

1709. December 24.

ALEXANDER ANDERSON of Auchinreath, *against* JAMES COCK, Town Clerk of Banff.

No. 61.

The four witnesses must be present at the signing of each of the notaries.

Janet Anderson, with consent of James Cock portioner of Carnock, granted an assignation of 1590 merks in favours of Alexander Anderson, bearing the parties to have signed upon the 24th August 1704 at Carnock, before four witnesses, insert and designed : Two notaries subscribed for Janet Anderson : Two of the witnesses sign in common form ; a third adjects to his subscription, " Witness to both notars' subscriptions ;" and the fourth signs with these additional words, " witness to the co-notars subscription." Alexander Anderson pursued James Cock, Town clerk of Banff, as representing the said James Cock, for payment of the sum assigned.

Alleged for the defender : The assignation is null, for that both the notaries do not subscribe before four witnesses ; in so far as the adjection to the subscription of one of the witnessess bears, That he was only witness to the co-notar's subscription.

Replied for the pursuer : The docquet of the assignation bearing it to be signed at one place and time, and before four witnesses, this essential part of the writ, cannot be redargued by any superfluous adjection to the witnesses' subscription, but only by improbation ; *2do*, No faith can be had to this officious adjection to the witnesses' subscription ; because, *non constat* when it was writ, or who writ it, and it bears not to be holograph ; consequently it is null by the act of parliament 1681 ; for it might have been adduced since the signing of the writ, and can be of no greater import, than if such a witness had granted a separate declaration, wanting writer's name, that he had been present only at the subscribing of one of the notaries, which would certainly have been null. June 27, 1704, Lady Kinfauns against Earl of Northesk, the Lords would not sustain this as nullity of a bond granted by Pittarrow and the Lord Lower, that two of the witnesses did adject to their subscription, " At Lower such a day witness to my Lord Lower's subscription ;" whereas the docquet of the body of the bond bore it to have been subscribed the day preceding at Pittarrow. *3tio*, Writs subscribed by several parties, use to be sustained, though wanting witnesses, from the presumed verity of the writ ; which equally holds in this case, where the husband subscribes as consenter, and so must be sustained as a witness.

Duplied for the defender : The adjection to the fourth witness's subscription, is not inconsistent with the docquet of the writ, which bears only in general, before such witnesses (without saying witnesses to both the notaries) but only qualifies that generality. Whereas in the case of the cited decision, the adjection to the subscriptions of the two witnesses, did downright contradict the docquet of the body of the writ ; *2do*, It is of no import to say, That this adjection is no more probative than a separate declaration ; for as it appears to be genuine *ex facie scripturæ* ; so the user of the writ must take it as it stands ; unless he offer to

prove, That such words were *viis et modis* added to the witness's subscription, after the delivery of the writ to him; *3tio*, If the wife's deed be null, the husband's consent and authorizing her *ad integrandam personam* (as lawyers phrase it) falls in consequence; as a curator's consent could not support the minor's deed, that is null for want of witnesses; because, by a husband or curator's so interposing, *id solum agitur*, to hinder the deed to be quarrelled, for want of authority in the disponent, and not to supply other nullities.

The Lords sustained the nullity, and found it not supplied by the husband's subscription; in respect he doth only sign as consentor, and not as a disponent.

*Forbes, p. 376.*

No. 61.

1710. July 10.

ISOBEL MAVER, Spouse to JAMES COWBACK, Weaver in Elgin, and the said JAMES for his Interest, against ALEXANDER RUSSEL.

In a process at the instance of Isobel Maver and her husband, against Alexander Russel, the Lords sustained a discharge subscribed by a notary for Isobel Maver the pursuer, albeit the notary's assertion bore not that she touched the pen, but only that at her command, who could not write herself, as she affirmed, he had subscribed these presents for her.

*Forbes, p. 419.*

No. 62.

1711. December 27.

Mr. ROBERT WHITE of Bennochie, Advocate, against JOHN KNOX, Tenant in Cartmore.

In a process at the instance of Mr. Robert White, against John Knox, the Lords found a tack granted by a person who could not write null, in respect it was not signed by two notaries and four witnesses present at the time, in the terms of the act 80. Parl. 6. Ja. 6, but was only signed at first by one notary and two witnesses, and at sometime thereafter by another notary and other two witnesses; albeit it was alleged, That the act of Parliament requires only the witnesses to be present at the time when the notaries subscribe, whether *unico contextu*, or *ex intervallo*; in respect it was answered, That law doth no more trust notaries subscribing separately in such matters, than it doth the testimony of singular or not concurring witnesses. This is clear from the statute requiring writs of importance granted by persons who cannot write, to be subscribed by two notaries before four witnesses present at that time, which implies, that both the notaries must subscribe before the witnesses then present, whence they are called Co-notaries. So it was decided, M'Morran against Black, No. 41. p. 16830. Cow against Craig, No. 46. p. 16833. Anderson against Cock, No. 61. p. 16840. The same is

No. 63.

A writ found null because it was not signed by two notaries and four witnesses present at the time, but was signed first by one notary and two witnesses, and afterwards by another notary and other two notaries.