

No. 150.

1706. June 27. M' MICKEN *against* KENNEDY.

The writer of a bond found sufficiently designed by the general designation of notary.

Forbes.

\* \* This case is No. 62. p. 524. *vide* ANNUAL-RENT.

1708. December 14.

WILLIAM JAMIESON in Glenside, and MARGARET JAMIESON his Daughter,  
*against* ROBERT SHERIFF in Culbeg.

No. 151.

In a writ bearing place and date at the top, and after the clause of registration these words, "Before these witnesses, Thomas Jamieson, writer hereof, and Alexander Jamieson, at Leckie," the words "at Leckie" were sustained as sufficient to design the writer, it being proved that they lived in Leckie at the time.

Robert Sheriff in Culbeg having subscribed a writ of the tenor following, "At Leckie the tenth day of March, 1708, it is concluded and agreed betwixt Robert Sheriff in Culbeg, and William Jamieson in Glenside of Leckie, and Margaret Jamieson his daughter; the said Robert Sheriff obliges him to marry the said Margaret Jamieson under the pain of 500 merks Scots; wherefore we consent to the registration of thir presents, in the books of Session, or any other Judge competent, before these witnesses, the said Thomas Jamieson writer hereof, and Alexander Jamieson at Leckie, day, month, and year of God foresaid." Upon this obligation William Jamieson and his daughter pursued Robert Sheriff for the 500 merks, in respect he had resiled from the purpose of marriage.

Alleged for the defender: The obligation is null by the act of Parliament 1681, for want of the designation of writer and witnesses.

Answered for the pursuer: These words "At Leckie" sufficiently design both.

Replied for the defender: The word "said" being prefixed to Thomas Jamieson's name, who is not mentioned in any former part, is an evidence that he was previously designed, and not to be designed by the words "At Leckie;" *2do*, In stile persons are not designed "at," but "in" such a place; *3tio*, The words "At Leckie" design the place, and not the writer and witnesses, as appears from the following words, "day, month, and year of God foresaid," without further mention of the place.

Duplied for the pursuer: If the writ by mistake mentioned the word "said" before Thomas's name, while he had not been formerly spoke of, the words "At Leckie" were the more necessary to design him, for helping the mistake; and the word being *inutiliter adjectum*, the designation *per illud inutile non vitatur*; *2do*, To live "at" or to live "in" such a place, are promiscuously used for one and the same; *3tio*, The words "At Leckie" cannot be allowed to design the place, because that was expressed at the head of the writ; and the words "day, month, and year" have been added *per incuriam*, they being expressed at the top; so that in

good sense and grammar the words "At Leckie" may be as well applied to the designation of writer and witnesses, as to the place; *hoc maxime attento*, that they and no other of that name reside at Leckie. No. 151.

The Lords found, That the words "At Leckie" related not to the date or place, but to the writer and witnesses, and found them sufficiently designed thereby, the pursuers proving that they lived in Leckie at the time.

*Forbes, p. 288.*

\* \* \* Fountainhall reports this case :

Robert Sheriff in Kilbeg, coming in suit of Margaret Jamieson, daughter to William Jamieson in Leckie, and having resiled from some proposals before, they now get a bond from him obliging himself to marry her, and, in case he fail, to pay her 500 merks; and having both gone to their parish Minister at Gargunnoch, and craved their banns in the Church, they were twice proclaimed, and before the third he resiled, and refused to marry her; whereon he is pursued for the 500 merks. Against which he alleges, That the bond is null, as wanting the designations of the writer and witnesses, as the act of Parliament 1681 requires; and which is declared unsuppliable. Answered, They are sufficiently designed, in so far as it bears "before thir witnesses, Thomas Jamieson, writer hereof, and Alexander Jamieson at Leckie," which is all one as if they had said "in Leckie," seeing they both dwell in that place, and none other of their name but they. Replied, This is a plain stretch; for "at Leckie" in propriety of grammar, is only the designation of the place where it was signed, and not to design the witnesses; in which case it would have said not "at" but "*in* Leckie" and it should have added the word "both," that it might have reached the first witness as well as the last, to whom only it is immediately subjoined. Duplied, There was no necessity of repeating Leckie as the place, for at the head of the bond it bears it was done at Leckie; so the second mention of it cannot, without a vain tautology, be applied to the place where it was signed, but was intended for the designation of the two witnesses; and in all dubious cases *ea interpretatio est sumenda qua actus valeat quam ut pereat*; and he clearly homologated the bond by giving up his name to the Minister, and two proclamations, all posterior to the bond; likeas, he had by his instability deprived the maid of other occasions seeking her. And the act 1681, requiring the designation of witnesses, admitted sundry exceptions, as in bills of exchange, merchants accounts, discharges to tenants; and the disappointing a marriage was as favourable as any to dispense with such formalities. The Lords, by plurality, found "at Leckie" was the designation of the witnesses, and so repelled the nullity and sustained the bond. If any thing had emerged anent the woman's unchastity, or bad behaviour, that might afford some excuse for his resiling, and free him from the penalty; but there was nothing of that alleged here.

*Fountainhall, v. 2. p. 471.*