

No. 148. Answered, The act of Parliament 1681 requires indeed that witnesses be designed, but determines nothing what designation shall be sufficient, and what not, and "indweller in Edinburgh" is as good as writer, and it has never been controverted; and if this were sustained as a nullity, it would reverse and endanger hundreds of bonds and other securities. It is true, if they offer to improve the subscription as false, then they may be put to condescend if there be more of the same name in Edinburgh, to design which of them it is; but it can never import a nullity; see 7th February, 1672, Stuart of Kettleston against Kirkhill, No. 564. p. 12654. and Sir George M'Kenzie's Observes on the foresaid acts of Parliament. The Lords repelled it as a nullity, but thought if the pursuer insisted for it, the defender would be obliged to condescend if the said Rollo was dead or alive, and to distinguish him so as to be known from others of that name, seeing the party's subscription was not denied, but was only suspected to be antedated, to prejudice the husband of his *jus mariti*.

Thereafter, Mr. Grant insisting on the improbation of the disposition *quoad datam*, the Lords ordained Keir to condescend and design this Rollo, the witness, more specially than he is by the writ.

Fountainhall, v. 2. p. 20.

1706. February 15.

ALEXANDER DUNCAN of Strathmartin, *against* JOHN SCRIMZEOUR of Kirkcoun.

No. 149.

A bond run thus, "I have subscribed these presents, written by George Henderson at Auchterhouse the 11th December, &c."

The place named was held to supply the designation of the writer, as well as to denote *where* signed.

Wintoun of Strathmartin having granted bond for 600 merks to William Nicol, hammerman in Lundie, docqueted thus, "I have subscribed thir presents, written by George Henderson at Auchterhouse this eleventh day of December 1685 years, before thir witnesses, Abraham Nicol, hammerman in Auchterhouse, Patrick Henderson, eldest lawful son to the said George Henderson writer hereof, and the said George Henderson." Alexander Duncan pursued reduction thereof against John Scrimzeour upon this ground, That the bond is null as wanting the writer's designation; and one of the witnesses is only designed, Patrick being designed by his father who is not designed.

Alleged for the defender: These words, "At Auchterhouse" are rather to be understood as the designation of the writer, than of the place of subscribing, seeing the not mentioning the place is no nullity, and interpretation is so to be made, *ut actus potius valeat, quam pereat*; unless we say that a country clerk did think it a piece of eloquence to express the place of subscription and his own designation in one word; *2do*, Patrick Henderson is designed eldest lawful son to George Henderson the writer, and the said George is designed father to Patrick; and both the Hendersons lived at Auchterhouse.

Answered for the pursuer: The writer cannot be understood as designed by the place of subscribing, because the bond bears to be written by George Henderson *at*, and not *in* Auchterhouse; and then the mention of the place of subscribing

is essential to a writ, and reckoned inter substantialia, Stair, Instit. Lib. 4. Tit. 42. § 19. as the proper mean to convel a false writ by proving alibi; *2do*, A witness in a bond granted by Mr. James Carnegie as principal, and the Earl of Southesk. as cautioner to two of the clerks of Session, being designed James M'Culloch inserter of the witnesses names, the writ was found null for want of a sufficient designation, although the person might be thereby more easily known and distinguished than by these words, at such a place.

The Lords found the designation snifficient, and repelled the nullity.

Forbe, p. 103.

* * * Fountainhall reports this case :

1706. *February 20.*—In the ranking of the creditors of Winton of Strathmartin, betwixt Alexander Duncan and John Scrimzeour of Kirkton, it was objected against a bond of 600 merks, That it was intrinsically null, because neither the writer nor witnesses were specially designed, the docquet running thus, “ In witness whereof, I have subscribed thir presents, written by Alexander Henderson at Auchterhouse the 11th of December 1685, before thir witnesses, Abraham Nicoll, hammerman in Auchterhouse, Patrick Henderson, eldest lawful son to the said George Henderson, writer hereof, and the said George Henderson ;” so that the writer has no designation, nor his son, who is only designed by his father, and he is no way designed. Answered, Henderson the writer is designed as living at Auchterhouse, and it is both intended for his designation, and of the place at which it was subscribed, the country writer thinking it a great piece of laconic eloquence in one word to express both the place of subscription and his own designation, and therefore the clause is conceived to bear both without any incongruity ; and it is notour that the bond is Henderson’s hand-writing, and that he lived at Auchterhouse ; and this being yielded, the witnesses are sufficiently designed. Replied, If this were intended for designing the writer, it would not have said at Auchterhouse, but *in* Auchterhouse. Next, the locus contractus is very essential to all writs. Vid. Bartol. ad L. 6. § 6. D. De Edendo, and Stair, Lib. 4. Tit. 42. § 19. and this bond being posterior to the act of Parliament 1681, the want of a designation is not suppliable ; and to design the father by the son, and the son again by the father, is like the Colziar’s circle. He believed as the Church believed ; and being asked what the Church believed, he replied, even as he believed. The Lords thought it was but an error, and seeing interpretation must be taken, ut actus valeat potius quam pereat ; therefore the Lords repelled the nullity, and sustained the bond.

Fountainhall, v. 2. p. 329.