No. 118.

the granter's subscription were sustained, the careful provision made by acts of Parliament concerning blank writs, reduction of deeds *in lecto*, and fraudulent conveyances in prejudice of creditors, might easily be eluded.

Answered for the pursuer: Though in other places, as in England, a writ is not probative till the witnesses make *affidavit* upon the verity thereof; with us writs formally signed before witnesses are valid and receive present execution, until they be improved or reduced. Witnesses are only adhibited to ascertain the date and the verity of the parties' subscription, without being obliged to know the contents of the body of the paper; yea, oft-times that is industriously concealed from their view, as particularly in testaments. The defender cannot found any thing upon the act 1696, unless in the terms thereof he subsume and prove that the Lady's name was blank at the subscribing of the bond.

The Lords repelled the reason of reduction and extinction of the bond. Though some were of opinion that it could not be quarrelled so much upon the act of Parliament 1696, as upon this ground, That the witnesses, who saw nothing of the writ above the parties' subscription, could not be held as witnesses to a subscription; that being a relative word implying *aliquid super*, which they did not see.

Forbes, p. 225.

1708. *November* 23. SIM *against* DONALDSON.

No. 119.

A witness, after 10 or 12 years, acknowledged his subscription, but did not remember that he saw the parties subscribe, or heard them own that they had subscribed. He declared, That he knew their subscriptions, and was sure he would not have subscribed witness, except in the presence of the parties. This the Lords found probative, notwithstanding the act of Parl. 1681, requiring witnesses to see the parties subscribe, or acknowlege their subscriptions, which doth not import that a witness, after a tract of years, can distinctly remember the thing.

Forbes.

This case is No. 132. p. 16713. *voce* WITNESS.

1710. *February* 1. BAILLIE *against* LOCKHART.

No. 120.

It being objected by one of the parties in a minute of sale, That the writ was null, because one of the two instrumentary witnesses was infamous, *infamia juris*; in so far as there was a decree of improbation of a bond obtained against him some years before, finding him accessory to the forgery, and ordaining it to be

No. 120. cancelled; the Lords repelled the objection, and found it no nullity, the witness being chosen by mutual consent.

Fountainhall.

This case is no No. 37. p. 8433. *voce* LOCUS PŒNITENTIÆ.

1710. *July* 5. The LORD GRAY *against* SIR WILLIAM HOPE.

No. 121. Inhibition sustained, although the names and designations of the witnesses were added upon the margin of the execution, and signed by the messenger, and the writ bore not, that the witnesses were also witnesses to the marginal note.

In the reduction ex capite inhibitionis, at the instance of the Lord Gray against Sir William Hope, the defender objected, That the pursuer's inhibition was null, in respect the witnesses in the execution are not designed in the body of the writ, conform to act 5. Parl. 3. Ch. 2. 1681, but both their names and designations adjected in a marginal note; which, though signed by the messenger, cannot be reputed as in the body of the writ, unless attested by the subscription of witnesses, or that the writ bear, that the witnesses therein were also witnesses to the marginal note; seeing eadem est ratio totius, et partis, one part of the same writ canot be more privileged than another, but all of it must be verified by the same solemnities; and therefore, as the body of the writ would be null, if wanting the subscription of witnesses, the margin is null for that defect.

Alleged for the pursuer: In the stile of law, the body of a writ comprehends all except the subscription and solemnities. Was ever a margin refused at the registers to be taken into the body of the book? Are not the designation of witnesses even in probative writs frequently added upon the margin, and reckoned a fulfilling of the act 179. Parl. 13. James VI.; nec temere sunt mutandæ quæ semper habuere certam interpretationem, L. 23. D. De legibus; *2do*, There is a difference between witnesses to the subscription of parties, and witnesses to the acts of notaries and messengers; the former being witnesses to the parties' subscription only and not obliged to know the tenure of the writ, or that the facts therein mentioned are performed accordingly; whereas the latter are witnesses to facts required in law to be done by the messenger, which properly speaking are the execution. The act of Parliament 1681 requires indeed subscribing witnesses in instruments of notaries, and executions of messengers, and that these witnesses be designed in the body of the writ, but requires not such instruments or executions to have all the solemnities of probative writs, as the writer's designation, and the witnesses to the subscription of the messenger or notary: For were it necessary for witnesses to attest the verity of the messenger's subscription, executions would be docqueted as probative writs, viz. That the messenger, for the more versification, had subscribed the said execution before such witnesses; whereas the docquet of a messenger's execution runs thus, "And for the more versification of this my execution, I and the said witnesses have subscribed these presents." Which difference betwixt probative writs and executions, is owned by the statute