

\* \* \* D. Falconer reports this case :

1750. *January 5.*

Archibald Campbell, vintner in Inverary, disposed to Colin Campbell of Inverasragan his brother, a tack of a house in that town, for his relief of certain considerable debts, in which he had become bound for him.

Thomas Wallace, merchant in Glasgow, a creditor of Archibald's, adjudged the tack, and pursued mails and duties, in which he was opposed by Inverasragan on his disposition, who had since the adjudication made payment of a debt he was bound in.

Objected to the disposition : In so far as it is supported on the cautionary and subsequent payment, the bond, wherein the disponee was bound, is null ; being subscribed before Thomas Watson and Mr. Duncan Macpherson in Inverasragan, so that the first witness is not designed ; and so it was found, that a bond subscribed before A. and B. servitor to C. was null ; ——— 1714, Haldane against Ker of Cavers, Sect. 5. *h. t.*

Answered : The word " servitor " could only apply to one of the witnesses ; but in this case the reference to place, agreeable to grammar, applies to them both.

Objected, *2dly*, The septennial prescription of cautionary was run, and he not obliged to pay ; and if he did it voluntarily, could not, on that ground, support a right to compete with an onerous creditor, who had adjudged prior to the payments.

Answered : The cautioner was not obliged to use the prescription, for freeing himself from the obligation ; and having paid, had a good claim against the debtor, whose debt still subsisted ; and therefore may use any security he has from him against another creditor.

The Lords repelled the objections to the disposition.

See. The same parties, No. 48. p. 2805. *voce* COMPETITION.

Act. *J. Ferguson.*

Alt. *H. Home.*

*D. Falconer, No. 116. p. 133.*

1749. *December 6.* ISABEL EDMONSTON *against* EDMONSTON of Ednam.

James Edmonston of Ednam, being prohibited by the tailzie whereby he held his estate, to provide younger children without the consent of certain friends, entered with their consent into a contract of marriage ; and thereby provided the number of three or more to 20,000 merks to be divided by him at any time of his life, and obliged himself to aliment them till the division.

Isabel Edmonston pursued Andrew her eldest brother for her share ; to which he answered, the consent of the friends was not validly adhibited, for that the

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No. 134.

No. 135.

A writ was subscribed by different parties at different times, and a witness to all the subscriptions wrote his name be-

No. 135  
fore that of  
another who  
was only wit-  
ness to the  
first, so that  
it was said he  
had written  
before the  
later sub-  
scriptions,  
and it did not  
appear whe-  
ther they  
were made  
before him or  
not. The writ  
was sustain-  
ed.

contract had been signed by the parties, and two of the consenters, before three witnesses, one of whom was the writer, and signed betwixt the other two, and by two other consenters of an after date, at two several places, before, as the testing clause said, the said writer, and two several witnesses, who both subscribed, but not the writer; for with regard to his name, which appeared at the deed, it was evident it had been written of the first date, being above the subscription of a person who was only witness to the subscriptions then adhibited.

The Lord Ordinary, 22d November, "repelled the defence;" and the Lords refused a bill, and adhered.

Pet. H. Home.

D. Falconer, v. 2. p. 121.

1752. December 26.

The CREDITORS of GRAHAM of Mossknow, against ROBERT GRIERSON.

No. 136.  
If an instru-  
mentary wit-  
ness be de-  
signed bro-  
ther-german,  
when he is  
brother-in-  
law, the writ  
is null.

In the ranking of the creditors of Graham of Mossknow, there was an interest produced for Robert Grierson, viz. a bond for 900 merks, dated in 1683, granted by Robert Telfer as principal, and William Graham of Mossknow as cautioner, to Sir Robert Grierson; and a bond of corroboration thereof by the said William Graham to the said Sir Robert, dated in 1699, together with an adjudication of the estase of Mossknow on the said grounds of debt; to all which Robert Grierson had right by progress.

The other creditors objected to this interest, That the original bond is null in terms of the act 1681, in regard that John Agnew, one of the witnesses, is designed brother-german to William Irvine of Bonshaw; whereas he was not brother-german, but brother-in-law to him; and as this was a false designation, or one which did not agree to John Agnew, it could not be considered as a designation of the witness in terms of the act, or make the bond in a better case than if John Agnew had not been designed at all.

Answered for Robert Grierson, That the act 1681 was intended to prevent forgery, but not to cut down bonds, truly executed, upon niceties and criticisms; and seeing *constat de persona*, and that John Agnew is designed, the bond is not null in terms of the statute, though part of the designation does not agree to the witness: Had he only been designed brother to Bonshaw it would have been sufficient; and therefore the addition of brother-german, in place of brother-in-law, cannot annul the bond: *2dly*, The bond is homologated by the bond of corroboration.

Replied for the other creditors, That the homologation can have no effect in this case, because Graham of Mossknow was only cautioner in the original bond: The principal debtor did not join in the corroboration, and therefore the original bond still remained null with respect to him; and consequently the cautioner could not be bound.

"The Lords found the bond void and null."

For Robert Grierson, Hay. For the other creditors, Ja. Erskine, junior. Clerk, Marray.  
Fac. Coll. No. 55. p. 81.