No 47. first objection. If the deed be intrinsically null, so as not even to found an action, it is no better than a bit of blank paper, and the party who wants to be free has no occasion to plead that there is *locus pœnitentiæ*; he was free from the beginning, there being no evidence of the bargain. On the other hand, supposing the minute of sale under consideration to be complete in all the legal solemnities, a writer named and designed, witnesses subscribing and designed; it will be admitted that such a writing must bar repentance. Now it is contended, that the present minute of sale, adminiculated by the party's acknowledgment of his subscription, is in every view equivalent to a minute perfect in every solemnity. It has been shown above, that the present deed, though defective in the solemnities, is a good foundation for an action; that it is liable to an objection indeed, but that the objection may be removed by referring the verity of the subscription to the defender's oath, or by his acknowledgment which saves the reference to oath; and that such oath or acknowledgment makes the deed no less effectual in law than if it had been originally liable to no objection. If so,' it must be no less effectual to bar repentance, than if it were complete in all the formalities.

It carried notwithstanding to adhere, upon a ground, that, in my opinion, has no support from reason, analogy, or decisions, namely, that a deed defective in the solemnities of the act 1681 is null and void, and no better than blank paper; and that therefore there must be *locus pœnitentiæ* as if the bargain had been entirely verbal.

Fol. Dic. v. 3. *p.* 394. *Sel. Dec. No* 226. *p.* 289.

No 48. *Locus pœnitentiæ* not barred by an informal writing.

1768. *July* 6. SHEDDAN *against* SPROUL CRAWFORD.

HUGH SPROUL CRAWFORD became bound, by a minute of sale, to dispone the lands of Haining, to Thomas Sheddan, at the price stipulated in the minute, which was signed by both parties, and bore to be 'written by Hugh Sproul 'Crawford, before these witnesses, Alexander Paterson and John Lang.'

It was lodged with John Lang, one of the witnesses, and sundry communings ensued respecting the cautioners, whom Crawford agreed to accept; and also relative to the making up of proper titles.

At length Crawford declared his intention to resile from the bargain; and an action having been brought by Sheddan, *objected*, That the minute was null, in respect it was written on paper not stamped, and did not design either the writer or witnesses.

Answered; A holograph offer, with a holograph acceptance, would have been binding, without witnesses. In this case, the offer and acceptance are contained in one writing, which is holograph of the defender; and, as it is impossible that a writing should be holograph of two persons, it is enough that it is holograph of the one, and signed by the other.

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