

served him *gratis* at this time, then he is *debitor beneficii* to him for it, and must give him an equivalent another time : and Moir was not his servant when he deponed.

The Lords, instead of his L.341, gave him L.200 Scots in full of all, which some thought a high modification ; yet Duff complained much, that they had put him to more than L.100 of expenses, in seeking his own by this process, for which he got nothing at all.

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1710. *December 23.* ELISABETH DICKSON and PATRICK HERIOT *against* ISOBEL LOGAN.

THE deceased Mr John Dickson, secretary to the Marquis of Twedale, in his contract of marriage, in 1707, with Isobel Logan, sister to Burncastle, dispones the fee of 7 or 8000 merks he had in Lord Yester's hands and in the African Company, to her, in case of no children, and the liferent only in case there were bairns. He dies in 1710 without children, whereon Elisabeth Dickson, and Patrick Heriot her husband for his interest, confirms herself as nearest of kin to the said Mr John, her brother, and pursues the debtors for payment. Isobel compares, and, producing her contract of marriage, craves to be preferred. Against which the executrix repeats a reduction on this reason, That it was null, because the 179th Act, 1593, declares, That all writs not mentioning the designation of the writer, by his dwelling-place, diocese, or other denomination, shall make no faith in judgment, nor outwith the same : and the 5th Act 1681 declares this defect shall not be suppliable by a condescendence thereafter. But so it is, this contract bears no more but "Written by the said Mr John Dickson ;" and though the word "said" be relative, yet in no part of the contract is he designed any more than simply by his name, which neither satisfies the letter nor meaning of the foresaid Acts.

ANSWERED,—The designation of parties and writers is only required in law *ad evitandam personarum incertitudinem*, and to discriminate two persons of the same name one from the other ; so that, by the Roman law, even *falsa demonstratio* did not vitiate *ubi constat de persona* ; names and designations being invented only to avoid confusion, dubiety, and uncertainty. Now here Mr John is sufficiently designed, by him and her being called future and affidate spouses ; for *correlata se mutuo ponunt et distinguunt* ; and in his assigning her to the bonds he is fully designed in them, which is all one as if it had been repeated in the contract ; for one may be known *per relationem ad aliud* ; and it is mere trifling and quibble, unless they say there was another Mr John Dickson married at the same time to another woman called Isobel Logan ; and, on their oath of calumny, they dare not refuse but he is the very man. Besides, the marriage having followed, and stood for some years, that, beyond all rational contradiction, explains and supplies all difficulties ; many things *favore matrimonii* being allowed, which law requires in other cases ; as minutes of contracts matrimonial are sustained though only signed by one notary, and though it be a minister instead of a notary : though the 133d Act 1584 only permits that in the case of testaments,—*Vid. 12th July 1631.* And all thir privileges are indulged, because marriage actually followed ; which supplied all defects.

REPLIED,—This is still to make up his designation by consequential infer-

ences; which is expressly prohibited by the Act 1681: and in a late case, betwixt *Walter Abernethy* and *Innes of Dunkinty*, where one was called Robert, his true name being John, the Lords would not allow them to alter it, but found it null. And this contract being exorbitant, giving all to the wife, to the prejudice of his sister, *rapienda est occasio* to rectify it; they being in the precise terms of a nullity introduced by the Acts of Parliament for the public good. And, in a competition betwixt the *Relict and Creditors of Mr Thomas Chalmers of Gogar*, the Lords found a marginal note, giving the wife the liferent of the house and yard, null, because it did bear that the witnesses to the writ were likewise witnesses to the marginal note; and yet that was in a contract of marriage; which are tied to the observation of legal solemnities as well as other writs: and the same cannot be supplied by equivalents or references to other deeds.

The Lords found him sufficiently designed, marriage and cohabitation having followed thereupon; and so repelled the nullity, and sustained the contract.

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1710. *December 30.* GEORGE HOME of WEDDERBURN *against* JOSEPH HOME of NYNEWELLS.

MR Joseph Home of Nynewells, holding some lands of George Home of Wedderburn, by a very strict reddendo, *viz.* £80 Scots of yearly feu-duty, under irritances in case of not punctual payment, suit and presence at his three head-courts, astriction to his mill of Hutton, &c. then follows this clause,—“*et prædictus Josephus Home serviet mihi et hæredibus meis tempore proclamationum regiarum, idque suis propriis expensis; sed in aliis meis privatis servitiis, impensis meis, cum ad id requiretur.*” In 1709, the Queen’s proclamation requiring all the heritors and freeholders to attend the criminal Lords of Justiciary, at their respective circuit courts, (from which they are now freed by a posterior British Act of Parliament;) Wedderburn did, in May that year, send a letter to Joseph Home of Nynewells, to attend him to Jedburgh, to wait on the Lords of Justiciary there, conform to the tenor of his charter; who did not obey, but went alongst with the shire of Berwick to the said circuit-court: for which contempt and disobedience Wedderburn sent his baron officer to cite Nynewells, his vassal, to compear at his baron-court to be held at Hutton; and, in regard of his absence, he fines him in £50 Scots for his contumacy. Nynewells, being charged on this decret, suspends on thir reasons: *1mo*, That it was in absence, and is null, the citation being unwarrantable at his house of Nynewells, which is not within Wedderburn’s barony nor jurisdiction, but holds of the Queen, and so is plainly *extra territorium*; and his baron-officer might as well come to Lothian, and cite any of his master’s vassals dwelling there; and so *extra territorium jus dicenti impune non paretur*. *2do*, The sentence being pronounced in his own court, he was both judge and party; *et nemo potest jus sibi dicere*. *3tio*, Nynewells being the Queen’s vassal as well as Wedderburn’s, and called out by the proclamation to attend the Sheriff, his duty to the supreme superior superseded and dissolved his obligation to Wedderburn; even as his marriage in ward-holding falls to the Queen, and not to any subaltern superior. Likeas, the demand was contrary to law; which requires all persons to come to courts