

expenses for his first journey, and granted summary warrant to apprehend and incarcerate the pursuer's agent till payment thereof were made. No. 131.

*Forbes, p. 170.*

1708. November 23.

WILLIAM SYM and ROBERT SCOT, *against* JOHN DONALDSON, Notary in BANFF.

William Cruickshanks, merchant in Banff, having disposed his whole estate to Jean Cruickshanks his daughter, Robert Scott writer in Edinburgh, assignee under trust to William Sym, heir to the said Jean Cruickshanks his mother, raised reduction and improbation of a disposition granted by the said William and Jean Cruickshanks, with consent of Patrick Sym her husband, to John Donaldson, upon this ground; that the disposition quarrelled bore only, that William Cruickshanks subscribed by two notaries and four witnesses, and the pursuer offered to improve the subscriptions of the witnesses (whereof the said William Sym was one) by their oaths. William Sym (who being an instrumentary witness, was allowed *cum nota* to depone, notwithstanding his interest in the cause) disowned his subscription. Another of the witnesses acknowledged his, but did not remember that he heard or saw William Cruickshanks give warrant to the notaries, or that he saw Patrick Sym or Jean Cruickshanks subscribe, or own that they had subscribed it, being ten or twelve years ago, but said he knew their subscriptions, and was sure he would not have subscribed witness, except in presence of the parties. A third witness was dead; and the fourth deponed, that it was like his subscription, though he could not be positive. The pursuer contended, That the disposition was not only null as to the subscription of William Cruickshanks, for want of four witnesses; but also was null *in toto*, in respect, *1mo*, The subscriptions of William Sym and Jean Cruickshanks, who subscribe as consenters, must fall as accessories with the subscriptions of William Cruickshanks the principal disponer; because, the whole four witnesses being indefinitely adhibited to the subscriptions of the parties and notaries, the controlling two of them weakens the faith of the other two; especially seeing the dead witness's deposition is only presumptively probative, and the other who owned his subscription is not positive, that he saw the parties subscribe, or heard them own their subscriptions, in the terms of the act of Parliament 1681, which annuls his testimony. *2do*, The disposition is null; because, not sidescribed by the parties at the juncture of the sheets; for albeit there was no positive law before the year 1696, requiring sidescription, *ita invaluit usus et consuetudo*, for preventing the cutting of a writ, and affixing new sheets of a different tenor to the last. Again, the act 1696, appointing every page to be signed as margins were before, implies, that sidescribing was necessary by our law. And by an act of sederunt July 18, 1691, all signet letters were ordained to be sidescribed, as was done by Clerks of Session in their extracts; consequently sidescribing is far more necessary to principal extrajudicial writs, that have no warrants upon record to check the tricks of unjust men.

No. 132.

An instrumentary witness was admitted *cum nota* to depone for improving a party's subscription, although he was to have been a gainer by annulling the writ.

No. 132.

Answered for the defender; *1mo*, The writ being unquestionably subscribed by Patrick Sym and Jean Cruickshanks, to whom William had formerly disposed the subject, it sufficiently denudes them, and excludes the pursuer who is heir to his mother. Nor is it of any moment, that they add the word *consent* to their name; seeing their signing their names simply would have sufficiently conveyed the subject; and the superfluous addition of the word *consent*, cannot prejudice the right *quia utile per inutile non vitiatur*. The act of Parliament 1681, requires only, That a witness should see the party subscribe, or hear him own his subscription, but not that a witness should after a long time distinctly remember that he saw the party subscribe, or heard him own his subscription; and one's owning himself to have been a witness, implies all that is required by the act of Parliament; *2do*, There was never any law for sidescribing before the act 1696, and the disposition quarrelled was anterior to the act 1696, the first law for sidescribing; and the Lords have frequently sustained writs not sidescribed as probative, where the last sheet duly subscribed, contained the substantial clauses relative to the preceding sheets; and the disposition quarrelled contains in the beginning of the last sheet, a coherent part of the clause concerning delivery of the writs, with the clause of registration, precept of sasine, and clause of reversion. The act 1696 points at what was ordinary, without declaring writs not sidescribed before to be null. It concerns also decreets, as well as contracts; and if the want of sidescribing were a nullity in all decreets, especially decreets of apprising; many hundred securities would blow up, it not having been customary to sidescribe such decreets, till a matter of thirty six years ago.

The Lords found the disposition in favours of Donaldson not probative as to the subscription of William Cruickshanks, but probative as to Jean Cruickshanks and her husband's subscriptions; and in respect the last sheet of the said disposition subscribed by them, contains the material things in the disposition, repelled the objection of its not being sidescribed by them

*Forbes, p. 281.*

1708. *December 31.*

JAMES SMITH, Factor to the Estate of Wintoun, *against* JOHN MATTHIE, Skipper in Prestonpans.

No. 133.

Menial servants sustained to prove the terms of a bargain, for the master's behoof.

In the process at the instance of James Smith *contra* John Matthie, for the price of a bargain of salt, bought by the defender from the pursuer, the Lords found the terms of the bargain proveable by the depositions of the Earl of Wintoun's own menial servants, for whose behoof the salt was sold; who were found as necessary witnesses in this case as merchants' servants and apprentices are for proving the sale and delivery of their master's goods: Albeit it was alleged for the defender, That domestic servants were not to be so trusted to depone in their master's con-