1745. *June* 18. BIRREL *against* MOFFAT.

No. 69.
A deed subscribed by notaries, but wanting a clause bearing an order to the notary to sign, not sustained.

It being objected to a disposition signed by notaries for the party, that the attestation of the first notary, who was Thomas Reid notary in Dalkeith, a person who thereafter became *pessimæ famæ*, and was banished the kingdom, did not bear to have been subscribed at the party's command; answered, That there was no form required by any statute of a notary's attestation; that when it bore *pro illo subscribo*, that was in effect to bear the party's command, since otherwise it could not with truth be said to be subscribed for him; *2dly*, That Reid the first notary was writer of the deed, which bore in the body of it to be signed by notaries at the granter's command, because she could not write, and which was equal to his having said so in the docquet.

The Lords "Sustained the objection, and found the deed null."

Witnesses to a deed signed by notaries are not only witnesses to the subscription of the notary, but also to the command given him, both which the witnesses attest; and for that very reason it is, that four are required. And as witnesses are neither bound, nor supposed in any case to know, what is contained in the body of the deed, they attest no more than what is in the docquet: The authority also to notaries must be given at the very time of executing the deed, for till then there is *locus pœnitentiæ*; and for any thing that could appear from the face of the deed in question, it might have been written many days before signing. The docquet's bearing *pro illo subscribo* was nothing; for though it may be true, that the notary could not with truth say so without her authority, yet that was but his assertion, which whether true or false, is the very question, as no fact was asserted in evidence of such authority, the truth of which the witnesses were to attest.

Kilkerran, No. 10. *p.* 609.

*** D. Falconer reports this case:

David Birrell, dyer in Dalkeith, disponed his whole effects in favours of his wife, by a deed, containing this testing clause, "In witness whereof, written on stamped paper by Thomas Reid, notary-public at Dalkeith, I have subscribed these presents, by the notary's subscribing for me, with my hand touching the pen, because I cannot write myself," subscribed by initials, and attested thus, Ego Thomas Reid notarius publicus attestor Davidem Birrel (mihi notum) non posse scribere aliter nisi per duas literas initiales, ergo pro illo subscribo; and by the co-notary, Ita est ego Matheus Dickson co-notarius publicus in præmissis requisitus.

Objected to this disposition, That the attestation did not bear the command of the party to sign for him.

No. 69.

Answered: The deed itself which is written by one of the notaries, expresses this, which is equal to his having expressed it in his docquet. The Lords, 17th February, 1744, found the reasons of reduction not relevant.

Pleaded in a reclaiming bill: That it is the subscription gives force to the deed, and if this is not duly signed by the notaries, it is equal to its not being signed at all. The most essential part of this sort of subscription is the command, as that gives the notary his authority; and therefore it must be affirmed in his docquet; nor can this be supplied by the body of the deed, though written by the same person, because in that he acts not as a notary, and it may be subscribed at a distance of time from the writing; whereas it is at the subscribing that the mandate ought to be interposed: Besides, the second notary's subscription bears no mandate, for he had nothing to do with writing the deed, and his docquet attests nothing but what is contained in the first; and this question has been decided 21st July, 1667, Philip against Cheap, No. 51. p. 16835.

Answered: No statute directs the particular form of a notary's subscription: It is sufficient it import that he was employed by the party to subscribe for him, which is done by these words, *pro illo subscribo*, since without a mandate none can be said to subscribe for another; and surely this subscription would subject the notary to the punishment of falsehood, if he had subscribed without a mandate; nor would he be heard to urge in his defence, That he did not affirm he had any: Besides, his affirmation in the body of the deed is as good evidence of his having done it upon command, as if it had been expressed in the docquet; and in the case of Philip, the decision went on in this specialty, That the subscriptions appeared to be written with a fresher ink than the paper itself, and so had been *ex intervallo*; and therefore no clause in the deed could prove a mandate at the time of subscribing.

The co-notary's docquet is sufficiently express; for the terms, *In præmissis requisitus*, imply the command given, and that all solemnities were adhibited necessary to make the act effectual: It must necessarily go further than the facts in the first docquet, for that never bears the mandate given to the second notary. In a word, a mandate to both is necessary; but it is not requisite it should be given to each in presence of the other, nor that their docquets refer to one another, as clearly the first does not refer to the second.

Observed by the Lords, That in the body of the writ, the notary speaks not, but the party; and the thing to be attested, is, That the party has spoke at all.

The Lords sustained the reasons of reduction, in regard the notary's subscription did not bear a mandate.

Act. *Williamson.* Alt. *H. Hume.* Clerk, *Murray.*

D. Falconer, p. 101.