No. 63. also confirmed by the authority of Craig, Feud. Pag. 156, and from the common law, Nov. 73. Cap. 8.

Forbes, p. 566.

1725. *June* 29. A. *against* B.

No. 64.

The Lord Royston asked the Lords, if a disposition to lands, subscribed only by one notary and two witnesses for the party, was null by the act of Parliament 1579, when the value of the lands was within £100 Scots? "The Lords were of opinion, that any heritable right, though the subject were never so small, ought to be subscribed by two notaries and four witnesses, when the granter could not sign."

Edgar, p. 184.

1729. *July.* WILSON *against* WILSON.

No. 65.

A tack was found null, as being subscribed by only one notary. See APPENDIX.

Fol. Dic. v. 2. *p.* 535.

1731. *December.* CULLEN *against* THOMSONS.

No. 66.

It was objected against a writ attested by notaries, that the notaries had not subscribed their attestations. Answered, The names of the notaries are at length in the attestations in their own hand writing, which is sufficient; the Lords repelled the objection. (See APPENDIX.)

Fol. Dic. v. 2. *p.* 536.

1737. *June* 28. DUNWOODIE *against* JOHNSTON.

No. 67.

A bill sustained accepted by notaries for the party. (See APPENDIX.)

Fol. Dic. v. 2. *p.* 535.

1739. *July* 6. JOHN CORSBIE *against* JAMES SHIELL.

No. 68.

The informality of a subscription, by

Corsbie being creditor to Shiell for the sum of 400 merks, due by bond, charged him for payment, which he suspended on this ground, That, by a mutual con-

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one notary and two witnesses, to a contract of importance, may be supplied by the party's oath.

tract betwixt the suspender and his creditors, he was bound to dispone to them his hail heritable subjects, which they agreed to take in satisfaction of their respective claims, and to discharge him of the same, upon delivery of the disposition; which being accordingly done, the charger, who is one of the creditors, was bound to grant a discharge, in terms of the contract.

Answered for the charger: That the contract was signed for him but by one notary and two witnesses, and consequently null. To supply this defect, the suspender referred it to the charger's oath, whether or not he had given orders to the notary to sign for him? Who accordingly deponed, That he desired William Hunter the notary to put his name down to the contract, and to sell the lands, and pay the hail debt. Whereupon the suspender pleaded, That the charger having acknowledged he gave orders to the notary to sign for him, is sufficient to support the subscription, and bind him to the common measures. Were it not for the adjected quality, the matter would be past dispute. Let us examine what effect the adjected clause can have, signifying that he gave orders to the notary "to sell the land, and pay his hail debt." With regard to which, it is obvious, that nothing can be more absurd than this addition; the notary's part was to subscribe for the charger, he had no earthly business with selling the land, or paying the debt; and, if it be meant that this was the supposition or condition upon which he gave orders to the notary, it is inconsistent with the oath itself; for, to give orders to sign a contract, is to give orders to sign the same as it stands, and it must be evident for itself. The question then comes to this, whether the command must be taken by itself to support the contract, or if the effect of the oath must be, to prove that the charger subscribed the deed with a quality and condition directly inconsistent with the contract itself? And, as to this, it is true, that when a contract is informal on the act 1681, and the verity of his subscription is referred to a party, it has been thought by some lawyers, that he might add to his acknowledgment that the debt was paid, or deed performed, &c.; though of this there is some doubt. It goes on this foundation, That the deed is *ipso jure* null, and that an informal subscription is the same with none; upon which supposition, there would be nothing left but to refer the verity of the debt to the party's oath; but this is far from being just reasoning: A subscription, of a bond, although not formal, upon the act 1681, is yet sufficient to found an action: It is not *pars judicis* to lay hold of the informality, but the business of the party: Hence it follows, that any deed of homologation, implying an acknowledgement of the party's subscription, is held sufficient, *personali objectione*, to bar the party from pleading his objection; 21st January 1735, Telfer. If this be law, it seems to follow, that any act or deed, tacitly implying the verity of the subscription, would have been sufficient, much more a direct acknowledgment. The moment that acknowledgment is interposed, there is an end of the controversy, the contract is rendered effectual at all points; after which, let the party add what facts and circumstances he has a mind, they ought to be considered as extrinsic, and nothing to the purpose. But, 2*do*, Let it be so, when the verity of a subscription is referred to a party's oath, that he will be allowed to give a qualified

No. 68. oath; yet surely it was never found that he can add qualities inconsistent with the terms of the contract. Suppose a bond, null upon the act 1681, is referred to the party's oath, would he be heard, after acknowledging his subscription, to say that the bond was only for fifty, when it clearly appears to be for a hundred? When the charger subscribed the contract, to be sure, it was to testify and interpose his consent to the same, when he adds, That it was to get payment of his whole debt; what is this, but, in other words, to say, That, though I subscribed the contract, I did not intend to be bound by it? *3tio*, To give the charger the whole advantage of his oath, let it be so, that he subscribed the contract in order to sell the lands, and get payment of his whole debt, even this is sufficient, *in hoc statu*, to bar him from personal diligence. There is no evidence in the field, what may be the extent of the subjects in the contract, nor any certainty; but upon good management, they may be disposed of so as to answer the whole debts. When this negotiation is finished, and effects turned into money, and applied for payment of the debts, then, and no sooner, will there be place for considering the quality of the oath; and, if then any part of the charger's debt remain unpaid, there may be access to do personal diligence for the balance.

Answered for the charger: Though he has owned he gave command to the notary to sign for him, yet the allegation is by no means relevant, and that it is still entire for him to object. Supposing this to be a subject of £1000 Sterling, as indeed it is his all, an acknowledged mandate to one notary to sign makes no subscription. The reason for introducing the law was, that one notary might not, by colleaguing with the other party, impose on illiterate persons; therefore it requires two, in matters of importance, in order that they may be checks on one another. As the law has thus declared what shall be equal to a party's subscription, so no consent can substitute any other equivalent; that is, no consent of the party can make the attestation of a notary, in matters above £100 Scots, to be a legal subscription; and this is the difference betwixt essentials and solemnities. The last are introduced for the sake of parties, and may possibly be dispensed with. For instance, where a witness is imperfectly designed, one may say that he is not bound to find out that witness; and, if he waves that objection, by any equipollent deed, he cannot return to it. But in essentials he has no power; for example, where a deed is not subscribed at all, he may enter, if he pleases, into a new bargain; but he cannot make that paper a deed of his, because that is fact, which will not change. In the same manner, he cannot make, nor agree to hold a deed of importance, attested by one notary to be his deed; because it is the law, and not the deed of the party, that declares what shall be equivalent to his subscription. Signing is the essence of a deed, and such a writing, not attested by two notaries, is not signed at all; so that here is a deed without a subscription. If this is allowed, it is a vain question, whether the charger gave warrant to the notary to sign the deed: Admitting he did, still the question remains, whether that attestation makes up his subscription; and, if the law says that nothing less than a warrant to two is sufficient, it is to no purpose to prove that he gave warrant to one. With respect to the reasoning touching the quality of the oath, it

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was *observed*, That the same was very plain, and altogether intrinsic. The question asked upon oath, was, Whether the charger had given warrant to the notary to subscribe this deed for him? and the man honestly answers, That he does not know one deed from another; because he can neither read nor write; but that the notary told him the contents of a deed, containing powers to the notary, with others, to sell Sheill's land, which would pay his hail debt; and that he gave him commission to sign such a deed for him; and, if any such deed appears (according to the present supposition) he will be bound by the notary's attestation. Now, to apply this to the fact, a deed of a quite different nature appears, part of the subject being retained, whereby the creditors will fall very short of their payment. It is plain from the deposition, that the charger gave no warrant to sign this deed, but quite another one, which never was executed, nor even intended by the suspender. It is true, the oath is inconsistent with this contract; but what then? The charger is not bound by it; for he denies he ever gave warrant to sign any thing like it. As to the example of the verity of a subscription to a bond for an hundred being referred to oath, and that the defender should acknowledge his subscription, but should add, that the bond was only for fifty, in which case, the quality would be extrinsic; it was answered, That the doctrine was true, but does not apply to the present question, where the verity of a subscription is referred to the oath of a party who can write; he has himself to blame for not reading it: So, if he has signed a paper of different contents from what he believed, the quality will not be extrinsic, but irrelevant, unless he can qualify and prove fraud; but it is otherwise, when a party can neither read nor write; the paper may be read or repeated falsely to him, and he must take every thing upon the faith of standers by; so, in the one case, the deponent answers pointedly to the question, "Did you sign this individual paper?" He knows it from another, and can answer accordingly; and, if he owns his subscription, he may be allowed to be bound up by his deed: But one who can neither read nor write, can give no answer to this question, "Did you give warrant to subscribe this paper?" Because he does not know one from another; he can only answer, That he gave warrant to sign a paper, and that paper he must describe by the terms thereof: So that, in the case put, if a man who cannot read and write should be asked, If he gave warrant to subscribe a bond for a hundred? And he should answer, No, but that he had given warrant to subscribe a bond for fifty, it would be absurd to pretend, that his oath must be disregarded, because it is not agreeable to the bond which appears: On the contrary, the bond could not be regarded, because of its being inconsistent with the oath.

The Lords found the subscription of one notary and two witnesses to the agreement produced, and now quarrelled as informal, was suppliable, and supplied by the party's oath.

C. Home. No. 124. *p.* 200.