

No. 105.

1635. *January 22.*BELL *against* LD. Mow.

When the witnesses are not designed, or perhaps not mentioned at all, which of course lays the writ open to the objection of not being subscribed by the party before witnesses, the use was to allow the pursuer to condescend upon the witnesses; which was found with respect to a writ before act 1681, though the witnesses were not so much as named in the body of the writ. See No. 96.

Durie.

* * * This case is No. 408. p. 12526. *voce* PROOF.

1664. *July 15.*

MR. WILLIAM COLVILL *against* The EXECUTORS of the LORD COLVILL his Brother.

No. 106.

An old writ wanting the designations of witnesses not sustained without other adminicles to instruct it.

Mr. William Colvill pursues the executors of the Lord Colvill his brother, for payment of 2000 merks of portion, contracted to him by his brother, in case his brother wanted heirs male. It was alleged, for the defender, absolutor, because the contract is null, there being no witnesses designed therein, to the Lord Colvill's subscription, but only two witnesses expressly subscribing as witnesses to Mr. William Colvill's subscription, and other two undesigned, subscribing as witnesses, but not relating to any particular subscription. The pursuer answered, that he offered to design the other two witnesses, which was always found sufficient to take away the nullity. It was answered for the defender, that albeit the designation were sufficient *in recenti*, where the witnesses were on life, because use may be made of these witnesses, to improve the writ, this could not hold *in re antiqua* where both witnesses were dead.

The Lords formerly found, that the designation was not sufficient, without instructing the writ by witnesses, or adminicles, for which effect, the pursuer produced several writs, subscribed by the Lord Colvill, and by one of the two witnesses, that *comparatione literarum* might instruct the truth of their subscriptions; and alleged further, that this being a mutual contract, and unquestionably subscribed by the one contracter, and being of that nature that he, whose subscription was unquestionable, did engage for a more onerous cause than the other;

The Lords compared the hand writs, and found them both alike, sustained the writ; the pursuer making faith that it was truly subscribed by both parties.

Stair, v. 1. p. 215.