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-

No 51. vail; whereas in truth suspension is not less necessary there, than in regard to other decrees. Nor would a deed null in any other sense be capable of homologation, which, however, those defective in the statutory formalities in particular have ever been found to be; 20th November 1627, Lockie, *voce* WRIT; 7th March 1612, Boswell *contra* Kinninmount, IBIDEM; 23d November 1699, Grierson and Mackie *contra* Scott, IBIDEM; Sinclair *contra* Sinclair, 17th February 1715, IBIDEM.

When the statutes, therefore, relative to the formalties of writings employ the same expresion, their purpose is to denote an exception or ground of reduction, which of course the party may voluntarily pass from, or be debarred from pleading. But surely there can be no stronger bar to such an exception, than the acknowledgement of subscription; which occurs in the present case, nothing being here objected to, but the mere omission above mentioned.

The primary end of all the statutes on this subject is the preventing of forgery. As the ancient mode of authenticating writings by the seal merely of the party, was found to give frequent occasion to fraud, the additional requisite of subscription was introduced by the earliest of those statutes, 1540, cap. 117. In like manner, because 'falsities encreased daily within the realm,' by reason of 'the bodies of contracts' being written by persons 'not commonly 'known,' that of 1593, cap. 179. enjoined, that the name and designation of the writer should be mentioned in the deed.

Nor when the act 1681 declared the omission of this and other requisites 'to 'be not suppliable by a condescendence,' was the spirit of that enactment different. From the consideration of the lubricity of human testimony, that mode of supplying the defects of writings was thus precluded; but the special exclusion of it, cannot surely imply that all other means are rejected. It rather indeed imports the contrary. And of all means of ascertaining the verity of deeds, the most complete and satisfactory is evidently acknowledgement of subscription.

Holograph writings are not excepted *verbatim* in any of the statutes; but if they are held to be so by implication, because of the little probability of falsehood in such cases, *a fortiori* ought those writings, which are acknowledged to be true and where there is no possibility of falsehood.

If it be supposed, that the statutory requisites in the form of deeds were in general also intended for the purpose of solemnity, this end, it must be owned, was sufficiently attained by the presence and the subscription of the witnesses. But in fact, as the presence of the writer is not required at the execution, the sole object of that particular circumstance must have been to guard against falsehood.

In conformity to these observations, many decisions have been pronounced. Thus where a contract was null in the sense of the statute of 1681, as bearing the subscription of one witness only, the defect has been found to be suppliable, by referring the verity of the subscription to the party's oath;

hall, 26th December 1695, Beattie *contra* Lambie, *voce* WRIT. And in each of the following cases, the grounds of the defender's plea have been recognised. 22d June 1611, Redpath against Huntly, *voce* WRIT; 29th November 1609, Weir against Moffat, IBIDEM; 8th July 1623, Sheriff of Cavers against Henderson, IBIDEM; 16th January 1739, Crawford against Wight, IBIDEM; 4th July 1739, Shiel against Crosbie, IBIDEM; 18th December 1739, Goodlet Campbell against Lennox, IBIDEM; 5th June 1742, Campbell against M'Lauchlan, *voce* PROOF; 23d November 1752, Duke of Douglas against Littlegill, *voce* WRIT; 20th December 1746, Fogo against Milliken, IBIDEM; 8th June 1748, Neil against Andrew, IBIDEM; 17th June 1748, Rutherford against Feuers of Bowden, No 44. p. 8443; 5th December 1765, Henderson against Murray, *voce* WRIT; 19th January 1779, Clark against Ross, IBIDEM. See also Bank. tit. 11. § 47; Erskine, b. 3. tit. 3. § 47. No 51.

Answered; It is for the purpose of solemnity, as well as of proof, that formal writings are required by law. In particular, 'solemnity in writ is essential to 'the perfection of dispositions to heritable rights, and of tacks,' Stair, b. 1. tit. 10. § 9. But a null or informal writing never can produce such solemnity. The end to be attained by that prescribed formality, is to promote due reflection and deliberation in transactions of importance. An informal deed rather denotes carelessness and want of attention.

Such a null writing cannot be even rendered probative. In particular, it cannot, by the acknowledgement of subscription. Whenever recourse is had to this, or, which is the same thing, to oath of party, it must be received as subject to every intrinsic quality; such as that of force, of fear, or of ignorance of the contents of the writing. Since the import of it may be thus quite contrary to that of the writing, it is the oath alone that is probative, and not the writing, as thereby rendered such. Besides, informal writings are by express statute declared "to make no faith," an enactment which is not to be repealed by any acknowledgment of a party.

By the same rule, in every case where the law requires writing for an essential solemnity, as in that of sasine for example, it might with equal reason be said, that since writing is only a solemnity intended for proof of deliberate consent, it should always be superseded by the superior evidence of the party's oath.

The nullity of a deed therefore remains after the acknowledgment of subscription; and it is a mistake to suppose that it has no other operation than by affording an exception, which is debarred by such acknowledgment.

It is to be remarked too, as the reason why it is not *pars judicis* to refuse action on a null writing, when the objection is not made by the defender, that every writing, whether valid or null, implies a verbal contract, which, though the subject of it be land, is always, while acquiesced in, a good ground of action; as the want of writing affords only *locus pœnitentiæ*.

No 51.

Nor is it of more importance in this argument, that homologation has been found to supply the defects of a null deed. This does not happen by imparting perfection to the writing, which continues void as before; but it is the act of homologation that establishes the contract, being a renewed expression of consent in the strongest manner *rebus et factis*, which will bind parties, when neither a verbal contract nor an informal deed would. A verbal contract concerning heritage may be resiled from; but acts of homologation, and *rei interventus*, render the contract equally binding as if it had been expressed by the most regular deed.

The decisions of the Court are extremely uniform, in respect to the principle, that a deed defective in solemnity cannot be supported by the acknowledgment of subscription. Even prior to 1681 this was found; Durie, 14th February 1633, Ranken *contra* Williamson, *voce* WRIT; Durie, Spottiswood, 11th February 1634, Cassimbro *contra* Irvine, IBIDEM. But the subsequent decisions to the same effect are of more importance. Harc. No 207. January 1686, Gordon *contra* Macpherson, *voce* WRIT; Fountainhall, November 1698, Campbell *contra* Robertson, IBIDEM; 21st November 1704, Kirkpatrick *contra* Ferguson, IBIDEM; 15th July 1707, Abercromby *contra* Innes, IBIDEM; 4th February 1710, Logie *contra* Ferguson, IBIDEM; 3d July 1711, Short *contra* Hopkin, IBIDEM; 22d December 1710, and 11th January 1711, Gordon *contra* M'Intosh, IBIDEM; 4th February 1725, Campbells *contra* Campbell, IBIDEM; 22d February 1728, Strachan *contra* Farquharson, IBIDEM; Innes *contra* Commissioners of Supply, No 13. p. 2079.; June 1730, Home *contra* Dickson, *voce* WRIT; 12th December 1738, Davidson *contra* Charteris, IBIDEM; 20th July 1744, Liddell *contra* Dick's Creditors, No 95. p. 5721.; 30th June 1758, Ferguson *contra* M'Pherson, *voce* WRIT; 2d February 1761, Young *contra* Ritchie, IBIDEM; Park *contra* M'Kenzie and Lawson, No 47. p. 8449.; Creditors of Young *contra* Little in 1763,* and Bisset *contra* Stewart in 1765, mentioned in Erskine's Institutes, B. 3. T. 2. § 2.;* 17th December 1766, Russel *contra* Paisley and Little, *voce* WRIT; 6th July 1768, Sheddan *contra* Spreul Crawford, No 48. p. 8456.; 21st July 1772, Crichton and Dow *contra* Syme, *voce* WRIT; 4th July 1781, Grierson *contra* King, IBIDEM; 25th November 1782, Wallace *contra* Wallace, IBIDEM; 9th December 1785, Walker *contra* Duncan*; 23d June 1786, Edmondston *contra* Lang, *voce* WRIT.

The LORD ORDINARY pronounced this interlocutor, "In respect of the decisions of the Court, and on that account alone, finds the tack libelled void and null, and reduces," &c.

A reclaiming petition having been presented, and answers given in, a hearing in presence took place, by appointment of the Court.

Several of the Judges thought, that the statute, by debarring condescendences in particular, did not mean to preclude the more certain test of the verity of deeds by acknowledgement or oath of party. The case of holograph writ-

* *See* APPENDIX.

No 51.

ings, it was *argued*, shews this; as these, notwithstanding the statute, are valid without witnesses, their verity being otherwise ascertained, although not near so completely as by such acknowledgement.

It was likewise *observed;* Though writing be *de essentia* of deeds respecting land property, yet no part of the contents of the testing clause comes under that description. It is not comprehended in the *verba solennia* of writings; which is evinced by this, that the name of the inserter of that clause is not required to be mentioned. Its sole purpose is for authenticating deeds, by the naming and designing of the witnesses. It is therefore useless in those writings, to authenticate which witnesses are not necessary; such as holograph deeds, and, surely much more, deeds of which the subscription is acknowledged. And if the want of this clause altogether would have been of no consequence, a partial want, or a defect in it, cannot be supposed of more significance. Besides, the deeds spoken of in the statute as 'not suppliable by a condescendence,' were evidently those only in which the subscription of witnesses was required.

The COURT, however, were unanimously of opinion, that in competitions of creditors effect ought never to be given to the acknowledgment of subscription, so as to affect any *jus quæsitum* arising from the informality of deeds. And

A majority considered, that no deeds whatever were probative, but those executed with all the formalities required by statute. Were the oath of party, it was observed, made to supply the want of the statutory requisites, the consequences would often be very unjust. Not only in general, with respect to all bargains to which writing is essential, the knave would be free and the honest man bound; but in the case of mutual contracts, when one of the parties happened to die, his heir might either be liberated, or hold the other party under the obligation at his pleasure; and in that of co-obligants, one of them surviving might be made liable for the whole debt, while his claim of relief against the other *correi* would by their death be cut off.

THE LORDS therefore adhered to the interlocutor of the Lord Ordinary, reducing the tack in question.

Similar decisions were given in several other cases determined at the same time.

Lord Ordinary, *Dreghorn.* Act. *G. Fergusson, M. Rost.* Alt. *Solicitor-General, Wilson.* Clerk, *Sinclair.*

S. *Fol. Dic. v.* 3. *p.* 395. *Fac. Col. No* 130. *p.* 252.

No 52.
A bargain concerning heritage, entered into by missives, found not to be binding, where one of the missives was improbative.

1794. *January* 23. JAMES BARRON *against* SARAH ROSE.

JAMES BARRON conveyed his right in certain houses to Sarah Rose, by the following holograph missive:

'MADAM, *Fort-George, 24th November* 1792.

'I promise to give you possession of all the houses belonging to me in Campbeltown, at Whitsunday 1793, according to our agreement of this date.'