

1715, February 17.

SINCLAIR of Freswick *against* SIR JAMES SINCLAIR of Dunbeth.

A bond since 1681, of which the debtor had paid a part, was sustained, though the designation of one of the witnesses was wanting; which must be upon this footing, That the nullity mentioned in the act is not a total nullity to bar action, but only such as to furnish the defender with an exception, which he may renounce, either by express consent, or by consent implied in acts of homologation.

*Bruce.*

This case is No. 36. p. 5654. *vide* HOMOLOGATION.

No. 315.

1716. July.

HENDERSON *against* BALFOUR.

Four persons signed an order or commission to a shipmaster in Leith, for building a ship of 50 tons burden, to be delivered to them for their respective interests. The ship was accordingly built, and every one paid his moiety except Balfour, whose defence was, That the order or commission was null by the act 1681, as wanting witnesses. Answered, *1mo*, The defender does not pretend to deny his subscription, and that is sufficient to bind him to all the terms and conditions expressed in the writ; *2do*, The defender is prevented *personali exceptione* from pleading the nullity, who saw the pursuer laying out his stock and labour upon his account in pursuance of the commission, after which it would argue the greatest turpitude if he should refuse to perform his part of the bargain. The Lords found the defender liable. See APPENDIX.

*Fol. Dic. v. 2. p. 552.*

No. 316.

1730. February.

CHATTO *against* DAVIDSON.

A bill of exchange null as bearing annual rent and penalty, was found not homologated even by a posterior payment of part of the principal sum; for if it was not good as a bill, it could be considered as nothing but a note neither holograph nor having witnesses, which in our law cannot so much as furnish an action. See APPENDIX.

*Fol. Dic. v. 2. p. 554.*

No. 317.

\* \* The direct contrary was found February 1733, Brown *against* Irvine of Wiseby. See APPENDIX.