1790. *February* 17.

The BANK of SCOTLAND *against* The CREDITORS of DANIEL TELFER.

No. 145.
Error in the name of one of the witneses inserted in the testing clause of a bond, how far remediable?

Mr. Daniel Telfer having, alongst with several others, interposed his credit with the Bank of Scotland for the partners of a mercantile company, the bond executed for this purpose was regularly subscribed by him; and opposite to his subscription, those of Alexander Gillespie and Robert Dickson were annexed as witnesses.

This bond was transmitted to Mr. James Fraser the Secretray of the Bank, by whom it had been written; and he immediately filled up the blank which had been left for inserting the names and designations of the witnesses. So far as related to Mr. Telfer, the testing clause mentioned his having subscribed "before Alexander Gillespie vintner at Douglas Mill, and Robert *Gibson* his servant."

After this, the bond remained for a considerable time in the custody of the bank. A notorial copy of it was taken; and the persons for whose accomodation it was granted having become bankrupt, a claim was made for the Bank in the distribution of their effects. But during all these proceedings, the bond had never been put on record, nor exhibited judicially.

Mr. Telfer conveyed his estate to a trustee for his creditors, who discovered the blunder that had been committed in filling up the testing clause, one of the witnesses being named Robert Gibson instead of Robert Dickson; upon which Mr. Fraser the Secretary of the Bank, made the following addition to it; "I say, Robert Dickson his servant, the word "Gibson" being a chirographical error of the writer in filling up the last line of the testing clause, all written by the said James Fraser." In a bill of suspension preferred by the trustee for Mr. Telfer's creditors, it was

Pleaded: By our ancient law, it was sufficient that the subscription of the party should be authenticated by credible witnesses who were present at the execution of the deed. But as this opened a door to many frauds, by the latitude given in receiving the testimony of any person who would swear to the actual subscription, the statute of 1681 wisely provided, that the witnesses should subscribe along with the party, and that their names and designations, as well as those of the writer of the deed, should be inserted in the body of it; "and that all such writings wherein the writer and witnesses are not designed, should be null, and should not be suppliable by condescending upon the writer, or designations of the writer or witnesses." The bond in question, therefore, as it was made out, was illegal and void, Robert Dickson,who subscribed as one of the witnesses, not being designed, while Robert Gibson, whose name appears in the testing clause, has not subscribed.

The method which has been taken to remove this imperfection, does not appear to be warranted by the law. If it be incompetent, where the subscribing witnesses are not designed, to bring a proof who those witnesses were, it must be still more so, without any proof, to substitute other names and designations, instead of those

No 145. which were originally inserted. In the many recent cases where an error in the names of the witnesses has been found to be a fatal one, it never occurred, that by the expedient here used the objection might be removed.

It is of no consequence, that the alteration was performed before the document had been produced in a court of justice; no reason can be given for a distinction so arbitary. It is indeed usual, at the time of subscribing a deed, to leave a blank for the testing clause, this being afterwards filled up by the writer. But from this practice, though it were more regular than it is, it will not follow, that the testing clause, after it is once filled up, may at any time be altered and amended at his pleasure. Such a latitude, allowed at a period when false writings are every day becoming more common, would be attended with the most mischievous consequences. Indeed the objection seems to be the stronger in this case, as it is not expressly said, whether the author of the alteration was the writer of the deed, or whether it was performed by some other person, 15th July 1707, Abercrombie against Innes, Sect. 11. *h. t.* 26th December 1752, Creditors of Graham against Grierson, No. 136. p. 16902. 17th November 1787, Archibalds against Marshall, No. 143. p. 16907. 28th November 1787, Douglas, Heron, and Company, against Mrs Helen Clerk, No. 144. p. 16908.

Answered: Though it is required by the enactment of 1681, that the names and designations of the writer and witnesses should be inserted in the body of every written instrument, it is no where said, that this is to be done at the time when the writing is subscribed by the granter. Where the parties subscribing live at a distance from each other, or from the writer of the deed, and in many other cases, that would be impracticable; and hence it is usual, between the clause authorizing the registration and the subscription of the party, to leave a blank for this purpose, which is afterwards filled up. It often happens too, that in opening the repositories of persons deceased, bonds and other documents are discovered without any testing clause, but accompanied with a note of the names and designations of the witnesses, which is understood to be sufficient authority for supplying the defect, even after the death of those who were parties to the deed.

Thus it is evident that the bond in question, though subscribed by the debtor when the testing clause was a-wanting, might be afterwards rendered complete by inserting the names and designations of those who had subscribed as witnesses. And as it will not be disputed that an error in transcribing the name of one of the witnesses, might at the time be rectified either by an erasure, or by such an explanation as was here given, it seems impossible with reason to maintain, that this may not be done at any time when the testing clause itself may be filled up; that is, at any time before the writing is made the subject of litigation, when the rule is, that *Pendente lite nil innovandum.* The observation, that the author of the alteration is not distinctly pointed out, seems hardly to merit an answer. Is is clearly stated, that the alteration was made by Mr. Fraser, the writer of the deed; and this is also apparent from an inspection of the writing itself. At any rate the objection is of no consequence; for although the name of the writer of the deed must

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be mentioned, that of the filler up of the testing clause is not necessary, as has been frequently decided; November 1683, Watson against Scot, No. 81. p. 16860. 19th June 1722, Laird of Edmonstone against Lady Woolmet, (See APPENDIX;) 11th March 1753, Alexander Durie against David Doig, Sect. 6. *h. t.*

The question was reported to the Court on memorials, by the Lord Ordinary on the bills.

The Lords were unanimously of opinion, that the objection was ill founded; and the bill of suspension was, of course, refused.

Reporter, *Lord Henderland.* Act. *Honyman.* Alt. *J. W. Murray.*

C. *Fac. Coll. No.* 115. *p.* 217.

1804. *March* 8. STEWART *against* WATHERTONE.

No. 146.
A prorogation of a submission sustained, although not attested in terms of 1681.

A similar objection to the nomination of an oversman over-ruled.

A submission was (February 5, 1800) entered into, of some disputed claims, by Peter Watherstone, merchant in Earlston, on the one part, and Robert Stewart, portioner in Gattonside, on the other, to three arbiters, mutually chosen by the parties, with powers to them, in case of variance in opinion, to choose an oversman. Two of the three arbiters executed a prorogation in the following terms; "*Earlston, 3d April,* 1800. According to the powers committed to us by the within submission, we, the said William Hogg and James Kerr, two of the arbiters within named, hereby prorogate the same to 26th May next.

(Signed) WILLIAM HOGG.
JAMES KERR."

Having differed in opinion, they chose an oversman; but the minute of devolution was also informal.

The decree-arbitral was pronounced on 24th May, 1800.

A suspension was brought of a charge upon the decree, as well as a reduction of the decree itself, upon various grounds, one of which was, that the minute of prorogation was not probative, in terms of the act 1681, and that the minute of devolution was also informal.

The Lord Ordinary, (6th June, 1801) at first assoilzied from the reduction, and found the letters orderly proceeded; but afterwards, (December 8, 1801), "in respect of the importance of the points argued in this case, as involving the solidity of decrees-arbitral on the one hand, and the established rules of law respecting the authentication of writings, if these shall be held applicable, on the other, makes avisandum with the cause to the Court."

Stewart

Pleaded: It has never been doubted, that a submission must be attested by all the legal solemnities. Although arbiters thus become something like Judges, yet,