1685. *March.*

ANNE GRAHAME *against* MARQUIS of MONTROSE and JAMES FENTON.

No. 115.
The objection to a testament, that one of the witnesses was a legatee, was repelled.

A person having named a stranger his executor and universal legatar, with the burden of some particular legacies, his sister raised reduction of the testament as nearest of kin, upon this ground, that it wanted habile witnesses, in so far as one of the witnesses was a considerable legatar, and so could not be *testis in causa sua.*

Alleged for the defender: That the reason is not relevant; because, 1*mo*, The witnesses were in effect instrumentary witnesses, who cannot be rejected; 2*do*, By the civil law *legatarii et fide commissarii* were habile witnesses *in testamento scripto*, though not *in nuncupativo*; 3*tio*, Whatever might be pretended against a testamentary witness pursuing for a special legacy, the witness there quarrelled may prove the verity of the testator's subscription, in favours of the universal legatar, to exclude the pursuer's interest of nearest of kin.

Answered for the pursuer: Though, where writs are granted and accepted by parties, as in the case of bonds, contracts, &c. the creditor receiving the security consents to the hability of the witnesses therein, that cannot be drawn as a rule to a testament in prejudice of the nearest of kin, who did not consent to or subscribe it; 2*do*, It was upon special considerations that legatars are allowed to witness by the common law, in respect here, principale negotium agebatur inter testatorem et hæredem, and seven witnesses were required; and the heir who had the heritage by the testament, had no reason to quarrel it; but these specialties take no place with us where moveables only are testable, and testaments need but two witnesses. Again, more faith was given to witnesses by the civil than by our law, ne defunctus intestatus decederet.

The Lords repelled the reason of reduction, and sustained the testament as a complete probative writ.

Harcarse, No. 561. *p.* 155.

1698. *November.* MUNGO CAMPBELL *against* MARGARET ROBERTSON.

No. 116.

In this case, the Lords had occasion to give another decision on the same 5th act of Parliament 1681*, in a pursuit by Mungo Campbell against Margaret Robertson, relict of John Bready, and now spouse to Anderson, writer in Glasgow; where a bond was quarrelled as false, because one of the witnesses deponed he did not know Bready, to whose subscription they subscribed as witnesses, being then a boy of 14, and called off the street to be a witness. The Lords were convinced the bond and debtor's subscription were true; yet, in respect of the foresaid act of Parliament, they found the bond not false, but null; and yet that knowledge of the party, which the act requires, cannot be understood of a distinct,

* See Grant against Keir, Sect 5. *h. t.*

No. 116. particular, antecedent knowledge, but only that he called himself so to the witnesses; else many bonds, and other writs, may be questioned on this head. The design of the act was to prevent the suborning and personating one man for another, whereof there have been sundry instances; and Julius Clarus, Tit. De testamentis, Quæst. 59. gives a famous one, where the suborned testator spoke out of the bed to the witnesses; but what degree of knowledge of the party is here requisite is *in arbitrio et religione judicis.*

Fountainhall, v. 2. *p.* 20.

1707. *December* 5.

PATRICK BELL Merchant in Glasgow, *against* ROBERT CAMPBELL of Silvercraigs.

No. 117.
A writ before the act 1681, found null for having only one witness inserted and designed therein, though two subscribed it, and not allowed to be supplied by condescending on the designation of the other witness.

In the process against Robert Campbell at the instance of Patrick Bell, as having right to the by-gone annual-rents of 10,000 merks by progress, from Mary Stuart, to whom they were assigned by the deceased Robert Campbell of Silvercraigs her husband, the defender's father, for payment of these annual-rents that had been intromitted with by the defender; he the defender contended, That the assignation, to Mary Stuart the pursuer's author was null, for having but one witness inserted and designed therein, though it be subscribed by two witnesses.

The pursuer offered to supply the nullity, by condescending upon the designation of the other witness, which is always sustained as to writs anterior to the act of Parliament 1681, the first positive law denying supply to writs not designing the witnesses.

Answered for the defender: The act 179. Parl. 13. Ja. 6. requiring the writer's name and designation to be inserted in writs before inserting of witnesses, implies that it was then a known standing law, that witnesses' names and designations should be inserted in all writs, to which they were adhibited witnesses; and the act 1681 was but correctory of an evil custom of supplying the designation of witnesses, that had crept in by practice. Yea, the inserting witnesses' names and designations was so far approved in our law before the act 1681, that even witnesses inserted, though not subscribing, were considered as instrumentary witnesses, to approve or improve the writ; and the said statute, which allows only of subscribing witnesses, requires expressly that in the terms of the former law their names and designations be inserted in the body of the writ; *2do*, Whatever may be said for supplying the designations of witnesses whose names are inserted in the body of the writ, a witness's name and designation was never allowed to be condescended on, where neither name nor designation was inserted in the body of the paper; as Sir George Mackenzie observes on the act 80. Parl. 6. Ja. 6. where he cites for this a decision, January 24th 1668, Magistrates of Dundee *contra* Earl of Finlater, No. 109. p. 16884.

Replied for the pursuer: The distinction betwixt a witness not designed, and one not inserted, is imaginary, without any foundation, statute, or decision: And