

1766. *December 17.*

DAVID RUSSEL Writer in Edinburgh, Trustee for the Creditors of James Ewart, *against* JAMES PAISLEY of Craig, and JOHN LITTLE Merchant in Langholm.

No. 138.

A bond not having the date, place of signing, and designations of the witnesses filled up in the testing clause, null, though the parties acknowledge the deed was subscribed by them.

John Armstrong in Wrae, having obtained a cash-account with James Ewart, he as principal, and the defenders as cautioners, granted a joint bond for what should be advanced to Armstrong. This bond was subscribed by the three obligants and two witnesses; but the date, place of signing, and the names and designations of the witnesses were not filled up in the testing clause.

Ewart advanced a considerable sum to Armstrong, and having become bankrupt, the pursuer brought an action against Paisley and Little, for repayment. The defenders acknowledged their subscriptions, but pleaded, That the bond was null, resting chiefly upon the omission to insert the names, and designations of the witnesses, as a nullity by the act 1681. The Lord Gardenston Ordinary, "found the cautionary obligation pursued on not obligatory, and assoilzied."

The pursuer reclaimed, and contended, That neither the date nor mention of the place of subscribing, were essential by our law, upon the authority of the following decisions, 11th December 1621, Hamilton *contra* Sinclair, 7th June 1666, Crawford *contra* Duncan, 1st July 1712, Macildownie *contra* Graham, 21st July 1711, Ogilvie *contra* Baillie, 4th July 1709, Vallange *contra* M'Douall. (These cases are all in Sect. 6. *h. t.*)

With regard to the other defect of the deed, it was pleaded, That the act 1681, having been only meant to prevent the falsification of subscriptions to deeds which had not been truly subscribed, ought not to be applied to this case, where both the parties and witnesses are alive, and their subscriptions acknowledged. Lord Bankton lays it expressly down, that there is no place for the sanction of the act, in such a case; and so it was found 26th December 1695, Beatie *contra* Lambie, Sect. 11. *h. t.* observed by Fountainhall.

The act does not deny action upon such deeds as are defective in any of the solemnities thereby required. It only affords an exception; which exception may be barred by homologation, as has been repeatedly found, Sect. 11. *h. t.* and if the exception may be barred by homologation, which is only an implied acknowledgement, it ought *multo magis* to be barred by an express acknowledgement of the obligation.

"The Lords refused the petition, and adhered."

Act. Nairn.

A. R.

Fac. Coll. No. 49. p. 87.