that the year agreed upon was. from the 1st of November 1714 te the 1st of November 1715. No. 326.

"The Lords found Taynish liable only for the £5 10s, of principal, but not for interest."

Act. *Advocatuo.* Alt. *Ro. Campbell.* Clerk, *Justice.*

Fac. Coll. No. 227, *p.* 419.

1761. *February* 2. DAVID YOUNG *against* JAMES RITCHIE.

No. 327. Subscription of party after subscription of instrumentary witnesses, and not in their presence, not valid.

James Ritchie having pursued David Young for payment of a bond for £261 granted to him by David Young and Archibald Campbell, Young defended himself by bringing a reduction of the bond as forged *quoad* his subscription.

In these processes the instrumentary witnesses to the bond agreed in swearing, that when they signed witnesses to the bond, David Young was not present, neither was his subscription at the bond.

But as there were circumstances in the case which created a strong suspicion that Young had, at an after-period, though not before the instrumentary witnesses, signed the bond, Ritchie contended, That a proof of Young's subscription, though after the date of the bond, and not in presence of the instrumentary witnesses, would validate the bond. Young, on the other hand, contended, That the bond was null and void.

"The Lords found the bond not probative."

For Ritchie, *Lockhart, Advocatus et Garden.* For Young, *Ferguson, et Jo. Dalrymple.*

Clerk, *Justice.*

J. C. *Fac. Coll. No.* 13. *p.* 242.

1772. *July* 21.

THOMAS CRICHTON and ANDREW DOW *against* PETER SYME.

No. 328. Act 1681, C. 5. reqniring witnesses, applies to all deeds, whether of importance or not; the act relative to such distinction being 1579, C. 80.

A cautionary obligation, in

Upon the 6th October, 1763, James Gordon, as principal, with Thomas Crichton and John Paton, as cautioners, granted bond to the society of wrights in Paisley for £10 Sterling.

Upon the 4th April, 1766, Gordon and Peter Syme subscribed a missive letter to Crichton, binding themselves, conjunctly and severally, to free and relieve him of the said bond. And, of the same date, they granted a missive to Andrew Dow, narrating, that Paton, the other cautioner in the bond to the wrights, had come under that obligation only upon condition that Dow should become surety for one half of the sums therein contained; and that, as Dow had accordingly granted said security, therefore Gordon and Syme are taken bound, jointly and severally, to relieve Dow of the security granted to Paton, and of all damages and expenses.

No. 328. the form of a missive, not holograph of the granter, not mentioning the writer's name and designation, and without instrumentary witnesses, not sustained as a formal deed, or actionable; nor the defect suppliable by the granter's acknowledging the verity of his subscription.

Found competent, in the same action, though grounded singly upon the deed, and also relevant, to refer to the granter's oath, that he came under a verbal obligation to the like effect.

Crichton and Dow brought an action before the Bailies of Paisley, libelling upon the said two missives, and concluding, in respect they had paid the bond, that Syme should be decerned to pay back the sum to them.

In this action, Syme objected, that, in regard the two missives were neither holograph, nor signed before witnesses, and that they did not bear the names or designations of the writer and witnesses, in terms of the act 1681, they were void and null, as it could not be alleged they were granted *in re mercatoria*. The Bailies over-ruled this plea; and Syme having obtained a suspension, the cause was, by the Lord Ordinary, taken to report; when a separate point being agitated, namely, whether the missives libelled on, *esto* they were not formal of themselves, could be supplied by referring the verity of the subscription to the suspender's oath? Memorials were ordered by the Court, and the former decisions to be therein stated.

The scope of the chargers reasoning was to show, 1*mo*, That the use of writing, in obligations, is as evidence only; 2*do*, That the solemnities prescribed by statute being intended to prevent forgery, and to obtain evidence of the agreement of parties, do not apply to deeds above all suspicion of falsehood, and where there is therefore sufficiency of evidence. Hence it was subsumed, that the missives founded on, though they fall under the certification of the act 1681, as wanting witnesses, yet are not *ipso jure* null, but only lie under an exception, arising from that act, which may be elided by the acknowledgement of the suspender, more especially, as the certification of the act carries in itself a limitation; "And all such writs to be subscribed hereafter, wherein the writer and witnesses are not designed, shall be null, and are not suppliable by condescending on the writer, or the designation of the writer and witnesses." Had the Legislature meant to infer an absolute nullity from this defect, they had said enough, by declaring, that all such writs should be null; but, by adding what follows, "That such defect should not be suppliable by any after condescendence," it plainly appears what they aimed at. They show, that they meant only to correct a practice which was attended with the worst consequences; and they show, that, in so far only the writ was to be held as null, as not affording of itself sufficient evidence, without being supported in a way less liable to suspicion than an after condescendence was found to be.

Argued by the suspender: 1*mo*, By the statute 1681, it is declared, That only subscribing witnesses in writs to be subscribed by any party hereafter, shall be probative, and not the witnesses inserted not subscribing; and that all such writs to be subscribed hereafter, wherein the writer and witnesses are not designed, shall be null, and are not suppliable by condescending on the writer, or the designation of the writer and witnesses." The statute then goes on to declare, That, if a witness should subscribe, without either seeing the party subscribe, or hearing him own his subscription, he shall be punished, as accessory to forgery. It next proceeds to enact, "That no witness, but subscribing witnesses, shall be probative in instruments of sasine, &c. bonds, or other writs, which shall happen to be sub-

No. 328.

scribed in any time hereafter; and that none but subscribing witnesses shall be probative in executions of messengers," &c. And, *lastly*, the act declares, That, in all the said cases, the witnesses shall be designed in the body of the writ, instrument, or execution, *respectivé*, otherwise the same shall be null and void, and make no faith in judgment, or outwith."

If words can put any thing beyond a doubt, they surely must do it in this case. In one part of the act, writings which do not labour under one half of the irregularities which the present do, are declared to be null and void; in another place, they are declared to bear no faith in judgment, nor outwith the same; and, *lastly*, they are declared incapable of being supported by a condescendence on the names of the writer and witnesses.

The solemnities declared so indispensable by the acts of Parliament, are not introduced merely as checks upon forgery, which may be supplied by the party's admission that the subscription was truly his; they serve another very material purpose. A man, when he gets into company with another, may be induced, in the warmness of his heart, to say or do a hundred things, which, in his cooler moments, he will most heartily repent; but, if a little recollection be allowed him, or if he is awaked from his revery by the entrance of two or more people, called in to be witnesses of what is going on, he will be more upon his guard, and deliberate more coolly upon what he is doing. This, then, seems to have been one of the many wise views which had weight with our Legislature, and has had weight with the Legislature of almost every other country, in imposing certain solemnities upon the execution of writings.

When such were the beneficial views of the Legislature of this country in requiring solemnities, if it were in the power of the Court, it would not be fond of departing from them; but still less will the Court be disposed to make a stretch, to defeat the effect of an express act of Parliament, confirmed by such a train of decisions both ancient and modern; 21st November, 1704, Kilpatrick against Fergusson, No. 305. p. 17022.; 15th July, 1707, Abercrombie against Innes, No. 306. p. 17022; 4th January, 1710, Logie against Ferguson, No. 309. p. 17026. 19th January, 1710, Straiton against Robertson, No. 22. p. 8344.; 22d December 1710, Gordon against M'Intosh, No. 224. p. 16974.; 22d February, 1728, Strahan against Farquharson, No. 227. p. 16978.; June, 1730, Hume against Dickson, No. 127. p. 16898.; 26th December, 1752, The creditors of Graham against Grierson. No. 136. p. 16902.; M'Kenzie and Lawson against Park, decided in November, 1764, No. 47. p. 8449; the case of Littles, which occurred soon thereafter, touching the validity of a discharge for a legacy of £20 Scots, conceived in form of a missive, and regularly signed before two witnesses properly designed; but the designation of the writer was wanting, on which account it was found null, (Not reported;) and the case of Shedden against Sproul Crawford in the year 1768, No. 48. p. 8456.

2do, As to the next point, Whether these letters can be supported, by referring the verity of the subscription to the suspender's oath? This device, to disappoint

No. 328. the effect of the act 1681, is not new; it has been attempted in every case that has occurred for many years past, and always with bad success. 1*st*, In the case of Logie above-mentioned, in the year 1710; again, in the case of Gordon, above quoted, in the same year. The learned author of the Dictionary observes, when mentioning this decision, that, perhaps, the nullities introduced by the act 1681, may not in all cases amount to a *denegatio actionis*; but, where there are no witnesses at all, the objection amounts to a *denegatio actionis*, and which, therefore, does not admit of being supplied, as was found in the case of a missive letter wanting witnesses altogether*.

If there is an *ipso jure* nullity known in this country, this founded on the act 1681 is it. The distinction between deeds *ipso jure* null, and those which are only liable to exception, is, that, in the first, the nullity is intrinsic, and can be discovered without the necessity of a proof; therefore, the deed can be taken out of the way, without the necessity of a reduction. In the other, the objection depends either upon proof, or other extrinsic circumstance; therefore a reduction is necessary, and the deed cannot be got the better of *ope exceptionis*. If this distinction is just, which the suspender is advised it is, and is applied to the present case, there is here an *ipso jure* nullity; for the Court, upon comparing these letters with the act 1681, must at once see that they are null; and it has been the practice, in every one of the above cases, to plead the nullity by way of exception. But, in the case of other objections to deeds, such as the objection of bankruptcy on the acts 1621 and 1696, both a reduction and proof of the bankruptcy are necessary; and, therefore, they can only be said to be liable to an objection, and not *ipso jure* null.

"The Lords sustained the reasons of suspension."

Thereafter, the pursuers, in a petition, offered to prove by Syme's oath, that he promised to relieve them of the security which they had entered into with Gordon and Paton; aand particularly, that he made the said promise at Paisley, upon the 6th day of October, 1763, and 4th day of April, 1766, and sundry other times.

"The Lords remitted to the Ordinary on the bills to take the suspender's oath upon the above reference, and to proceed in the cause as he should see proper."

The suspender reclaimed, objecting, 1*st*, That the mean of proof now allowed, is incompetent in the present action; 2*dly*, That, though competent in this action, the mean of proof is irrelevant; and, 3*dly*, That, even if he were to depone upon the reference, that he had made the alleged promise; yet, as it was part of the agreement that the promise should be reduced into writing, which was never done in proper form, he has therefore *locus pœnitentiæ*, and in that view the reference proposed can have no effect.

"The Lords refused the petition, and found the respondents entitled to the expense of the answers."

Act. *Ilay Campbell et Alexander Law.* Alt. *Charles Hay.* Clerk, *Campbell.*

Fac. Coll. No. 19. *p.* 50.

* Compare No. 303. p. 17021. with No. 312. p. 17029. which are in the precise words of Lord Kames alluded to.