

1711. July 21.

DAVID OGILVIE of Clova *against* WILLIAM BAILIE of Lamington.

No. 123.

Date and place not essential to the validity of a writ, and the designation of witnesses to a writ before the act 1681 allowed to be supplied, though the witnesses were not named in the body of the writ.

In a process at the instance of Clova against Lamington, for payment of 2,000 merks of legacy left by Mrs. Grizel Hamilton, daughter to the Lady Bargeny, to which the pursuer had right by assignation from the legatary; the defender produced a declaration under the testatrix's hand for proving that she had power to bequeath only the half of the said sum. The pursuer replied, That the declaration was null, as wanting date, place, witnesses' names and designations.

Duplied for the defender: Date and place are not *de substantialibus* of a writ, and he offered to condescend upon the witnesses, which he might do, the writ being signed before the act of Parliament 1681.

Triplied for the pursuer: Date and place are essential to a writ, and cannot be supplied, nor were ever the names and designations of witnesses not mentioned in the body of the writ allowed to be supplied by a condescence, though the designations of witnesses whose names were inserted might be supplied.

The Lords found, That date and place are not essential to the validity of a writ, not being mentioned *inter substantialia* in the act of Parliament 1681; and found that the declaration being emitted before the making of the said statute, the designation of the witnesses may be supplied, though their names were not inserted in the body of the writ.

*Forbes, p. 533.*

1716. June 8.

JOHN WALKER *against* The REPRESENTATIVES of JAMES ADAMSON.

No. 124.

Witnesses to a subscription must know the subscriber.

Janet Handyside having disposed certain tenements in Edinburgh to John Walker, he pursues improbation, reduction and declarator of extinction of certain adjudications, to which the relict and representatives of James Adamson have right; for whom it was alleged, That the pursuer's title being a disposition from Janet Handyside, was null, because, by the 5th act, Parl. 1681, it is provided, That no witness shall subscribe as witness to any party's subscription, unless he then knew that party. *Ita est*, The witnesses to Janet Handyside's disposition did not know her to be the person designed in the disposition, and never saw her before or after; upon which allegiance the two subscribing witnesses being examined, one depones he never saw the subscriber of the disposition before, nor knew that there was such a person till the neighbours in Hastie's close declared to the deponent, that she was the daughter of John Handyside, merchant in Edinburgh, and at her subscribing, the said Janet declared to the deponent and two of her neighbours then present, that she was the daughter of the said John Handyside, upon the faith whereof the deponent subscribed as witness. The other

instrumentary witness, who was also writer, deponed conform, except that he remembers there was only one woman present when Janet Handyside declared who she was. No. 124.

The defender alleged : That it is proved by these depositions, that the subscriber of the disposition was altogether unknown to the witnesses ; and that the design of the law being for preventing any person to personate another, which could not be effectually prevented, unless the witnesses had proper knowledge of the subscriber, and that they were witnesses to the person designed in the writing. And here the disposition was framed by no warrant from the disponent, who did indeed own at subscribing, that she was the person designed in the writ ; but that was no warrant to the witnesses, because, if a party were to personate another, no less could be done ; but the law requires knowledge in the witnesses themselves, that the subscriber is the true person designed in the writ.

It was answered : That the law does require indeed, that no witness shall sign, unless he then know the party ; but the knowledge requisite is only upon credible information, which the witnesses had in this case ; for the neighbourhood told them, that Janet Handyside was the daughter of John Handyside, and that she dwelled in that place where the writ was signed ; and then the witnesses coming to the house, she owned herself to be the person in the presence of one or two more, which persons present could not be suspected to be accomplices in a fraud, seeing they were to act no part in the matter, but merely bye-standers ; and where there is any contrivance, no person is privy to it, except those who are necessary to carry on the design, and probable information is by act of sederunt, 20th July, 1688, concerning notaries, declared to be sufficient knowledge of the party for whom they are to subscribe, that the same be attested by those who subscribe as witnesses to the notary's subscription, or by other credible persons, and more certain knowledge is requisite in a notary who subscribes for the party than in witnesses ; and though a notary has a public office, and thereby is obliged to serve his employers in that office, yet he is not bound to sign for any party of whom he has not such a knowledge as the law requires, which must always be more than is required in witnesses ; and here there was no question of the reality of the true party's subscription, which is otherwise sufficiently astructed.

“ The Lords found, That the witnesses had such credible information, that the subscriber was the true person designed in the writ, that they might lawfully sign as witnesses to a subscription, and repelled the nullity.

*Dalrymple, No. 157. p. 215.*