

1712. July 22.

ALEXANDER MURRAY of Broughton *against* The LADY SEMPLE.

In a competition for the arrears due to the deceased Lieutenant Colonel James Hamilton, betwixt Murray of Broughton and the Lady Semple, both pretending right thereto by assignations from the Lieutenant Colonel, the Lords found the assignation, to Broughton, bearing, to be written by Edward Dudgeon Gentleman, null; because the designation of the writer was not good.

Albeit it was alleged for Broughton: That the title of Gentleman is owned in several acts of Parliament regulating pains and fines by the quality and degree of the persons, being a character of distinction peculiar to such as are below the degree of barons or landed men, and above that of yeoman and tradesman: As among the Romans *spectabiles, clarissimi, superillustres*, were authorized distinctions of quality. Besides in England, and in Ireland, where the assignation was written, persons of fashion above the degree of merchants or tradesmen, and under that of knight, go under the title, addition, or designation of Esquires or Gentlemen, in the direction of letters, bills of exchange, &c. And writer and witnesses cannot be expected to be otherwise designed in writs, than they are commonly designed in the place where the writ is granted; *2do*, The Lords are in use to conjoin such general designations with the place where the writ is dated, so as to presume the same for the place of abode of the person so designed; and this assignation being written at Dublin in Ireland, must be understood written by Edward Dudgeon, Gentleman of Dublin in Ireland.

In respect it was answered: That not every adjection to a writer's name is in the construction of law a sufficient designation, but such only as doth, by taking off ambiguity or uncertainty, so fix and point-out the person designed, as he may be known and found, in case improbation or falsehood were proponed. But the designation of Gentleman, being assumed by every body at pleasure, doth in effect no more ascertain the person, than if he had been designed man or boy; Nor *2do*, Can the writer of this paper be presumed Gentleman in Dublin, where it was writ, Gentleman being no employment or character that connects with the place, as merchant or chirurgeon might do; *3tio*, Though there were no need of an addition or designation to writer or witnesses in a paper by the law of England or Ireland, yet this not bearing to be signed, sealed, and delivered, according to the form observed there, but being written after the Scottish form, with a consent to registration in the books of Council and Session in Scotland, in relation to a subject in Scotland, it must stand and fall according to the law of Scotland:

Forbes, p. 625.

* * * Forbes again reports this case:

1714. July 27.—In a competition for the arrears due to the deceased Colonel James Hamilton, betwixt Murray of Broughton, and the Lady Semple, both pre-

No. 155.

The appellation "Gentleman" not sustained as a designation of the writer of a paper in Dublin, written not after the Irish but the Scots form, with a consent to registration in the books of Council and Session in Scotland in relation to a debt there.

Decided contrary below.

No. 155. tending right thereto by assignments from the Lieutenant Colonel; the Lords, 22d July 1712, found the assignment to Broughton, bearing to be written by Edward Dudgeon Gentleman, null, because the designation of the writer was not good.

Murray of Broughton reclaimed by a petition upon the grounds formerly pleaded in his behalf, and in fortification thereof, added, *1mo*, That the act introducing necessity of designing writer and witnesses does not especially condescend what designations are necessary, but leaves the same *arbitrio judicis*; *2do*, In England and Ireland, when the designation was written, persons of fashion, betwixt the degree of merchants or tradesman, and that of knight, go under the designation of Esquires or Gentlemen; as appears by a certificate in process under the hands of John Foster, recorder of the city of Dublin, and one of the Justices of Peace of the said city; and Charles Campbell residenter in the said city, and Justice of Peace of the county of Louthmaith, in the kingdom of Ireland. The designation being thus good, conform to the custom of Ireland, when the writ was drawn, it ought to be sustained here; seeing it cannot be expected that writer or witnesses should design themselves otherwise than as they are commonly known *in loco contractus*, and where they dwell.

Answered for the Lady Semple, *1mo*, Though it be left to the judge to determine what is a sufficient designation, designations being so various and manifold, that it was impossible to design them all by a law; yet still a designation may be such a special characteristic as plainly discriminates the party from all others, and particularly from those of the same name, which the designation of Gentleman, assumed by every person at pleasure, does not; *2do*, It is denied that Gentleman is a sufficient designation in England or Ireland; for the contrary appears from the manner of designing persons in the returns of precepts by Sheriffs in Criminal Courts, and others, where designations are necessary by the laws of these places; yea, Broughton's allegiance is redargued by the certificate produced by himself, where, in the certifiers were so far from thinking the title of esquire or Gentleman sufficient, that they are distinguished by two special additions.

The Lords found the designation of Gentleman good, and therefore repelled the nullity, *Vide* 22d July 1712, *inter eosdem*, (*supra*) where the contrary was decided.

Forbes MS. p. 98.

* * * Fountainhall also reports this case:

1712. July 24.

This was a competition betwixt Murray of Broughton and the Lady Semple, as having right from Brigadier Richard Cunningham, her last husband, for Lieutenant-colonel Hamilton's arrears. She objected against Broughton's assignment that it was null, because one Edward Dudgeon was writer of it, and one of the witnesses, and it gave him no other designation than "Gentleman," which never ascertains the person, nor can satisfy the terms of the 5th act 1681, declaring all

writs null where the writer and witnesses are not designed. Answered for Broughton, The designation is sufficient, the writ being subscribed at Dublin in Ireland, so it is the same thing as if it had designed him Gentleman in Dublin, by connecting the place with the writ, which makes a full designation; and in Mr. Andrew Reid's case against Brown in 1700, the designations of " Merchant" and " Chirurgeon" were sustained to import Merchant and Chirurgeon in Dumfries, because the writ was signed there; and the nullity of a defective designation was repelled; *2do*, This was *in re militari* among soldiers; so suppose it were null by the common law, yet it may be dispensed with in privileged writs, which are regulated *jure gentium*; their unskilfulness in the statute laws of particular nations still continuing as *causam dans privilegio*. Replied, It is not every adjection to a name that in the construction of law makes a sufficient designation; but it must preclude all ambiguity and uncertainty, and so demonstrate the person as he may be known in case of improbation and falsehood. And on the 27th July 1710, Sir Thomas Kennedy *contra* Oswald, (Not reported.) Hary Nicol being designed writer of a bond without any farther, though he was known to be a writer in Edinburgh, yet the bond was found null. As for Reid's case, it *toto celo* differs; for there they were pointed out by their crafts and in corporations, whereby they will be found in the stent roll of the burgh; but " Gentleman" is a denomination which men wanting an employment take up at pleasure, and gives no fixed idea of the man; and this writ is a hermaphrodite mongrel, neither good by the law of England nor Scotland; not of England and Ireland, because it does not bear " signed, sealed; and delivered, in presence of the witnesses;" and it is as little valid by the law of Scotland, wanting the designation of the writer and witnesses, though it be drawn in the Scots form. And in a late case of one Arbutnot, a disposition signed in Ireland was found null, being neither in the English nor Scots form, but a mixture of both. And as to its being *inter milites* and about an officer's pay, our law knows no such privilege; and even the Roman law gave it only to them when they were *in expeditione*, as appears from Tit. Instit. De militari testam. and when dismissed, it ceased *post annum*;—but so it was, that Col. Hamilton was out of the service long before the assignation. Duplied, The title of a Gentleman is a character of distinction to such as are above the quality of merchants, but are not landed men; and the policy of all nations, acknowledges such distinctions; as among the Romans they had their *spectabiles*, *clarissimi*, *illustres*, et *super illustres*. So by our law we have the degrees of Noblemen, Barons, Gentlemen, Burgesses and Yeomen, as appears from the 170th act, Parl. 1593, in proportioning the pains of lawburrows, and the 38th act 1661 anent Justices of Peace fining for fornication, and the act 1701 against wrongous imprisonment; and in all these cases the custom of places is to be considered *mos regionis ubi actus frequentatur spectandus est*; et *ubi constat de persona rapienda est occasio ut actus valeat potius quam pereat*. The Lords noticed that the English law does not require the designing of the witnesses, but only that they make affidavit before a Judge on the verity of their subscription; and there-

No. 155. fore some moved that Mr. Dudgeon might, before answer, be examined, if he truly wrote this paper. But our statute in 1681, declaring the want of a designation un-suppliable, this was laid aside; and the writ being conceived in the Scots form, and yet disconform to our law, the Lords found "Gentleman" no sufficient designation, and so annulled the writ.

Fountainhall, v. 2. p. 759.

1714. November 9. HALDEN of Lanerk, *against* KER of Cavers.

No. 156.

A bond was found null, because one of the witnesses was designed "A. B. inserter of the sum," without any other precise distinction.

In a competition for mails and duties of the lands of Middlemaswalls, betwixt the said parties, Halden objected, That the bond which was the ground of Caver's adjudication, was null, one of the witnesses not being designed, and not suppliable after the act 1681, being dated *in anno* 1683.

Answered for Cavers, That the witnesses being thus insert in the bond, "Gilbert Elliot inserter of the sum, and Archibald Nielson servitor to the Laird of Cavers" and they both being servants to Cavers at the time, they were sufficiently deisgned, the above designation being applicable to both; so that Cavers did not impugn the act of Parliament, but only accommodate the words specially inserted to answer the design of the act, since there was really a designation in the writ. And this differs from cases preceding the act, where, when there was no designation at all, the Lords used to allow a condescence and proof; but here there is a designation, and the question only, how it shall be applied? Neither is it incongruous, where two are set down, to apply the predicate (which here is the word *servitor*) though in the singular, to both; *2do*, The letter (s) has only been an omission; so that it is not so much the supplying of an omitted condescension, as supplying the *vitium scriptoris*; or not so much the condescending upon the designation not to be found in the writ, as helping a literal escape.

Replied for Lanerk, That in the above clause Archibald Neilson is only designed, and Gilbert Elliot hath no designation, for "inserter of the sum" designs no person; and to apply the words "servitor to the Laird of Cavers" to Gilbert Elliot, is a plain force, and may be used almost in every case to elide the act of Parliament. And as to the application of a singular predicate to plural subjects, as that way of expression was rarely used, and only by poets, among the Romans, so it was never received in our language; nay, even in Latin it was never used in expressing the securities of men's rights, these not being to be shaken loose upon grammatical or rhetorical turns, much less upon poetical flights of expression. To the second, replied, that if *vitium scriptoris* could be held for an excuse, it would go by much too far; for though it may be sometimes sustained, where from other clauses in the same writ, it appears that the error is merely an escape in writing, but substantially there is no error; yet it is not so here, where there is nothing in the bond to persuade that Gilbert Elliot was Cavers's servant; but rather the