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; 2*do*, 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

No. 117.

if the inserting were to be divided from the designing, the latter is by far the more important; seeing designation affords means of inquiry into the hability, faith, fame, and condition of the witness, whereas the bare inserting of his name would contribute nothing thereto; nor will the inserting of a witness prove that he was present at the subscribing of the writ. But then again, the witness quarrelled is inserted by his subscribing of the writ; and it is no matter what place of the writ he be inserted in; for albeit the act of Parliament requires the writer of a paper to be inserted and designed in the body thereof, before inserting the date and witnesses' names, custom hath sustained the inserting of the writer in any part of the writ: *2do*, A condescendence upon the inserter of the witnesses was sustained, though himself was neither insert nor designed; November 30th 1683, observed by my Lord Newtoun; which furnisheth a good argument for the supplying of a witness not inserted. No. 81. p. 16860.

Duplied for the defender: The filler up of the date and witnesses is neither in the letter, nor in the reason of the law, and useth not to be distinguished from the witnesses, whereof one ordinarily fills up the date and witnesses' names and designations, though he may sometimes forget to mark the same.

The Lords sustained the nullity.

Forbes, p. 203.

*** Fountainhall reports this case:

Bell having right by progress to an assignation of a liferent-annuity made *in anno* 1644, and pursuing Silvercraigs as representing the granter, he objected the assignation was null, because it had two witnesses subscribing thereto, and there was only one designed, mentioned and insert in the body of the writ thus, "befor these witnesses, Robert Stewart, burgess of Linlithgow, writer hereof," and so the writ ends without any more. Answered, The writ has truly two witnesses subscribing, though one of the two is neither named nor designed in the body of the writ; and this being long before the act of Parliament 1681, requiring, that they be specially designed, and that the omission should be unsuppliable, he condescends yet upon the designation of the other subscribing witness, viz. Mr. Gavin Stewart, who was then Minister at Dalmellington. Replied, That where the witnesses are insert *in gremio* of the writ, the law and practice before the year 1681 allowed the supplying thereof, by condescending on their designation; but here the second witness's name was not so much as insert in the body, which is such a nullity as could never be supplied; for, as the judicial law required two or three witnesees, so did our ancient law, Regiam Majestatem. Lib. 2. Cap. 38. where Skeen cites the Canon law, and adds this reason, quia testimonium unius est vox nullius; and our municipal law requires the same, Q. Mary, act 43. Parl. 6. and act 78. Parl. 9. act 80. 1579; and act 179. 1593. Likeas, our decisions have been conform, Falconer against the Earl of Kinghorn, No. 107. p. 16883. 30th November 1683, Watson against Scot, No. 81. p. 16860. and 3d of January 1683, Clark against the Laird of Balgouny, No. 56. p. 16837; and 15th July

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 condescendence 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 condescendence, 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 obligements 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.

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