

in law to the woman contracted, to tocher her, being a stranger to her, she being only his wife's sister, whom no law could compel him to tocher; and therefore he alleged, that the form prescribed by the act of Parliament, *in anno 1579*, concerning two notaries and four witnesses, should be kept; which allegiance was repelled, but the reason in this case especially was, because the contract was first registrated against the defunct in his own life-time, and thereafter was transferred in this suspender, as heir to him, and so there were two decreets thereon standing. *Vide* December 10, 1630, Nisbet against Newlands, No. 287. p. 17016.

Clerk, *Hay*.

Durie, p. 357.

Spottiswood reports this case :

David Crawford having got a decret of transferring against Gilbert Muir as heir to his father, who was obliged in a contract of marriage between the pursuer and Elizabeth Cunningham, for the payment of 200 merks charged upon the said decret, Gilbert suspended upon this reason, That the contract was null, in so far as his unquhile father was obliged therein, because he was not subscribing in it, and only one notary and two witnesses, and so null by the act of Parliament. Answered, That ought to be repelled, *1mo*, In respect of the decret standing, given upon lawful probation; *2do*, It floweth upon a contract of marriage, which is an onerous cause, in respect whereof the strictness of that solemnity ought to be dispensed with. Replied, That his father being but a stranger to the parties, the defect alleged should work in his favours, he having received no benefit by the said contract. The Lords found the letters orderly proceeded.

Spottiswood, p. 203.

1628. *March 12.* WILLIAM DISHINGTON *against* SIR WILLIAM SCOT.

By the act of Parliament 1593, the name of the writer should be inserted in the body of all writs and evidents, otherwise the same are to make no faith in judgment nor outwith. Yet ordinarily before the Lords the party user of the writ is suffered to condescend upon the writer thereof, which is sustained as well as if his name had been inserted therein.

Spottiswood, p. 359.

* * Lord Kames makes the following observations on this case :

The act 179, Parl. 1593, statutes, " That all writs and evidents shall make special mention in the end thereof, before inserting the witnesses, of the name and de-

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signation of the writer, otherwise the same to make no faith in judgment or out-with." It is not extremely clear what is intended here, whether that the omission of the writer's name and designation should make the deed *ipso jure* null, so as to deny action upon it, or if it should only furnish an exception to the defender; if the first, the writ is no better than blank paper, and consequently not capable of support by homologation or otherwise; if the last, the exception must resolve into this, That the deed is not a full legal proof, which of course leads the pursuer to support the deed by making a proof who was the writer, or by alleging that the defender has acknowledged the deed and homologated the same, which must bar him from making any objection to its veracity. Our Judges have interpreted the act in the last sense; and therefore, in a question upon this act, the omission of the designation of the writer was allowed to be supplied by condescending upon the same.

Fol. Dic. v. 2. p. 549.

No. 286.

1630. March 19. HARPER against JAFFRAY.

Harper, procurator for a Frenchman, pursues John Jaffray in Aberdour for payment of certain franks, whereupon the said Jaffray had got a bond alleged subscribed, and written with his own hand, without witnesses. It was replied, that the bond was subscribed by the defender, and that it was sufficient, according to the custom of Normandy, betwixt merchant and merchant, to give such bonds, and the same was sustained before the judges of that province; which reply the Lords found relevant. *2do*, The defender denied the subscription to be his, and seeing the bond wanted witnesses, the pursuer ought to prove the subscription of the bonds to be his. The Lords repelled the subscription, and ordained the defender to improve.

Auchinleck MS. p. 146.

No. 287.

1630. December 10. NISBET against NEWLANDS.

A contract of marriage subscribed only by one notary before witnesses, is not challengeable upon that head, either by the husband or wife or their representatives, provided marriage have followed upon it, because the marriage is an act of homologation, which bars them from making the objection.

Stair.

* * * This case is No. 59. p. 5682. *voce* HOMOLOGATION.