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

No. 330.

Two persons having signed missives, agreeing to the terms of a lease, neither of them holograph of the parties, a scroll was made out in terms of themis sives; but the parties afterwards differing as to some particulars, the granter resiled. In an action for implement founded on the missives, the granter acknowledged his subscription; but the Lords notwithstanding found the missive improbative. (See APPENDIX.)

Fol. Dic. v. 4. *p.* 426.

1781 *July* 4. GRIERSON *against* WILLIAM KING.

No. 331.

Objected to the discharge of a legacy that it was not holograph, the writer was not designed, nor were there any instrumentary witnesses. The Lords found it could make no faith in judgement.

William King, by his father's settlement, was left sole heir and executor, burdened with the payment of £20 Sterling to each of his sisters, payable the first term after his decease, " with the due and ordinary annual-rent from the said term, during the not-payment thereof."

Robert Grierson had married one of the sisters, several years before. She survived her father; and, some time after her death, Grierson brought an action, in name of his children, against his brother-in-law, for payment of the legacy above mentioned. King produced a discharge by Grierson, against which it was, *inter alia*,

Pleaded for the pursuer: 1*mo*, The discharge founded on, is not holograph; the writer is not designed; nor are there any witnesses either designed or subscribing. In terms, therefore, of the act 1681, it must be " null and void, and can make no faith in judgment."

The decisions upon this point are numerous; andthere are many of a recent date; December 26, 1752. Graham against Grierson No. 136. p. 16902 Mackenzie and Lawson against Park, November 29. 1764; No. 47. p. 8449. Sheddan against Spraul-Crawford, No. 48. p. 8456.; and Crighton and Dow against Syme, July 25. 1772. No. 328. p. 17047. But one that more particularly applies to the present case is, the decision in the 1763, Creditors of Young against Little, (Not reported,) where a discharge of a legacy of £20. Scots, conceived in the form of a missive letter, and subscribed before two witnesses properly designed, was found to fall under the statute, as wanting the designation of the writer.

2*do*, Robert Grierson had no right to discharge the legacy in question. By his father-in-law's settlement it was declared, that this provision should bear interest from the term of payment. As, therefore, it was a sum that, before the act 1661, Cap. 32. would have been accounted heritable, it still remains so *quoad*

the rights of husband and wife; and consequently, could not fall under the *jus mariti*, or be properly discharged by the husband. No. 331.

Answered: 1*mo*, The design of all the statutory solemnities of writings is, to guard against forgery; and, where the verity of the subscription, as in the present case, is not denied, the deed, though defective in these solemnities, should be binding upon the party, except in cases where the law or practice has made writing an essential requisite; Bankt. B. 1. Tit. 11. § 48.; Beattie, No. 303. p. 17021. and Crosbie, No. 68. p. 16842. It is to these cases that the statute more particularly applies; while others have, in practice, been exempted from the shackles of form, and are daily sustained, though destitute of all the statutory solemnities; Campbell against Lennox, December 18, 1739, No. 230. p. 16979. Foggo against Milliken, December 20. 1746, No. 231. p. 16979.; Henderson against Murray, December 5, 1765, No. 236. p. 16986; and Clark against Ross, January 19, 1779. (See Appendix.)

Numerous decisions, too, are collected in the Dictionary Sect. 8. *h. t.* where deeds defective in point of form have been sustained; and, among these, discharges are particularly mentioned. It is true, that most of the cases there observed, were of discharges between masters and tenants. But, if the rusticity of tenants is sufficient to exempt them from legal forms, the same mild maxim should be extended, without reserve, to all transactions which appear to be *negotia inter rusticos*; and will apply, with the greatest propriety, to such a case as the present, where, perhaps, neither of the parties ever saw or heard of a discharge, but in its simplest form.

2*do*, Although the act 1661, Cap. 32. declares, in general, that obligations for sums of money, containing a clause for payment of annual-rent, shall not fall under the *jus mariti*; yet, the Legislature certainly pointed at such obligations only as are conceived in the form of a bond, strictly so called; and by no means to those common obligations, where the interest is stipulated, principally as a spur to make the debtor more punctual in his payment; Ersk, B. 2. Tit. 2. § 10. Gillhagie against Orr, December 13, 1738, No. 6. p. 5770. This is always to be presumed, where the interest is made to run, not from the date of the obligation, but from the term of payment; but, were such a clause to alter the nature of the obligation, from moveable to heritable, the *jus mariti* would be excluded in many cases, where it has never once been doubted that it takes place.

This last point was thought to depend altogether upon the circumstance, whether the term of payment had come or no before the date of the discharge; which the papers left uncertain. But the Court being of opinion, that the transaction was such, as rendered writing essential, and required the statutory solemnities, they "repelled the defence founded on the discharge."

Lord Ordinary, *Kaimes*. Act. *R. Cullen* Alt. *Mark Prigle*. Clerk, *Tait*.

Fac. Coll. No. 68. *p.* 11.