

1739. July 4.

SHEIL *against* CROSBIE.

An ordinary having found a deed of importance signed only by one notary and two witnesses, null, and not suppliable by the party's oath, that he had given order to the notary to subscribe for him, the interlocutor was, upon petition and answers, "Altered;" some of the Lords putting it upon this, That in general such nullities were suppliable by oath of party upon the verity of the deed.

And it may be true, that this opinion receives some countenance from certain decisions, whereby it has been found, that the nullity of not designing a witness, and the like, was suppliable by acts of homologation. But the decision did not proceed upon that general ground; for the Lords who spoke for altering, declared their opinion upon the general point for the Ordinary's interlocutor, and their dislike to the said decisions on the point of homologation; but observed, which was the ground of the decision, that this case is very different from that of a party's subscription not duly attested by the legal solemnities; for that a second notary's subscription is not required in way of solemnity, but *in majorem evidenciam*. And therefore, where only one notary subscribes, the want of the second notary's subscription may be supplied by oath of party, or acts of homologation. Before the act 1681, even where a party's subscription was not légally attested, the defect might have been supplied by homologation, or by the party's oath, that he subscribed the deed, though this cannot be admitted since the act 1681; but as the subscription by notaries is no part of the subject of the act 1681, all defects in deeds by notaries are suppliable now, in the same manner as before that act.

Kilkerran, No. 4. p. 605.

1742. November 23.

DUKE of DOUGLAS *against* the Other CREDITORS of LITTLEOIL.

It was objected to an adjudication produced by the Duke in the ranking of the creditors of Littlegil, that the decree of constitution on which the same proceeded had been obtained in absence, for the sums contained in two accounts, fitted between the Marquis of Douglas and his curators on the one part, and Littlegil on the other, in the year 1663, the docquets whereof, were null, in respect they did not design the writer; and that farther, though two witnesses were subscribing, yet neither of them were inserted in the body of the writ, which last defect the creditors contended was not suppliable.

In answer to this, it was insisted on, and with some shew of plausibility, that there was no statute before the year 1681, requiring witnesses' names to be inserted in the body of the writ subscribed by the party; for that all that is required by the

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A writ subscribed only by one notary may be supplied by the party's oath, or by acts of homologation.

No. 322.

If inserting witnesses' names was necessary before the act 1681, and if the omission of the designation of the writer, and names of the witnesses, is suppliable? — Deed subscribed by more than two parties.

No. 322.

act 1540 is the subscription of the party and witnesses, without defining whether the subscription of the witnesses was enough, or if they were to be inserted; and though the act 1579 requires the witnesses to be designed in the body of the writ, yet that is only in the case where the writ is signed by notaries; but by that very same statute, where the writ is signed by the party, no more is required but the subscription of the party and witnesses; and a decision was appealed to, July 3, 1634, Home *contra* Home, No. 104. p. 16881. where an objection to a bond, subscribed by a party and two witnesses, that the names of the witnesses were not inserted in the deed, was repelled, and the bond sustained, seeing there were two witnesses subscribing, which, as the decision bears, the Lords found as good as if their names had been inserted; and upon which the Lord Dury observes, that the *ratio decidendi* was that the statute 1579, requiring that the witnesses should be inserted and designed, referred more directly to writs subscribed by notaries than to writs subscribed by the party; and it was said, that wherever it had been found, that a deed of date before 1681, signed by the party and witnesses, was null for not having the witnesses inserted in the body of the writ, as in the decision observed by Forbes, Dec. 5, 1707, Bell *contra* Campbel, No. 117. p. 16883. it had proceeded from an erroneous admission of the party on the import of the old statutes.

But in all this there was nothing solid; for the inserting the witnesses in the body of the writ was required *de jure communi*, antecedent to any of our statutes, as we learn from Craig, and even from the books of the Majesty. And indeed no more was requisite, till, by the statute 1540, the subscription of the witnesses was required, and which supposes their being inserted; for no otherwise could a party be said to subscribe before the witnesses, than when he in the deed acknowledged it; and if more was necessary, this is put beyond doubt by the act 1593, requiring the writer to be designed before inserting the witnesses, while yet there was nothing requiring the witnesses to be inserted, but the *jus commune*, on the supposal of which the act 1540 proceeded.

It was further argued, that supposing it requisite, before the act 1681, that the witnesses should be inserted and designed, yet, as even the decisions which suppose the inserting necessary, admit, that the designation of a witness inserted might, before the 1681, be supplied, so where the witness was subscribing, he was thereby as effectually inserted as if he had been mentioned by the writer in the writ, and therefore his designation was no less suppliable in the one case than in the other.

To this it was answered, That the witness subscribing, was by no means equal to his being inserted in the writ before the party subscribed, in respect the witnesses' names may have been added *ex post facto*.

The Lords "Sustained the objections, that the writer was not designed, and that the witnesses were not inserted in the docquet; but before answer to the question, Whether the designation of the writer and witnesses was suppliable, remitted to the ordinary to hear parties, in what manner the Duke's procurators

would undertake to supply the same, and what evidence may be offered to support any condescence that may be made.”

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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 LITTLEGILL.

The question between the Duke of Douglas and the creditors of Littlegil, 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 condescence 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.”

No. 323.

If the omission to insert the writer and witnesses, in a deed before the 1681, is suppliable?

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 Littlegil, 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