

1699. February 4. DONALDSON *against* SIMPSON and DONALDSON.

IN a concluded cause, Donaldson *contra* Simpson and Donaldson, being a pursuit for two legacies, one of 600 merks, and the other of 1000 merks, and a discharge being produced of both; it was *objected* against the 600 merks discharge, That it was null, because it was only signed by two notaries and three witnesses, contrary to the 80th act 1579. *Answered*, That act relates only to heritable rights and other writs of importance, and so will not comprehend this discharge. *Replied*, All writs, by our law, above L. 100 Scots are reputed of importance, and the said act has ever been extended to other papers of the same kind with such as are therein expressed. THE LORDS found it null for want of the fourth witness, but sustained it as sufficient to discharge L. 100. Then it was *objected* against the 1000 merks discharge, That it was likewise null, *imo*, Because there was no other instruction of the verity of the debt, but only the executors giving it up in the confirmed testament; which being done to save the quot and exhaust the inventory, is no acknowledgement of the justness of the debt; *2do*, It bears two places, at which the two notaries subscribe for him, viz. the one at Kelso, and the other at Smelholme; whereas they cannot be truly *co-notarii*, unless they be together, and get the mandate at one time, *unico actu et contextu*; and they have signed at several places to hold in the charge of the one notary's coming to the place of the other's residence. THE LORDS thought this last a nullity, but demurred upon the first.

*Fol. Dic. v. 1. p. 463. Fountainhall, v. 2. p. 41.*

1710. February 25.

ALEXANDER ANDERSON of Auchinreoch *against* JAMES COCK.

ALEXANDER ANDERSON of Auchinreoch gave in a protest for remeid of law and appeal against some interlocutors in a cause betwixt him and one James Cock. The case was, Janet Anderson, sister to the said Alexander, had a faculty in her contract of marriage with Cock, to dispose of 1600 merks in case of no bairns; and accordingly she assigns it to her brother; who insisting for payment, it was *objected*, her assignation was null, because, though subscribed by two notaries and four witnesses (in regard she could not write herself) one of the four was not witness to both the notaries' subscriptions; because he expressly adjects these restrictive words to his subscription, "witness to the co-notary's subscription;" which clearly imports he only saw one notary subscribe. *Answered*, The writ bears only one date and place, so it is impossible but he hath seen both the notaries sign; and if the letter S had been added to the word subscription, to put it in the plural number, it would have made

No 13.

A discharge signed by two notaries and only three witnesses, was sustained to the extent of L. 100 Scots.

No 14.

Two notaries subscribed a deed for a person who could not write. One of the witnesses added to his subscription "witness to the co-notary's subscription." The Lords found the writ null except as to L. 100 Scots.

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. *2do, Alleged,* The husband is consentor 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 disposes 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 allegiance. Against which two interlocutors, Auchinreoch protested, and appealed. See APPENDIX.

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

1710. July 20.

No 15.

An adjudication proceeding on an assignation to a bond of L. 200 Scots restricted to L. 100, with annual rent 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. *infra.*

JAMES SCLANDERS, Tenant in Newton against GEORGE HILL, Bailie in Queensferry.

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 opposed the act of Parliament, 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-