1787. *November* 17.

DAVID, ANDREW, and WILLIAM ARCHIBALDS, *against* MARION MARSHALL.

No. 143.
A witness was designed in a deed by a *familiar* appellation, and subscribed in his *proper* one. The deed found to be void.
1579. C. 80.
1681. C. 5.

John Archibald executed a deed, whereby he gave to Marion Marshall his wife, the liferent of a small tenement of land, yielding only £3. 13*s.* a-year.

After John Archibald's death, his widow, in virtue of the above-mentioned settlement, possessed the tenement for several years; when, at last, it was objected to as informal, by David, Andrew, and William Archibalds, the brothers of the deceased, on this ground, that although one of the witnesses had, in the testing clause, been designed Thomas Hillock, weaver in Alloa, the name of the witness actually subscribing was Thomas Hill.

Mrs. Marshall, the widow, offered to prove, that the person thus designed and subscribing was the same; that in his youth he had been commonly called Hillock, and had for some time adhibited his subscription in that manner; but that afterwards he had been accustomed to subscribe by the name of Hill. Several writings also were produced, to which he was either a party or a witness, where he had been designed Thomas Hillock *alias* Hill. And it was

Pleaded: The deed in question cannot be thought to fall under the enactment of 1579, because the parties and witnesses subscribing "have been denominated by their special dwelling-houses, and other evident tokens." The only objection, then, that can arise, is in consequence of the subsequent statute in 1681, by which indeed it is provided, that "only subscribing witnesses shall be probative, and not witnesses, not insert, subscribing; and that all writings in which the witnesses subscribing are not designed shall be null." Although, however, this last statute has been so rigidly enforced, as not to admit of the clearest evidence, not appearing from the face of the deed, that a person not mentioned in the body of it did actually subscribe as a witness; yet a different rule ought to be observed in a case like the present, where the person subscribing is actually, though somewhat inaccurately, designed, and where the only difference between the testing clause and the subscription is, that in the former the witness has been mentioned under a familiar appellation instead of a more proper one. If, as in the other deeds which the witness had occasion to subscribe, the words "*alias* Hill" had been added, no doubt could have arisen as to the validity of the deed; and surely the omission of these words cannot be deemed fatal to it.

Answered: The words of the act 1681, requiring that the witnesses subscribing should be those previously designed, are clearly applicable to the present case; for Thomas Hillock, who is designed, has not subscribed, and Thomas Hill, the witness subscribing, has not been designed. As to the proof here offered, it must be equally inadmissible, as it was found to be in a variety of former cases. Nor indeed could any latitude of this sort be permitted, without at once taking away the effect of an enactment, which, from the increasing number of forgeries, becomes every day more necessary.

No. 143. The Lords, after advising minutes of debate, " sustained the objection." A petition was afterwards presented for Mrs. Marshall, the widow, but it was refused.

Reporter, *Lord Braxfield.* Act. *Geo. Wallace.* Alt. *A. Abercromby.*
Clerk, *Sinclair.*

Fac. Coll. No. 4. p. 8.

1787. *November* 28.
DOUGLAS, HERON, and Company, *against* MRS. HELEN CLERK.

No. 144.
An error in the Christian name of a subscribing witness, otherwise properly designed in the deed, and in such a manner as sufficiently to distinguish him, held a nullity under the statute.

In a process of ranking of creditors, it was objected to a bond produced for the interest of Mrs. Clerk, that it bore to be signed in presence of a witness there designed, " Thomas Wars, servant to Thomas Nicolson, vintner in Edinburgh ;" whereas the name of the witness subscribing was " Francis Wars." And in support of the objection, it was

Pleaded: The statute of 1681, Cap. 5. expressly requires that witnesses be designed; and declares, that if this be omitted, the writings are null; and that the defect cannot be afterwards supplied by condescendence. Here the subscribing witness mentioned is not even named in the deed; which therefore is null; a conclusion sanctioned by a decision in a case precisely similar, Abercromby against Innes, 15th July, 1707, Sect. 11. *h. t.*; in which it was successfully argued, " that it was more safe for the lieges, and just for the Lords, to walk by the rule of the express words of the act of Parliament, than to break in upon it, and thereby introduce the supplying or rectifying of other greater mistakes." The same principal governed more lately the analogous case of the Creditors of Graham against Grierson, 26th December, 1752, No. 136. p. 16902.

Answered: *Si constet de persona*, as in the present case, where the designation excludes the possibility of doubt, both the spirit of the statute, and the construction given to it by the Court, combine to exclude the nullity in question. The inference from the scope of the enactment is self-evident, and the interpretation of the Court is exemplified in the case of Beattie against Lambie, 26th December, 1695, Sect. 11. *h. t.*

The Lord Ordinary found, " that Mrs. Clerk could have no place in the ranking, in respect that the bond upon which her interest is founded was not executed in terms of law."

To this interlocutor, on advising a reclaiming petition and answers, the Lords adhered.

Lord Ordinary, *Swinton.* Act. *Abercromby.* Alt. *Solicitor-General.* Clerk, *Home.*

Fac. Coll. No. 6. p. 11.

S.