

No. 117. 1664, Mr. William Colvill against the Lord Colvill, No. 106. p. 16882; where the Lords made a difference, if the witness craved to be designed was dead or alive; for in case of death, they inclined not to sustain any such suppliment. See also Sir George Mackenzie observes on the 80th act of Parliament 1579, where he refers to the decision, 24th January 1668, Magistrates of Cullen against the Earl of Findlater, No. 109. p. 16884; and there is more hazard in sustaining a writ, where he is not so much as insert, as when he has been insert, but not designed; for, in the first case, his subscription might be adhibited many years after the principal party has signed; but, in the other, it shews he has been intended for a witness, though by haste or ignorance he is undesigned. Duplied, There was neither law nor custom for inserting witnesses' names before the year 1681; and when it was omitted, it was never controverted, but the same might be supplied by a condescence on the person, otherwise this might annul and endanger many such writs in Scotland, and open a door to many pleas; and whether the witness be dead or living, it may be supplied *comparatione literarum* with his other subscriptions. The Lords, by a plurality, found the assignation null, and not suppliable by a condescence, after a climateric of sixty three years, and that all parties were dead: Others said this might be a very dangerous preparative. There was a separate ground that occurred to some of the Lords, that this assignation being in implement of some obligations in a contract of marriage in favours of a wife, the same was sufficiently astructed, supported, and adminiculated thereby; but this not having been debated, the Lords did not determine on that ground.

*Fountainhall, v. 2. p. 399.*

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1708. January 21.

The LADY ORMISTOUN and the LORD JUSTICE CLERK her Husband for his Interest, *against* JOHN HAMILTON of BANGOUR and his TUTORs.

**No. 118.**

A bond not found null though it was when executed so folded up that the witnesses saw nothing above the granter's subscription.

In the action at the instance of the Lady Ormistoun against John Hamilton of Bangour, as heir to the Lord Whitelaw her first husband, for payment of £7000 Sterling, which the defunct by his bond obliged his heirs and successors not descending of his own body, to pay to her in case she survived him, at the term of Whitsunday or Martinmas subsequent to his decease; the defender repeated a reduction and declarator of extinction of the bond upon this ground of nullity, That the witnesses insert saw not, at their subscribing, the body of the writ, or the Lady's name insert therein; so that it might have been half a sheet of blank paper; seeing non esse et non apparere paria sunt; de non apparentibus et non existentibus idem in jure est judicium; and by the 25th act, Parl. 1696, bonds blank in the receiver's name, or not filled up therewith, at least before delivery, in presence of the witnesses to the granter's subscription, are declared null. For if a holograph bond, so folded up as the witnesses thereto could see no writ above

the granter's subscription were sustained, the careful provision made by acts of Parliament concerning blank writs, reduction of deeds *in lecto*, and fraudulent conveyances in prejudice of creditors, might easily be eluded. No. 118.

Answered for the pursuer : Though in other places, as in England, a writ is not probative till the witnesses make *affidavit* upon the verity thereof; with us writs formally signed before witnesses are valid and receive present execution, until they be improved or reduced. Witnesses are only adhibited to ascertain the date and the verity of the parties' subscription, without being obliged to know the contents of the body of the paper; yea, oft-times that is industriously concealed from their view, as particularly in testaments. The defender cannot found any thing upon the act 1696, unless in the terms thereof he subsume and prove that the Lady's name was blank at the subscribing of the bond.

The Lords repelled the reason of reduction and extinction of the bond. Though some were of opinion that it could not be quarrelled so much upon the act of Parliament 1696, as upon this ground, That the witnesses, who saw nothing of the writ above the parties' subscription, could not be held as witnesses to a subscription; that being a relative word implying *aliquid super*, which they did not see.

*Forbes, p. 225.*

1708. November 23.

SIM against DONALDSON.

No. 119.

A witness, after 10 or 12 years, acknowledged his subscription; but did not remember that he saw the parties subscribe, or heard them own that they had subscribed. He declared, That he knew their subscriptions, and was sure he would not have subscribed witness, except in the presence of the parties. This the Lords found probative, notwithstanding the act of Parl. 1681, requiring witnesses to see the parties subscribe, or acknowledge their subscriptions, which doth not import that a witness, after a tract of years, can distinctly remember the thing.

*Forbes.*

This case is No. 132. p. 16713. *voce* WITNESS.

1710. February 1.

BAILLIE against LOCKHART.

No. 120.

It being objected by one of the parties in a minute of sale, That the writ was null, because one of the two instrumentary witnesses was infamous, *infamia juris*; in so far as there was a decree of improbation of a bond obtained against him some years before, finding him accessory to the forgery, and ordaining it to be