No. 87. to creditors to annul all bonds of that stile; and the adjection of these words, *writer hereof*, to the subscription, is fully equivalent to the adjection of the same words at the end of the bond; *3tio*, The writer is even designed in the body as a witness, and then as writer he is designed at his subscription; which answers the very letter of the law, as the pursuers would interprete it. And it appears, by inspection, that the adjection to the subscription has been at the time of subscribing.

"The Lords repelled the nullity, and sustained the testament."

Dalrymple, No. 158. p. 221.

1761. *June* 16.

ALEXANDER DUKE of GORDON and his CURATORS, *against* JAMES GORDON of Cocklarachie.

No. 88.
Charter, wanting the name and designation of the writer, null.

In the year 1617, George Marquis of Huntly disponed his three quarters of the davoch lands of Cocklarachie to George Gordon, redeemable for the sum of 6,000 merks, and to be holden of the Marquis for payment of £26 Scots yearly, during not redemption.

In the year 1642, George Gordon, the grandson of the original wadsetter, having advanced the further sum of 3,000 merks to the Marquis, the parties entered into a new contract referring to the wadset 1617, and declaring this sum of 3,000 merks to be an eik to the original wadset sum, so as that it should not be lawful to redeem the lands without payment or consignation of the whole sum of 9,000 merks.

In the year 1645, George Gordon entered into a second marriage with Elizabeth Fraser; and, by his contract of marriage, he became bound to infeft his wife in life-rent, and the eldest son to be procreated between them, heritably and irredeemably, in the said three quarters of the davoch lands of Cocklarachie; as also in the other fourth quarter of said lands, which George Gordon held of the Crown. This contract contained a precept, but no procuratory; and it did not appear that any infeftment had followed upon it.

In the year 1668, George then Marquis of Huntly, with consent of his curators, granted a feu-charter to John Gordon then of Cocklarachie, whereby, upon a recital of the foresaid marriage-contract 1645, and of the said John Gordon's being the eldest son of the said marriage, and for certain other good causes and considerations, he not only ratified and confirmed the foresaid marriage-contract, with the obligation therein contained in favour of the said John Gordon, the eldest son and heir-male of the said marriage, but of new gave, granted, disponed, and confirmed to the said John Gordon, his heirs, &c. heritably and irredeemably, not only the three-fourths of the lands of Cocklarachie, but also the other fourth, to be holden of him the said Marquis, and his heirs, &c. in feu and heritage for ever,

for payment of a feu-duty of £26 Scots, "nomine feudifirmæ tantum, pro omni alio onere, exactione, quæstione, demanda, seu servitio seculari." No. 88.

Upon the precept of sasine contained in this charter, John Gordon was duly infeft.

This charter does not mention the name or designation of the writer.

In the year 1687, the Marquis, then become Duke of Gordon, granted to the said John Gordon a new charter of the three quarters of the davoch lands of Cocklarachie, with a *novodamus*, to be held of the Duke for payment of 100 merks of feu-duty, and redeemable upon payment or consignation of the sum of 6,000 merks at the first term of Whitsunday, which should happen three years after the death of the longest liver of the said John Gordon and Jean Guthrie his wife; and, upon payment thereof, he is bound to redispone the said lands to the said Duke, with all the securities thereof.

The *quæquidem* of this charter 1687 refers to a procuratory of resignation said to have been granted by the said John Gordon in favour of himself, his heirs, &c. as a warrant for granting the charter: But the date of this procuratory is blank in the charter. The procuratory itself, or instrument of resignation following thereon, did not appear; nor was there any evidence offered that any such ever existed.

It may also be observed, that this charter is without any date, excepting, that there is a docquet subjoined, dated in the 1700, declaring, that, to the best of the Duke's remembrance, the charter was signed in Edinburgh Castle in July 1687.

This charter also bears to be granted "pro certis pecuniarum summis nobis per dictum Johannem Gordon persolutis."

In the year 1721, upon the death of John Gordon, Alexander Duke of Gordon granted a precept of *clare constat* to James Gordon his son, proceeding on a recital, "Quia per authentica instrumenta coram nobis producta, et per nos aliosque nostro nomine visa, lecta, et considerata, clare constat, et est notum, Quod quondam Johannes Gordon de Cocklarachie, pater prædilecti nostri Jacobi Gordon nunc de Cocklarachie, obiit ultimo vestitus et sasitus ut de feodo, in totis et integris illis tribus quarteriis seu tribus, et quatuor partibus davotæ terrarum de Cocklarachie, &c.; Redeemabilibus tamen dict. terris, molendinis, et aliis supra-ment. et sub reversione, per nos, nostrosque hæredes, assignatos, solutione vel consignatione dict. quondam Jacobo Gordon, suisque hæredibus et successoribus, 6,000 mercarum monetæ Scotiæ."

Upon this precept no infeftment followed; but James Gordon had been in the constant use of paying the yearly feu-duty of 100 merks; and having occasion to depone at taking up a judicial rental of the estate of Gordon in the year 1729, he produced this precept of *clare*, and acknowleged, that he possessed three quarters of the davoch lands of Cocklarachie in virtue of that precept, redeemable for 100 merks.

The Duke of Gordon brought a process against James Gordon, to have it found and declared, that the said three-fourths of the davoch lands of Cocklarachie were redeemable by him upon payment or consignation of the sum of 6,000 merks.

No. 88.

The defender insisted, That he had acquired an irredeemable title to the lands, as the charter 1668 is null, because it does not bear the name nor designation of the writer; and therefore, in terms of the act 179, Parl. 1593, "cannot make any faith in judgment, nor outwith." That though by the indulgence of the Court, parties are usually allowed to supply the designation of the writer where it is omitted, by condescending upon and astructing the same; yet that is the furthest length practice has ever gone in relaxing the express regulation of the law in that particular: But the defender does not in the present case so much as pretend to condescend either upon the name or designation of the writer, far less to bring a proof of it, which has always been found necessary: That a case could hardly occur, in which a legal objection ought to be more favourably listened to; for it is plain, that the drawer of this charter knew nothing of the vassal's redeemable right, and that the contract 1645, which had wrongously set forth his titles as irredeemable, was all that was laid before him, and which had been made a handle of imposing upon a minor and his curators, in order to obtain a deed by which the minor was so apparently and enormly hurt, by giving an irredeemable charter to the heir of his vassal, of lands which his predecessor possessed under reversion, for a sum not above half the value.

2do, The right was never properly vested in the person of John Gordon by the charter 1668, even supposing it had not been liable to a nullity; for the contract of marriage 1645 could be no warrant to the superior for granting that charter, as it contains no procuratory upon which resignation could be made in his hands. Neither can it be supposed to have been given in place of a *clare constat*; for there was no infeftment to which John Gordon, the son of the second marriage, could pretend to connect as heir. A precept of *clare* could only be granted to his elder brother of the first marriage. The only way by which John Gordon could make up his titles to these lands was, by adjudging them upon the contract, which it does not appear he ever did.

3tio, But supposing the charter 1668, with the infeftment thereon, to have been effectual to vest the irredeemable property of these lands in Cocklarachie, that charter was thereafter departed from; 1*mo*, By the late Cocklarachie himself, when he granted the procuratory of resignation, which was the warrant of the charter 1687, and accepted of the charter following upon that procuratory; 2*do*, By his son the defender, when he also accepted of the above-mentioned precept of *clare* 1721; and, in the *last* place, by their having paid 100 merks of feu-duty in terms of the said charter, which was a clear approbation of this title, and is full evidence that their possession has been held under the charter 1687, and by no means under the charter 1668.

Pleaded for the defender Cocklarachie: The designation of the writer is not *de essentialibus* of the writing itself; but is required by the statute for a particular purpose, viz. as a means to facilitate the improbation of the deed, if liable to suspicion as false; so that when, from other concurring circumstances, there lies no suspi-

cion of the reality of the deed, or that it is *aliunde* astructed, there is not even occasion to condescend on the name of the writer. The authenticity of the charter 1668 is proved by the consent and subscriptions of the Marquis's curators, by the infeftment upon this charter duly entered in the public registers, and which has stood there so long unchallenged, and last of all, by the charter 1687, which, though unexceptionable on many other accounts, is the strongest acknowledgment of Cocklarachie's right. For Cocklarachie could grant no procuratory of resignation without being infeft. But he had no infeftment but that upon the charter 1668; and as the Marquis acknowledges, by the charter 1687, that he took a procuratory of resignation from him, it clearly imports an acknowledgment of the charter 1668 as a true deed. No. 88.

2*do*, It is not to be supposed, that without some bargain or transaction betwixt the family of Gordon and the predecessor of the defender, the Marquis and his curators would have given up the right of redemption which he had upon these lands, and have granted an irredeemable right of the same, in consequence of a settlement in a contract of marriage to which they were no parties, at least upon the face of the deed. It is probable that this bargain was entered into as early as the contract 1645, which therefore is ratified in the charter 1668; and it cannot otherwise be conceived, that Cocklarachie would, in that contract, have bound himself as he did to infeft his second wife, and the eldest son of that marriage, in the lands irredeemably, if he had not then had assurances from the family, that they were to consent to the alteration of the succession, and also to the alteration of the nature of the right. It ought also to be observed, that the charter 1668 is entirely a new grant of the lands, proceeding upon a recital of the contract of marriage 1645, which contract the Marquis, for certain good causes and considerations, ratifies, approves, and confirms, and then *de novo dat*, *concedit*, *disponit*, &c.; and this accounts for not reciting the former rights granted to the defender's predecessors in the charter, and why no mention is made of a procuratory of resignation, which it seems the parties did not think necessary, as they were making altogether a new bargain, and not renewing an old right.

3*tio*, There is no proper evidence that the charter 1668 was ever departed from or abandoned; for the procuratory of resignation, which is supposed to be the warrant of the charter 1687, is not produced; neither is there any evidence that it ever did exist, nor does it appear that any instrument of resignation was taken thereupon: And therefore the defender has the greatest reason to deny that ever any procuratory of such a tenor as could warrant this charter did exist; and as no infeftment was ever expede upon the charter, it is clear that Cocklarachie never accepted of it, or made it his title to those lands.

The same answer also applies to the precept of clare 1721, which the defender never did accept of, but got it upon receipt and obligation to make it forthcoming to the Duke, and never took infeftment upon it, or used it in any shape as his title to these lands.

It is indeed true, the defender's father paid the feu duty of 100 merks, and the defender, since his death, continued to do the same, which he was led to do

No. 88. by the evidence he saw that his father had done it. Whether the sight of the charter 1687, and not being apprised of the objection to which it lay open, or whether his father might not have chosen to pay this in order to keep well with his noble superior, the defender will not pretend to say; but that he was wronged, is obvious; and this undue exaction for time past, will not oblige him to continue it in time coming; nor will it fix upon him such an acceptance of the charter 1687 and precept 1721, as to overthrow all his former title deeds to these lands.

Observed from the bench, *non agebatur* by the charter 1668 to give any new right, and though a *Novodamus* is thrown in; yet it is qualified by a *salvo jure nostra*, which is a contradiction.

The Court was of opinion the charter 1668 was null.

"The Lords found the lands redeemable for 6000 merks."

Act. *Ferguson.* Alt. *Burnet, Lockhart.* Reporter, *Lord Coalston.*

J. M. *Fac. Coll. No. 37. p. 72.*

*** In the case Ewing against Semple, 20th July, 1739, No. 11. p. 1352. *voce* BASTARD, it was objected to a bond, that the writer was not designed before inserting the testing clause, and that he was designed only by adding to the name of one of the witnesses, "writer hereof." The Lords repelled the objection.

*** In the case Scot against Dalrymple, 17th January, 1781, No. 212. p. 8838, it was objected to a disposition, that the writer's designation was erroneous, in so far as he was termed "writer to the signet," instead of "clerk to A. B. writer to the signet." The Lords repelled the objection.

SECT. IV.

Instrumentary Witnesses.

1583. *April.* LAIRD GORMOCK *against* The LADY.

No. 89. Found that a witness could not at

There was a decreet-arbitral given betwixt the Laird of Gormock and the Lady sought to be registered. It was alleged that it ought not to be registered, nor