at the same time present at subscribing. But be that as it will, there was no tripartite contract in this case.

Vide infra Nov. 11. 1746, and Jan. 6. 1747 *inter eosdem.*

Kilkerran, No. 9. *p.* 608.

November 1. 1746, and *January* 6. 1747.

The DUKE of DOUGLAS *against* the other Creditors of LITTLEGIL.

No. 323.
If the omission to insert the writer and witnesses, in a deed before the 1681, is suppliable?

The question between the Duke of Douglas and the creditors of Littlegill, How far the nullity of a writ, of date before the 1681, in not having the names of the writer and witnesses inserted in the writ, is suppliable? is at large stated *supra* Nov. 23. 1742. And now and no sooner a proof then allowed before answer to the Duke, upon a condescendence given in by him of circumstances for supporting the deed, coming to be advised, the Lords at first, upon Nov. 11. 1746, "Found that the want of the names of the writer and witnesses was not suppliable;" but afterwards, on advising bill and answers, on Jan. 6. 1747, found, "That the same was suppliable, and, by the proof now brought, supplied."

Kilkerran, No. 12. *p.* 610.

*** D. Falconer reports this case:

In the year 1661, the Marquis of Douglas, with consent of his curators, granted a factory over part of his estate to Baillie of Litlegil, who, by a counter-obligation, became bound to pay up to him the grassums and entry monies due by the tenants and vassals, amounting to a determined sum, and that at Martinmas 1661 and 1662, and to account for a determined rental during the terms of the factory, which was to commence after Martinmas 1660; and at the same time the Marquis granted a factory to James Inglis in Waterside, over the barony of Douglas, part of the subject of Littlegil's factory, for the crop 1660, who was obliged for diligence, and to account for his intromissions.

An account was fitted, 18th February 1663, between the Marquis and his curators, and Littlegil, who therein charges himself with Inglis's intromissions, and obliges him to be accountable, for the balance, by a docquet, the subscription

No. 323. whereof is attested by witnesses, but who are not inserted and designed in the writ, as neither does it contain the writer's name and designation.

Of the same date there is another account docqueted in the same manner, intituled, Rests to be charged on Littlegil, consisting of some articles of the rents and grassums which he had accounted for, and in the last article the balance of Inglis's account, all which he became bound to do diligence for, and to account for his intromission.

On these grounds the Marquis obtained a decreet 1679, against Littlegil's son and apparent heir, and 1681, adjudged the estate.

In a competition amongst the creditors of Littlegil, objections were made to the Marquis's grounds of debts; and it was pleaded for the now Duke ofDouglas, That in accounts between Heritor and Factor, the solemnities of attestation were not necessary to be observed; and supposing they were, yet the account being before the statute 1681, the designations of the witnesses and writer's name might be supplied; and he offered a condescendence of facts, from which, together with other subscriptions produced, it would appear that the persons named by him were the subscribing witnesses and writer. It was further pleaded, That Littlegil's obligation relative to the factory, loaded him with a liquid charge above the sum in the decreet, which he could no way lessen but by the account, or undertaking to prove articles of discharge; and so it being necessary to use the docquet, he nor his heir having approbated, could not now reprobate it.

The Lords were of opinion that the Marquis, when he pursued the decreet, having a discharge against Littlegill for the subject of his own factory, his producing the accompt was a restriction of his claim; and so he could take decreet for no more on that account; but this was no approbation by the defender; and therefore there being nothing to make him liable for Inglis' rests, but the docquet itself, the question remained with regard to them of the validity of the attestation: neither was this to be considered as a deed between heritor and factor, as these rests fell not under his factory; so that there was no necessity of considering that answer to the objection.

Pleaded for the Duke, that originally neither the subscription of the party nor witnesses, but only the appending the granter's seal, was necessary to give validity to writings, Reg. Maj. L. 3. C. 8. § 3. & 4. Maikenzie's observations upon act 117. Parl. 7. Ja. V. Custom introduced the method of subscribing, beside appending the seal; but there was no law requiring the presence of witnesses. The act first statuted, that faith should not be given to any deed, without the subscription of the party and witnesses; or if the party could not write, a notary. This act first introduced the necessity of witnesses, but did not determine in what manner they were to be adhibited. Sometimes in practice deeds were signed before witnesses, neither inserted nor subscribing, but who, when called upon, attested the verity of the subscription; and in this case the validity of the deed behoved to depend on the witnesses living till it came to be made use of. Sometimes they were inserted, but did not subscribe, and sometimes were not otherwise inserted than by their subscription.

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By act 80. Parl. 6. Ja. VI. it was statuted "That where parties could notwrite, deeds of importance should be subscribed by two notaries before four witnesses, who should be designed; but this relates only the deeds of importance subscribed by notaries; and for want of the insertion of witnesses, a reversion subscribed by notaries found null, 1623 July 8th Cavers against Henderson, No. 94. p. 16877. and yet a bond signed by the party, and to which there were two subscribing witnesses, but who were not inserted, was sustained, 1634, July 3, Home against Home No. 104. p 16881. for this reason that there were two witnesses subscribers of the bond, which the Lords thought as good as if their names had been inserted; and Durie, who observs these two cases, takes notice of the difference, and in that manner reconciles them. To this statute has been owing the practice of inserting and designing witnesses; but as no law required it, the neglect could be no nullity, and the practice was far from being uniform.

The next statute is the 175th Parl. 13. James VI. which requires the writer's name and designation to be inserted before inserting the witnesses; and by this law it is the writer ought regularly to be named and designed in the deed; but yet in fact, till the statute 1681, this was thought suppliable by a condescendence; and the practice obtained the sanction of the Legislature *quoad præterita*; but it was then statuted, That deeds without the writer and witnesses, their names and designations, should be null, and not suppliable. Now, if the want of inserting the writer, which was required expressly by the act James V. could be supplied, much more might that of the witnesses, which no statute expressly required.

Thus far it has been argued, on the supposition of the witnesses' names not being inserted; but the contrary appears; their names are at the paper; and it can make no difference whether they are in their own hand-writing, or that of the writer; and it cannot be denied but that their designations may be supplied.

Pleaded for the creditors: That the adhibiting witnesses to the execution of deeds, always obtained amongst us, even when the appending the seal was the only completion of them; in evidence of which, all the old charters and writs extant were appealed to, which also further appeared by the Reg. Maj. § 6. of the chapter cited by the Duke, and by L. 2. C. 38. § 1 and 6., and Craig, L. 2. D. 2. § 17. The insertion therefore of their names needed not to be commanded by any statute, as it was a practice older than any of them. But it was supposed, and hence the statute 117. James V. required the subscription of the party and witness, which was never doubted to mean two witnesses, being the number always adhibited; and the act 175, James VI. required the inserting the writer's name and designation, before inserting the witnesses, and that 1681 statuted, that only subscribing witnesses should be probative, and not the witnesses inserted, which was all that was requisite by the former law.

As writings were always null, which did not bear to be executed before witnesses; so this essential part was never allowed to be supplied by a condescendence, though the designations introduced by after statutes were, Mackenzie Obs.

No. 323. on act 80. Parl. 6. James VI. Stair, Title, PROBATION BY WRIT, § 4. as further appeared from the act 1681, statuting, "That from thence forward it should not be lawful to supply by a condescendence the name and designation of the writer, or the designations of the witnesses."

There was no room for distinguishing betwixt the cases of the witnesses subscribing or not; for as before 1681, their subscription was not necessary, the law ought to be held the same in both cases. When the witnesses are named before the subscription of the party, it stands fixed, the validity of the deed is to be determined by their testimony; and there can be no fishing out of witnesses *ex post facto*; so that there may be little danger in allowing their designations to be condescended on, but people may be got to add their subscriptions at a distance of time, without seeing the party subscribe.

Decisions cited for the Duke, with the answers made to them.

3d July 1634, Home against Home, No. 104. p. 16881. noticed before; 22d January 1635, Bell against Mow, No. 105. p. 16882. where in a contract of wadset, there were neither witnesses inserted nor subscribing.

Answered, That in both these cases, the parties were alive, and did not deny the verity of the subscription, and in the latter, the Lady, granter of the wadset, had judicially ratified it, and yet the deed was only sustained, in case the witnesses should declare that they were present, and saw the subscription, which makes against the Duke, since the witnesses in this case are dead, and cannot be examined.

21st July 1711, Ogilvie against Baillie of Lamington, No. 123. p. 16896.

Answered only to this, That it was indistinctly marked.

23d July 1676, Innes against Gordon, No. 143. p. 12056. and 2d February 1710, Sharp of Hoddam against Maxwell of Cowhill, No. 310. p. 17027. in which cases the writer's name was allowed to be supplied.

Answered, by distinguishing betwixt the writer's name and the witnesses, the former having been no nullity till 1579, as the latter always was.

Decisions cited for the creditors, with the answers made to them.

8th July 1623, Sheriff of Cavers against Henderson, No. 94. p. 16877.

Answered, this concerned a deed signed by notaries, and besides, the Lords having found the nullity, the question was not, whether it could be supplied by a condescendence; but the party having owned the subscription, the deed was thereupon sustained.

17th June 1625, Kinaldy against Kaldy, No. 96. p. 16878.

Answered, In this case there were neither witnesses inserted nor subscribing, and the Lords refused to allow a proof of executing the deed by witnesses.

3d February 1665, Falconer against the Earl of Kinghorn, No. 107. p. 16883. where the Lords allowed the pursuer to design and prove by living witnesses; and Dirleton the observer says, they would not have allowed a proof, if the witnesses had been dead.

Answered, The decision makes against the creditors, since it contains this al-

ternative, or otherwise to condescend on other adminicles to astruct the verity of the subscription. No. 323.

Sum of the condescendence offered.

The witnesses subscribing were Mr. William Douglas Advocate, and John Muir, writer to the signet, the ordinary lawyer and writer to the family; to prove which is produced, *first*, A gift by the Marquis's father, 1653, of the ward and marriage of a vassal, to Mr. Douglas; and of the same date a procuratory by him for prosecuting the said gift, signed before witnesses. *2dly*, The above factory to Inglis, to which he is witness. *3dly*, An obligation by Littlegil to the Marquis, 1664, for producing the vouchers of some articles he had got credit for in a former account, to which Mr. Douglas is witness. *4thly*, A backbond, 1664, by Littlegil, relating to the same accounts, touching an article of the Lady's jointure, part of which only had been paid, also witnessed by him. *5thly*, An obligation by him of the same date, to employ as the Marquis's proportion for building a bridge, a sum of money paid to him for that purpose, witnessed by Mr. Douglas. *6thly*, An obligation by the same, touching the receipt of a blank bond, witnessed by the same. *7thly*, A tack 1668, granted by Mr. Douglas as the Marquis's commissioner.

With regard to John Muir, he is the writer of Littlegil's factory and bond relative thereto, and Inglis's factory is wrote by his servant. *2dly*, A tack, 1661, is wrote by his servant. *3dly*, He is writer and witness of the three above-named obligations by Littlegil; and all these writings and subscriptions agree with the writing and subscription of the docquet in question.

It being observed, That in the case of some of the decisions, where the supplying the defect was allowed, the witnesses were still alive, and might be examined whether they witnessed the deed; the parties were directed to endeavour to discover whether these witnesses now condescended on, were alive at the obtaining the decree of the constitution; so that they might have been examined if an objection had then been made; on which the Duke's procurators reported that Mr. William Douglas was dead, but that it appeared John Muir was one of the commissioners of the signet in the year 1679.

The Lords, 11th November 1746, "Found that the want of the names and designations of the witnesses to the docquet, with respect to James Inglis his intromissions was not suppliable."

On bill and answers they found, 6th January 1747, "That the want of the names and designations of the witnesses to the docquet, with respect to James Inglis's intromissions was suppliable, and was actually supplied.

The Lords refused a bill for the creditors, and adhered.

Act. *R. Craigie, et Lockhart.* Alt. *Ferguson.* Clerk, *Gibson.*
Reporter, *Elchies.*

D. Falconer, No. 157. *p.* 198.