1753. *March* 11.

ALEXANDER DURY and DAVID DOIG *against* JOHN DURY.

No. 175.
A deed sustained, where the testing clause was written partly below the subscription of the parties.

Doig, as trustee for Alexander Durie, having brought a process for adjudging the lands of Dury-hill, John Dury produced, as a preferable right, a disposition of these lands by Alexander in his favour.

From inspection of this deed, it appeared, That, at the time of its being subscribed, neither the date, nor the names and designations of the witnesses, were inserted; and that there was not sufficient space left for the purpose, the disponer having set his name too near the words, with which the deed, as it stood at that time, ended: That, in order to remedy this defect, some words, which had been in the deed when subscribed, were afterwards erased; and that the writer of the deed had replaced them in a closer hand, and crowded in the date above the subscription of Alexander; but that he wrote the names and designations of the witnesses lower down, in such manner that, had the two lines containing them been extended, the first would have passed through the subscription of Alexander, and the other below it.

Such was the appearance of the disposition; and the trustee of Alexander contended, that it had been fraudulently obtained, and that every legal nullity might in equity be pleaded for setting it aside. He objected therefore, that the deed was null by act 5, Parl. 1681, which provides, that "the witnesses shall be designed in the body of the writ, otherwise to bear no faith in judgment, nor outwith." Now, in the present case, the names and designations of the witnesses are, in part, below the subscription of the disponer; and therefore cannot be said to be inserted in the body of the writing. Nothing is in law termed the deed of any man, which is not authenticated by his subscription; and nothing that is below his subscription, can, in the nature of the thing, be authenticated by it. If a deed were not to terminate at the subscription of the party, the names and designations of the witnesses might be subjoined even on the blank side of the sheet whereon the deed is written; for that, if the body of the writing end not at the subscription of the party, it can only end at the extremity of the paper itself. Farther, when writings are subscribed, there is often left a blank space for the testing clause, which is afterwards inserted, although neither the parties nor the witnesses be present. This method, in itself irregular, but authorised by practice, proceeds evidently on an implied consent of the parties; who, by leaving a sufficient blank, are understood to mean that it should be filled up with that clause, which is by law required for completing of the deed; but this presumption ceases, when, as in the present case, a person subscribes his name in such manner as not to leave sufficient room for the insertion of the testing clause; and his purpose is then understood to be, that the deed should remain for ever, as it was when he signed it, ineffectual and improbative: Hence it follows, that he who is possessed of such writing, may not,

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by means of a rasure, make way for that essential clause which the granter of the deed had by his method of subscribing excluded. *Lastly*, If this deed should be found valid, it will follow, that, whenever the designations of witnesses happen to be omitted in a deed, any person may invent designations, and subjoin them below the subscription of the party; or, if there be no room for them there, may erase a sufficient number of words, and insert them above the subscription of the party; by which means, the regulations introduced by the act 1681 might be constantly eluded.

Answered for John Dury: The disposition by Alexander was neither fraudfully obtained, nor without a just and adequate cause: The objection resolves into a criticism on the words "body of the writ;" but our acts of Parliament are not so accurately framed as to admit of such critical interpretations; that, in explaining them, some latitude must be used, appears from this clause in the act 1681; in strictness of speech, "the body" ought to be distinguished from "the head" or beginning, and "the foot" or close of the writing. Now, according to this literal interpretation of the clause, there has never been any deed executed in Scotland, in such form as to be secured from this statutory nullity; for the names and designations of the instrumentary witnesses are never inserted in the body of the writing, but uniformly subjoined at the close of it. So fatal might be the consequences of a literal interpretation of this act; but, its true intendment is no other than that the names and designations of instrumentary witnesses should be narrated in the deed itself, in contradistinction to the former practice, which permitted extrinsic evidence to be taken in proof of these designations; and hence it was found, that a bond was not null, although the writer of it was not otherwise designed than by adding these words, "and writer hereof," to his subscription as a witness, 26th July, 1716, Dronnan against Montgomery, No. 87. p. 16869.

Neither has any statute provided, that the signing of the parties should be in such manner below the whole of the deed, as that it may properly be termed a subscription. The King superscribes; and marginal notes, which must necessarily be signed by the parties, are not subscribed; and least of all does this rule take place with respect to the testing clause, which is generally, and agreeably to law, filled up after the signature of the parties.

"The Lords repelled the objection."

Reporter, *Tinwald.* Act. *Sir David Dalrymple & Boswell.*
Alt. *Sorymgeour & R. Craigie.* Clerk, *Kirkpatrick.*

D. *Fac. Coll. No. 75. p. 113.*

*** Lord Kames reports this case:

No. 175. 1754. *February* 9.

A disposition produced in process was objected to as not probative. The fact which gave occasion to the objection appeared upon the face of the deed, and was as follows: The granter's subscription was close to the body of the writing; and the testing clause was crowded in, partly at the side, and partly under the granter's subscription, whence it plainly appeared, that the granter's subcription was adhibited before the testing clause was inserted; and that it was done inadvertently close to the body of the writing, without leaving a blank as usual, for inserting the testing clause; which has been crowded in afterwards as above mentioned.

The Court was a good deal divided about this objection. I gave my opinion, that the objection was good both by the common law and by the statute 1681, upon this principle, that the subscription of the party is that act which authenticates the writing. A superscription of a private party will not avail. What is below the subscription cannot be authenticated by it; because it does not appear, that what is below made a part of the deed when the subscription was adhibited. More particularly, as it appears from ocular inspection that the witnesses names and designations were filled up after the subscription of the party, it is not proved by the deed that the testing clause had the granter's authority; which makes the case the same as if there were no testing clause. And the provision in the act 1681, that the names and designations of the witnesses must be inserted in the body of tthe deed, is that the testing clause may be authenticated by the subscription of the party.

Elchies observed, That writs are often subscribed with a blank left for the testing clause, which, after the subscription of the party, is filled upby any hand; and therefore, that it can be no nullity to insert the testing clause *ex post facto*, whether a blank be left for it or not. I answered, That when the testing clause is filled up in the body of the writ, the whole writ is authenticated by the party's subscription placed regularly under the testing clause. If such a writ be challenged, it is not sufficient barely to allege, that when the party's subscription was adhibited, a blank was left in which the testing clause was afterwards inserted. This of itself is not a nullity; and therefore to make the objection relevant, it is necessary also to allege, that the testing clause was inserted without the authority of the granter. This allegation is undoubtedly relevant, and, if verified, the deed will be annulled. But where the testing clause is not inserted in the body of the deed, but at the side or below the subscription of the party, this is evidence from occular inspection that the deed was subscribed by the party without a testing clause. The deed is null from ocular inspection; and to obviate that nullity, it must be incumbent upon the user of the deed to prove, that the testing clause was adjected to the deed by the authority of the party. In short, where the testing clause is in the body of the writ, the deed is formal and effectual in law, unless it be disproved. But where the testing clause is put under the subscription of the party, the deed is informal,

because it affords no evidence that the granter gave authority for adding the testing clause; and therefore this fact must be proved, without which the deed is not effectual in law. No. 175.

"It carried by the narrowest plurality to repel the objection."

Sel. Dec. No. 62. *p.* 81.

1706. *March* 5. JEAN LOCKHART *against* DR. ARCHIBALD HAMILTON.

No. 176.
Vitiation of a writ, what effect it ought to have?

Margaret Pringle, *anno* 1717, executed a disposition of some tenements near the Bristo-port of Edinburgh, to Margaret Monteith her daughter, in liferent, and to William Hamilton, Margaret Monteith's eldest son in fee, and to his heirs and successors. This disposition contains procuratory and precept; and a sasine upon the precept was produced in process, bearing date 1st August 1717, in favour of Margaret in liferent, and her son William in fee.

William Hamilton the fiar having gone to the West Indies with the sasine in his pocket, and having died there without issue *anno* 1742, the succession devolved upon Thomas Hamilton his immediate younger brother, who finding Margaret Pringle's disposition without any sasine upon it, as far as appeared, made up titles as heir to his brother William by a general service, and made a gratuitous disposition of all his effects, including the subjects contained in Margaret Pringle's disposition, to his wife Jean Lockhart.

Thomas Hamilton having died in the year 1744, also without issue, the succession again opened to Dr. Archibald Hamilton the next brother; and the sasine in favours of William being now discovered, he made up titles accordingly as his heir, passing by Thomas, who, as said above, was never infeft.

Jean Lockhart unwilling to give up her right, inquired into the history of William's sasine, which was her only obstacle. Examining Margaret Pringle's disposition in the record, a notandum was discovered on the back of it in the following words: "1st March 1717, Betwixt one and two afternoon, sasine given by Walter Ferrier within designed, bailie in that part, to Margaret Monteith in liferent, and William Hamilton in fee. Witnesses John Reid and William Cleland writers in Edinburgh, James Cunningham freeman weaver in Portsburgh, and John Couts stocking-weaver in Bristo. Whereupon instruments taken in the hands of William Chalmer notary-public." As this notandum gave satisfactory evidence that a sasine was taken on the 1st of March, Jean Lockhart's doer upon searching the record, found the sasine above-mentioned, dated 1st of August 1717, in every article agreeable to the said notandum, the date only excepted. And as there was some slight appearance of a manufacture upon the word *August* in the sasine, it was conjectured, that this was the same sasine which was *de facto* taken on the 1st of March, and that being neglected to be recorded within the 60 days, the notary, to cover his own neglect, had falsified the date, by turning *March* into *August*, in order to qualify it for being recorded.