No 48.

2do, At any rate, the defender is bound by his own holograph writing, and the only question is, whether he can get free, upon the footing that no effectual obligation was constituted against the pursuer? But the pursuer homologated the deed, by signing it; by lodging it in the hands of a third party, so that he could not afterwards destroy it; by delivering a letter from his cautioners, and by bringing his action.

The act 1681, c. 5. does not annul deeds in which the legal solemnities have been neglected; it only furnishes an exception to the party, who may wave it, either expressly, by acknowledging his subscription, or tacitly, by acts of homologation. So it was found, 17th February 1715, Sinclair *contra* Sir James Sinclair, *voce* WRIT; and so our law has been understood to stand from the most ancient times, as appears from Reg. Maj. III. 8. 4. and 5, where the acknowledgement of the seal is held to be sufficient to support the deed. Upon the same principles, deeds defective in other solemnities have been sustained, in consequence of an acknowledgment of the subscription, upon a reference to oath; 26th Dec. 1695, Beattie *contra* Lambie, *voce* WRIT; and there is no reason why a voluntary acknowledgement should not be equally effectual.

Replied; Unilateral deeds only can admit of being holograph; but the minute was not of that nature; it was a mutual contract, in which the rule is, that both parties must be bound, or neither; and, as it is clear, that the pursuer was not bound, it follows, that the defender must have been free, although the minute had, in other respects, been binding upon him, which it was not, as being a writing neither holograph, nor capable of being holograph, and deficient in the solemnities of the act 1681.

None of the facts condescended upon are such as could have inferred homologation against the pursuer, so as to have bound him to stand to the minute against his will. And the decisions referred to do not apply. An obligation for money may be created by a missive letter, or even by a verbal promise; but a bargain of sale of lands cannot be effectually constituted without a formal writing.

"THE LORDS found, that the agreement libelled, not being wrote on stamped paper, and having no witnesses designed, is not effectual to oblige the defender to convey a land estate."

Act. *John Dalrymple.* Alt. *Geo. Wallace.*

G. F. *Fol. Dic. v. 3. p. 394. Fac. Col. No 69. p. 309.*

1770. *February* 16.

ALEXANDER MUIR Gardener in Canongate, Pursuer; *against* JAMES WALLACE of Wallacetown, Defender.

No 49.
A writing, neither in terms of the act 1681, c. 5, nor holo-

WALLACE, by a missive subscribed by him, but neither holograph, having witness subscribing, nor any other solemnity, having agreed to sell to Muir an adjudication of a tack, Muir brought an action concluding for implement, by

No 49. graph, insufficient to constitute a bargain as to heritage, though the subscription was acknowledged.

granting a complete conveyance to the subject. Wallace acknowledged his subscription, but *pleaded*, that as the agreement related to heritage, and had none of the solemnities required by law, nor was holograph, he was at liberty to resile. The Lord Ordinary having found the letter libelled on binding, the question came before the Court upon a petition and answers.

The point argued was, Whether a writing, though neither formal nor holograph, was sufficient by law to constitute a bargain of heritage, provided the subscription to such writing was sufficiently authenticated?

The petitioner Wallace maintained the usual argument as to deeds of importance upon the statute 1681, c. 5; and that notwithstanding the missive there was still *locus pœnitentiæ*, and referred to the following authorities; 14th February 1633, Rankin *contra* Williamson, *voce* WRIT; 5th December 1671, Dickson *contra* Dickson, IBIDEM; Lord Stair, B. 1. t. 10. § 9.; 22d February 1628, Strachan *contra* Farquharson, *voce* WRIT; Park against M'Kenzie, &c. No 47. p. 8449.; 1765, Bisset *contra* Stewart*.

The respondent, on the other hand, *argued*, that all that was required or intended by the solemnities of a deed was, that the subscription should be authenticated; which was more effectually done by the acknowledgement than by any form or solemnity that could be devised. Lord Bankton, v. 1. p. 337. § 47.; 15th July 1662, Wauchope *contra* Niddrey, *voce* WRIT; 26th December 1695, Beatie *contra* Lambie, IBIDEM; 11th January 1711, Gordon *contra* M'Intosh, IBIDEM; 10th July 1717, Paterson *contra* Inglis, IBIDEM; 22d January 1735, Telfer *contra* Hamilton of Grange, IBIDEM; 6th July 1739, Crosbie *contra* Shiell, IBIDEM.

Their Lordships gave judgment with much deliberation and at considerable length; they were a good deal divided. Those on one side maintained, that to cut down such a missive, was a great encouragement to dishonesty and breach of faith; that no solemnity whatever could give more credit to a deed than the acknowledged subscription of the party; and though there might be some reason for requiring solemnities to deeds transmitting heritage, yet as the the argument did not stop there, but was extended to all deeds of importance, it came to apply also to bargains of moveable subjects, and of course went too far. It was *answered*, That there was a clear distinction in the application of this rule and the regulation of the statute 1681, as to heritage and moveables; but that as this was an heritable subject, the rule introduced for the safety of the lieges as to their land rights, which had been fixed and acquiesced in so long must be rigidly observed. That these solemnities had been introduced at a period when writing and witnesses were not so readily procured; and it would be absurd to abolish them now, when no such difficulty occurred. There was no distinction betwixt a conveyance and an obligation to convey; for as the last could be rendered effectual by law, it would, if the solemnities were dispensed with, completely evade the rule. And though a promise by missive was no

* Erskine, B. 3. T. 2. § 2, *see* APPENDIX.

doubt binding upon the conscience of an honest man, the intendment of the law was, to admit, in certain cases, of *locus pœnitentiæ*; which, if matters were entire, he was entitled to take advantage of. No 49.

THE LORDS found, "that as the subject in question is an heritable subject, the letter libelled on is not binding."

Lord Ordinary, *Elliock.* For Muir, *Lockhart.*
Clerk, *Ross.* For Wallace, *Boswell.*

R. H. *Fac. Col. No 26. p. 60.*

1779. *July* 29. MAITLAND *against* NEILSON.

NEILSON, by a missive not holograph, became bound to enter into a tack with Maitland, containing all the usual clauses, and a counter missive agreeing to that proposal was signed by Maitland, though not holograph of him. A scroll of the lease was made out, but they differed on some articles, and Maitland did not obtain possession. In a pursuit against Neilson by Maitland to implement and assign the tack, the LORDS held the missive not probative, though Maitland acknowledged the subscription, and found, that as it was covenanted there should be a tack in writing, there was still *locus pœnitentiæ*. *See* APPENDIX. No 50.

Fol. Dic. v. 3. p. 395.

1790. *May* 22. MALCOLM M'FARLANE *against* JAMES GRIEVE.

No 51.
The acknowledgement of subscription, not sufficient to supply the want of any of the statutory solemnities of deeds.

M'FARLANE granted a lease to Grieve. Before possession had followed, however, the former instituted a reduction of it on this ground, that it had been omitted to insert in the deed the name and designation of the writer, a requisite, it was said, essential to its validity by the statute of 1681. The defender

Pleaded; That statute, it is true, has enacted, 'that all such writs wherein 'the writer and witnesses are not designed, shall be null, and are not supplia' able by condescending upon the writer, or the designation of the writer and 'witnesses.' But though the term *nullity* does in our statute law sometimes import an intrinsic nullity, yet generally by that word nothing more is meant, than a circumstance affording an exception or reason of reduction. Thus, deeds null according to the terms of the acts 1621 and 1696, are yet never set aside without a formal process. In like manner, with respect to entails, many contraventions are expressly declared by the statute of 1685 to infer an *ipso facto* forfeiture, but in order to give effect to them, a declarator is required.

If such were not the case, it would be *pars judicis* to advert to objections of this kind, and no decree in absence where they occurred would be of any a-