

1710. February 2.

JOHN SHARP of Hoddam, and CHARLES MAXWELL of Cowhill and his LADY,
against the EARL of Nithsdale.

Hoddam having, as executor creditor to Dougal Maxwell of Cowhill, with the concurrence of his apparent heir, pursued the present Earl of Nithsdale, for payment of 2000 merks contained in a bond granted by the deceased John Earl of Nithsdale to Dougal Maxwell *in anno* 1669; the defender alleged the bond was null for want of both the writer's name and designation.

Replied for the pursuers: They offered to supply the nullity, by condescending on the writer and his designation, which they might do, the bond being granted before the act of Parliament 1681. And for clearing that such a nullity in writs anterior to that statute was thus suppliable by our custom, they cited the authority of President Spottiswood, Pratt. Pag. 359. Sir George Mackenzie Obser. on the act 1593, and several decisions, as December 5th, 1665, Cunningham against Duke of Hamilton, No. 294. p. 17019. and February 22, 1676, Laird of Innes against Gordon, No. 143. p. 12056. and November 29, 1683, No. 81. p. 16861.

Duplied for the defender: Though in the case of writs anterior to the act of Parliament 1681, a supplying the designation of the writer might have been admitted; both name and designation were never allowed to be supplied. And December 5th 1707, Bell, No. 117. p. 16888. an assignation before the act 1681 was found irremediably null; for that there was but one witness inserted, though two subscribed: Now it was more favourable to indulge the making up the designation of a subscribing witness, than to supply both writer's name and designation, which is the making up a man.

Triplid for the pursuer: The decision Bell No. 117. p. 16888. comes not home to the case in hand; for the supplying a witness's name and designation, differs much from supplying the name and designation of the writer; seeing the writ might have been signed without witnesses, but not without a writer.

The Lords found the defect of the bond suppliable by the pursuer's condescending upon, and proving the writer's name and designation.

Forbes, p. 392.

Fountainhall reports this case:

An appeal given in for the Earl of Nithsdale against Murray *alias* Maxwell of Cowhill. It was a pursuit on a bond. The defence was, It is null, wanting the writer's name. Answered, It is a bond prior to the act of Parliament 1681, and I will condescend on him yet, and prove it. Replied, By the 175th act 1593, the want of the writer's name is expressly declared a nullity; and though by interpretation that law was so far relaxed, that where a writer was undesignated in the writ, the Lords allowed the supplying it by condescending on his designation, and prov.

No. 310.

The want of writer's name and designation in a bond before the act 1681, allowed to be supplied by a condescence and proof.

No. 310.

ing it ; but it was never extended to this case, where the writ bore no writer's name at all ; for there the writer cannot be known, much less designed after 40 years time. The Lords found the practice before the act of Parliament 1681, had allowed the condescending on the writer, as well as on his designation, till it was obviated and discharged by that act ; and therefore sustained the bond, they proving who was the writer, and repelled the nullity. Against which my Lord Nithsdale protested for remeid of law.

Fountainhall, v. 2. p. 573.

1710. *November 21.*

WILLIAM HAMILTON of Wishaw *against* JOHN MOIR of Cairnhill.

No. 311.

A deed sustained although the first page was informally executed, as it was relative to the other page which was formal.

An agreement betwixt William Hamilton of Wishaw, and Gavin Moir of Cairnhill, was drawn up in form of articles, written upon half a sheet of paper ; these to be performed by Cairnhill upon the first page thereof, signed by both parties and witnesses, without inserting or designing the writer and witnesses ; and those to be performed by Wishaw, upon the second page ; at the foot whereof both parties obliged themselves to perform the above and within articles, betwixt and a certain day : Then the writer and witnesses are duly inserted and designed, and both parties and witnesses do again subscribe. Wishaw pursued John Moir, as heir to Gavin Moir his father, to perform his part of the articles.

Alleged for the defender : Process cannot be sustained against him, upon the articles to be performed by his father ; because the same bear no date, nor the names and designations of writer and witnesses inserted.

Replied for the pursuer : The law requires writer and witnesses to be inserted and designed in the end of the writ ; and it is so here. For this mutual agreement is but one *idem corpus juris*, answering to the inscription on the first page ; and the articles in the last page expressly relate to the first ; and long missive letters written upon several pages are obligatory, though the last page be only subscribed ; and writer and witnesses are only inserted and designed under the last page or docquet of fitted accompts consisting of many pages.

Duplied for the defender : Inserting on the second page the writer and witnesses' names and designations, doth no more supply the nullity of the first side of the contract, than if it had been written on different sheets ; for the articles of the first side might have been blank, and filled up at pleasure. And though accompts and missive letters have, by our uniform practice, been found not to fall under the act of Parliament ; obligations and contracts are not so privileged. *2do*, It required a statute, to allow decreets and securities to be written bookwise ; and yet in these not only is each page subscribed, but the number of pages and the writer and witness are mentioned ; whereas the second side of these articles do not bear, That the witnesses subscribing were also witnesses to the first side, or that it was written of the same date, and by the same writer.