

No. 292.

1662. July 1. BRAIDY *against* BRAIDY and MUIR.

A contract of marriage was sustained, both against principal and cautioner, albeit subscribed but by one notary, and by one subscribing witness, there being more witnesses inserted, in respect that marriage followed thereupon.

*Stair, v. 1. p. 119.*

No. 293.

Foreign writs are sustained, although wanting the formalities required by our law, if executed *secundum consuetudinem loci*.

1665. February 1. ELPHINSTON of Selmes, *against* The LORD ROLLO and the LAIRD of NIDDRIE.

The Lord Rollo being addebted in a sum to umquhile Mr. David Anderson of Hill, Margaret Anderson his daughter gave a procuratory to intromit with all papers and to uplift all sums belonging to her in Scotland to John Anderson, whereupon John Anderson discharges the Lord Rollo, and takes a new bond from him, and assigns it to Niddrie. Thereafter Selmes getting assignation from the said Margaret, Rollo suspends on double pointing. Selmes alleged, that he, as assignee, had right to the sum. It was answered, that Rollo was discharged by the procurator before the assignation. It was answered, *1mo*, That the procuratory was null, because it wanted the designation of the writer, and witnesses; *2do*, It was offered to be improved as false and fenziel. It was answered to the first, that the procuratory was made in Ireland, *secundum consuetudinem loci*, where designation of witnesses is not required, but a writ being sealed, subscribed, and delivered before witnesses, albeit they be not designed, the writ is effectual. To the second, the Lord Rollo, having made payment, *bona fide*, to a procurator, albeit the procuratory should be improved; the debtor not being accessory, but paying *bona fide*, could not repete, otherwise all commerce would be marred, and no body will be secure to pay any assignee, or procurator; but as payment made *bona fide* to them that have no right, is relevant, only because it is done *bona fide*, and necessarily; so must it be good, though they have forged the procuratory. It was answered, that payment was not yet made, but only a new bond granted; and that it could not be *bona fide* seeing the procuratory, wanting the ordinary solemnity of witnesses designed, might have just ground of doubt, and the debtor was not to have paid without sentence.

The Lords repelled the first allegiance, and sustained the writ according to the custom of Ireland; being notour to themselves. As to the other point; The Lords did not decide in it till it appeared, whether Niddrie would prevail upon the new bond, and make it equivalent to payment; but they thought that payment made *bona fide* would be sufficient, albeit the writ were improved, where there was no ground to doubt.

*Stair, v. 1. p. 262.*