

1731.

CARRE

v.

HALDANE.

JOHN CARRE of Cavers, Esq.—*Appellant*.

JOHN HALDANE of Lanark, Esq.—*Respondent*.

15th March, 1731.

WRIT.—Act 1681, c. 5. What an insufficient designation of a witness to a bond.

[Bruce, p. 1. Mor. Dict. p. 16924.]

JAMES LAW executed a bond for L.500 Scots in favour of John Carre, the appellant. After Law's death, Carre obtained a decree of adjudication upon the bond against certain lands, in which he had been infeft, and upon this adjudication raised an action of mails and duties against the tenants. No. 12.
1683.

Posterior to the adjudication, James Law (son and heir to the granter of the bond) sold and disposed the lands in question in favour of John Haldane, the respondent, who thereupon brought an action of mails and duties against the tenants, and likewise a reduction against the appellant, concluding to have his bond and the adjudication following on it set aside, on the ground (among other reasons) that the subscribing witnesses were not designed in terms of the act 1681, c. 5. The designation was as follows: “Before these witnesses, “Gilbert Ellet, inserter of the sum, and Archibald “Nilson, serviter to the laird of Cavers.”

The Lord Ordinary, by interlocutor of this date, reduced the bond and adjudication, and ordered November 10,
1714.

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CARRE

v.

HALDANE.

Entered
January 28,
1730.

the tenants to pay the rents, &c. to the respondent.

This judgment was three times brought under review of the whole Court, and as often adhered to.

The appeal was brought from the interlocutors “of the 10th and 23d November, and 7th and 16th December, 1714.”

Pleaded for the Appellant:—It being offered to be proved that both witnesses were servants of the laird of Cavers, the single designation of “servitor” is evidently applicable to both. It is obvious that the writer of the deed so intended it, and at all events the error, which consists only of the omission of the letter *s* at the end of the word “servitor,” can amount to no more than *vitium scriptoris*.

The bond having been granted for a valuable consideration, viz. money actually lent, and the question being with a purchaser who acquired the lands under burden of this debt, the act ought to be construed as favourably as possible. The only object of the act was to prevent frauds in the execution of deeds, and there is here not the least suspicion or allegation of any fraud.

Pleaded for the Respondent:—The witnesses are not designed in terms of the statute. Its words are imperative, and expressly exclude all proof to supply a defective designation.

After hearing counsel, “it is ordered and adjudged, &c. that the appeal be dismissed, and that the said interlocutory sentence or decree made by the said Lord Ordinary, and the several interlocutors of the said Lords of Session in af-

Judgment
March 15,
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“firmance thereof be, and the same are hereby
“affirmed.”

1731.

BORTHWICK
v.
BORTHWICK.

For Appellant, *C. Talbot* and *J. Grahame*.

For Respondent, *Dun. Forbes* and *Will. Hamilton*.

LILIAS BORTHWICK, *Appellant* ;

JOHN BORTHWICK of Cruikston, Esq. *Respondent*.

19th March, 1731.

TAILZIE.—Act 1685, c. 22. An entail, containing prohibitory and irritant clauses *de non contrahendo debitum*, having been executed before the date of the act 1685, but not followed by infestment until after it, and not recorded in terms of that act,—found not to debar the heir from granting bonds of provision to his younger children.

[Fol. Dict. II. p. 434. Mor. Dict. p. 15556.]

By an entail of the lands of Overshiels, bearing date the 23d May, 1685, the heirs are prohibited under irritant and resolute clauses, “to contract any debts, or yet to do any deed whereby the same may be apprised or evicted or adjudged from them.” There is no mention in the deed of any power of making provisions for wives or children. The deed which contained a clause dispensing with delivery, remained in the granter’s custody until his death in 1687. It was registered in the books of council and session on the 7th January in that year, but was not recorded in the Register of Tailzies.

No. 13.