No 14. the writ good; and it is hard for so small an omission to lose his right; and who knows but these words have been added by another than the witness, it having lain in the process a considerable time, and never quarrelled. The Lords found the assignation null, except as to L. 100 Scots. 2*do*, *Alleged*, The husband is consenter to his wife's deed, and therefore his heir can never quarrel it upon any nullity. *Answered*, The husband's consent was required singly *ad integrandam personam mulieris*, to capacitate her to dispone; he obliges himself to nothing, he assigns nothing, neither does he convey any thing, but merely consents to her deed; the effect whereof is, that the deed shall be null for the want of his authority; but if it be null upon another head, he is no way obliged to warrant that; for *hoc non agebatur inter partes*. A minor dispones with his curator's consent; if the curator afterwards succeed as heir to the minor, his consent as curator will not debar him from quarrelling the deed. The Lords also repelled this allegeance. Against which two interlocutors, Auchinreoch protested, and appealed. *See* Appendix.

Fol. Dic. v. 1. *p.* 463. *Fountainhall, v.* 2. *p.* 572.

1710. *July* 20.

No 15. James Sclanders, Tenant in Newton *against* George Hill, Bailie in Queensferry.

An adjudication proceeding on an assignation to a bond of L. 200 Scots restricted to L. 100, with annualrent from the date of the decree, in respect the assignation was subscribed by two notaries and only three witnesses for the cedent who could not write; was brought in *pari passu*, with another adjudication without year and day thereof. See No 12. *supra*.

John Sands, girdlesmith in Culross, being debtor to Margaret Robertson and Bailie George Hill in Queensferry, and likewise to James Sclanders in Bothkenner, they adjudge his acres lying there; and in a competition for the mails and duties, it is *objected* against James's assignation from his father, that it was null by the 80th act 1579, because, being a matter of importance which requires two notaries and four witnesses, it is only subscribed by two notaries and three witnesses; and by an act of sederunt, the Lords have declared all writs above L. 100 Scots to be deeds of importance. *Answered* by Sclanders, He acknowledges his assignation cannot sustain for the whole sum assigned, but he was willing to restrict it to L. 100 Scots, where one notary and two witnesses are in law sufficient; and this was never refused in the case of bonds, though containing never so great a sum; and there is the same parity of reason to find it in the great conveyances and transmissions of writs that there is in bonds themselves; and the rule upon which this principle of law is founded, is that *utile per inutile non vitiatur*, and the same holds likewise in nuncupative testaments and legacies, that they are good in so far as extends to L. 100 Scots, though granted for more. *Replied*, He opponed the act of Parliment, declaring them *simpliciter* null, without allowing any restriction, as was found 31st January 1623, Fotheringham and Scrimgeour *contra* Watson, *voce* Writ; and 13th November same year, No 8. p. 6839.; and there was a great difference betwixt bonds and assignations thereto; for though the cur-

rent of decisions hath allowed bonds above L. 100 Scots to subsist *quoad* that sum, yet it was never sustained in assignations, which is *jus individuum*, whereas a sum in a bond is divisible; and if the assignation be null *quoad* the excresce above L. 100, then that returns to the cedent, who may exact it, which wholly evacuates the act of Parliament; and as to nuncupative testaments, which have extraordinary indulgences, it is a bad inference to argue from them to acts *inter vivos*. Next, if this were proponed by the debtor against his own bond, to evade a just debt, it might be thought unfavourable; but this is a nullity proponed by a co-creditor on a positive act of Parliament, for supporting his debt, which must be confessed to be in a much better case than the common debtor. And Stair has a decision to this purpose, 21st June 1681, Couts *contra* Strachan, No 12. p. 6842. See 19th December 1629, Elliot *contra* Morton, No 10. p. 6840. THE LORDS by plurality found the assignation good for L. 100 Scots; and it being stated from what time this was to be computed and applied, the LORDS drew it back to the date of the adjudication, and made it bear annualrent *ab eo tempore*, and rejected both the extremes of the date of the bond and of the interlocutor, and pitched on the middle period betwixt the two. No 15.

Fol. Dic. v. 1. *p.* 463. *Fountainhall, v.* 2. *p.* 589.

*** Forbes reports the same case.

IN a competition for mails and duties of John Sands's lands in Culross, betwixt James Sclanders, and Bailie George Hill, adjudgers,

Alleged for Bailie Hill; Sclanders's adjudication is null, in regard it proceeds on an assignation to a bond of L. 200 Scots (which in the construction of law is a writ of importance) subscribed only by two notaries and three witnesses, contrary to the act 80th, Parl. 1579, that requires writs of importance to be subscribed by two notaries and four witnesses, if the party cannot write.

Replied for Sclanders; There is no positive rule in law determining what are writs of importance, but it is left *in arbitrio Judicis*; and L. 200 is not a sum of great import. 2*do*, He is content to restrict his adjudication to a security for L. 100, and to come in for that *pari passu* with Hill, albeit his adjudication be not within year and day of Sclanders's: And in many cases, the Lords sustained bonds and legacies for sums exceeding L. 100, though wanting the solemnities of law, if restricted to that sum, December 19. 1629, Elliot *contra* Morton, No 10. p. 6840; and nuncupative testaments beyond L. 100 are allowed to subsist for that sum.

Duplied for Bailie Hill; The Lords by their uniform practice have determined writs for sums exceeding L. 100 to be writs of importance; and often found such to be *simpliciter* null, when disconform to the act 1579, January 31. 1623, Fotheringham *contra* Watson, *voce* WRIT; Marshall *contra*

No 15. Marshall, No 8. p. 6839.; Couts *contra* Straiton, No 12. p. 6842. The Lords never sustained informal obligements for the restricted sum of L. 100, except either when the greater sum was payable at different terms, which made it look like different obligements; or when the share of each of several co-obligants not bound jointly and severally, was under L. 100; or in the like circumstantiate cases. But however hard it might be thought to annul a bond altogether in favours of a covetous debtor upon such a pretence, there is no such hardship by annulling *simpliciter* an informal assignation, because, the debt standing secure by the bond, a right thereto may be again made up, when this assignation is out of doors. Nay farther, a bond for a divisible sum may stand good for a part, and be null as to the rest; whereas the creditor's right by the assignation, being *jus individuum*, must be effectual for the whole sum assigned, or not at all; and restricting the assignation to a part of the sum, could not hinder the cedent to renew it *quoad* the superplus, or to do diligence for it in his own name. Albeit a nuncupative testament for more than L. 100 be sustained for that sum, no argument can be drawn from thence in favours of conveyances *inter vivos*; because, law indulgeth many defects in testaments, that the last will of dying persons may have effect; as a testator who cannot write is allowed to subscribe by a notary and two witnesses, &c.

The Lords sustained the assignation granted to James Sclanders with the adjudication following thereon, in so far as extends to the sum of L. 100 with annualrent thereof from the date of the decreet, and allowed both the adjudgers to come *in pari passu*.

Forbes, p. 427.

SECT. III.

Testament, where the Executor is a subscribing witness.—Retour.—Verbal Legacy above L. 100.

No 16.
A testament, in which a person nominated executor, was subscribed by him as witness. The Lords reduced it *quoad* the nomination, but sustained it *pro reliqua parte*.

1613. *July* 1.

The Nearest of Kin of Umquhile Marion Crichton, Lady Inverleith, *against* Bishop of Glasgow.

In an action of reduction pursued by the nearest of kin of umquhile Marion Crichton, Lady Inverleith *contra* the Bishop of Glasgow, and remanent Executors, for reduction of the Lady's testament, the Lords assoilzied from the first reason, which was founded upon the alleged fraud used by Thomas Young, in making the Lady give command to the notary to subscribe the said testa-