1764. *November* 29. WILLIAM PARK *against* M'KENZIE & LAWSON.

No 47.
If mutual missives, concerning the sale of a house, want the forms required by act 1681; found that the defect cannot be supplied by the acknowledgment of the parties, that the subscriptions are genuine.

WILLIAM PARK having agreed to sell a tenement belonging to him in Glasgow to William M'Kenzie and John Lawson, the terms were settled by an offer from the purchasers and the vender's acceptance. The offer is in the following words: '*Glasgow*, 9*th September* 1761.—Mr WILLIAM PARK.—SIR, As 'you design to dispose of your tenement in Arneil's Close, we hereby make 'you an offer of L. 89 Sterling, payable at Whitsunday next, you putting us 'in possession, and giving us a regular progress of writs at that term. As 'witness our hands, *William M'Kenzie*, *John Lawson*.' The acceptance runs thus: 'I hereby accept the said offer of L. 89 Sterling, and oblige myself to 'give you possession, and a regular progress of writs, under the penalty of 'L. 20 Sterling. (Signed) WILLIAM PARK. *Thomas Gilfillan*, Witness, '*Matthew Park*, Witness.'

The offer is holograph of William M'Kenzie. The acceptance is also of his hand-writing. William Park all along acknowledged the verity of his subscription; and though the witnesses are not designed, it was never denied but that they were witnesses to the deed.

William Park being tempted with a better offer, sold the tenement to Alexander Nisbet, March 1762, and Nisbet was instantly infeft. At the same time, William Park doubting whether he might not be bound by his first bargain, took a back-bond from Nisbet, declaring his disposition to him void, in case his first bargain should be found effectual against him.

In a process at the instance of M'Kenzie and Lawson for implement, Park's defence was, That the writings above mentioned were not probative, being defective in the solemnities required by the act 1681. To which the answer was made, That the solemnities of the act 1681 are all of them contrived to prevent forgery; and, therefore, the want of them cannot be an objection to a deed where the party, by owning his subscription, does, in effect, acknowledge the verity of the deed. THE LORDS found the offer and acceptance not probative; and, therefore, assoilzied the defender. And what follows is the substance of a petition reclaiming against that interlocutor.

The questions that arise from this case are, 1*mo*, Whether this minute of sale, executed in the form of an offer and acceptance, be null *ipso jure*, from wanting the solemnities of the act 1681, so as to make it *pars judicis* to deny action upon it; or whether it be a good foundation for an action, admitting the defender to object the defects of formality, and the pursuer to remove that objection, by referring the verity of the defender's subscription to his oath, or by replying upon his owning his subscription; 2*do*, Whether, when the writing is supported by such acknowledgment or oath, it be, notwithstanding, competent to the defender to recede from the bargain, as if it had been verbal merely.

No 47. To clear the first question, writings must be distinguished into two kinds. The first is where the writing itself constitutes the obligation, termed, in the Roman law, *literarum obligatio*. The other is where the writing is intended for evidence only. An English bond in judgment, and in Scotland a bond containing a clause of registration, are examples of the first kind. These ought to be complete in all the legal solemnities, so as, *per se*, to bear full faith, without needing any extraneous support; for, otherwise, they can never answer their intention of being a good foundation for execution, without the intervention of a process. And yet it is not certain that we have regularly denied execution where there is any defect in solemnity. It will be found upon enquiry, that many bonds, containing a clause of registration, have been admitted upon record for execution, without being complete in all the solemnities; which is evidently an erroneous practice, putting the party under the necessity of finding caution in a suspension, as if the bond were complete in all points.

Of the other kind, the minute of sale under consideration is a proper example. It is calculated entirely for making evidence of what is agreed upon betwixt the parties; and, considering it in this light, it is natural to apply the same rule to it that is applicable to every sort of evidence; namely, that, if the evidence founded on do not afford full conviction *per se*, it must be competent to support it by other evidence. That this rule obtains in practice, with respect to written evidence, as well as every other sort, shall be made clear by many examples of various kinds.

But, before giving these examples, it may be proper to obviate an objection that stares one in the face, upon perusing the statutes that require certain formalities in all writings, under the certification of nullity and of making no faith. After taking a cursory view of these statutes, we shall examine whether any satisfactory answer can be made to the said objection. Our first statute, regulating the solemnities of writings, is the act 117th, Parl. 1540, enacting, 'That, in time coming, no faith be given to any writing under seal, without the subscription of the party.' The act 179th, Parl. 1593, ordains 'the writer to be named and designed, otherwise the writ to make no faith.' And the act 5th, Parl. 1681, enacts, 'That the want of the designation of the writer and witnesses shall be a nullity, and not be suppliable by a condescendence.' The writing in question is deficient in every one of these solemnities, excepting only the subscriptions of the parties. And why ought it, then, to be exempted from the statutory certification of being null, and of making no faith? This objection seems, at first view, invincible; and yet, upon a narrow inspection of these statutes, two answers occur that are separately relevant.

The first is, that, in requiring certain solemnities, to prevent falsehood or forgery, it could not be the intention of the Legislature to comprehend deeds acknowledged to be true by the parties, and, consequently, free from any sus-

picion of falsehood or forgery. Every Lawyer knows, that words alone, without intention, will not avail in a statute more than in a private deed; and that there is nothing more common than for a Court of Equity to deny any effect to a statute beyond the intention of the Legislature, however express the words may be, similar to what is always done with respect to private contracts. And if it can be made evident, that a writing, the verity of which is acknowledged by the parties, is not meant to be comprehended under the said statutes, but is left upon its natural evidence, without requiring any solemnity, the objection mentioned falls to the ground. And to make this evident, the following arguments are submitted. No 47.

Originally, before writing was common, a deed was attested by the seal of the party. At that time, both in England and in Scotland, it was the defendant's privilege to plead *quod non est factum*; or, in other words, to deny that the seal was his or his predecessor's; and this obliged the pursuer to prove the seal. But if the defendant acknowledged the seal, he was not admitted to deny the writ to have been made with his consent or that of his predecessor; but was compelled to warrant the writ and to fulfil the same, or, as more strongly expressed by Glanvil, "Ubi sigillum suum esse publice recognoverit "in curia, cartam illam precise tenetur warrantizare, et conventionem in ipsa "carta expressam, omnino servare sine contradictione." Glanvil, L. 10. cap. 12. *Reg. Mag.* L. 3. cap. 8.

Thus stood our law when the satute 117, Parl. 1540, was made; it proceeds upon the narative, that seals being lost or forged may occasion much hurt; and enacts, "That in time coming no faith be given to any writing under seal, without subscription of the party." To carry on the chain of the argument, it is of importance to consider, whether a party's owning his subscription must not have the same effect with his owning the seal, when sealing only was necessary. That it ought to have the same effect must be evident upon considering, that owning the subscription banishes all suspicion of falsehood or forgery still more effectually than owning the seal. And, therefore, it may justly be taken for granted, that if after this statute a party acknowledged his subscription he was not at liberty to deny the writing, but was bound to fulfil it in every article. Upon this plan it remains only to be examined, whether the law, with respect to the point under consideration, has suffered any alteration by subsequent statutes. And with a view to this examination, I proceed to the statute next in order, viz. act 179, Parl. 1593. the preamble of which is as follows: "That the Parliament understanding falsehood to encrease daily, especially by employing obscure writers who are not notaries, and whose hand-writing is not known;" therefore enacts, "That the writer be specially named and designed, otherwise the writ to make no faith in judgment nor outwith." It is yielded, that the certification here is applicable to registrable writs in the strictest sense of the words: No bond defective in any solemnity required ought to be admitted upon record for execution, because

No 47. no deed is entitled to that extraordinary privilege but what is complete in every article, But with respect to writs serving for evidence only, and acknowledged by the parties to be true, the following reasons evince that these are not comprehended under this statute, but were intended to be left upon their former footing. 1*st*, The acknowledgment of the truth of the writ, is of all the most complete evidence, so as to render every other check unnecessary. 2*d*, The enacting clause of a statute can never go beyond the purpose and intendment of the statute, declared in the statute itself. Here the declared purpose of the statute is to prevent falsehood; and for that good reason the enacting clause cannot be applicable to a writ which is free from all suspicion of falsehood. And 3*d*, As there was no occasion earthly to alter the law with respect to an acknowledged subscription, it ought not to be lightly supposed that the legislature intended to alter established law, unless such intention had been expressed.

In the act 5th, Parl. 1681, two particulars are enacted, *first*, " that no witnesses shall be probative unless they subscribe;" and *next*, " that the want of the designations of the writer and witnesses shall be a nullity, and not be suppliable by a condescendence." The former was to prevent an inconveniency arising from defect of memory; for after a long distance of time, a man might readily forget that he had been witness. The latter was intended to put an end to the former practice of supplying defective writs, by condescending on the writer, &c. which had occasioned much vexation to the lieges, by dark and doubtful probation. But it deserves well to be remarked, that this statute requires not witnesses to be adhibited in any writing where they were not formerly requisite. And consequently, if they were not made requisite by former satutes in writs acknowledged to be true, the statute 1681 makes no alteration.

Nor is there any thing new or singular in pleading as above, that such writs were never meant to be regulated by the foregoing statutes. The Court of Session has excepted another writ from these statutes; and that is a holograph writ without witnesses, though more liable to forgery than a writ acknowledged to be true. A holograph writ is not excepted *verbatim* in any of the statutes; and therefore if words alone be regarded, it is null, and can make no faith. Yet this writing has always been sustained as an exception from the statutes. For what reason, but that the checks introduced by the statutes to prevent forgery, are scarse applicable to a holograph writ, which is very little liable to forgery? This argument concludes *a fortiori* to the present case. The certainty of the subscription, vouched by the defender's acknowledgment, is more satisfying evidence of the truth of the deed, than can arise from a holograph writ, without that acknowledgment. If therefore a holograph writ be unexceptionable evidence, no reason can be assigned why the writing in question ought not to be equally so: If the former be an exception from the statutes, the latter is better entitled to be an exception. And with respect to ra-

tional evidence, a holograph writ must undoubtedly yield the preference: It may possibly be forged; there is no possibility of forgery in the other. No 47.

I proceed now to the *second* answer, which is, That even supposing writs like that in question to be comprehended under the statutes, yet that when any solemnity is neglected, it is not the intendment of these statutes to declare every such deed to be *ipso jure* null, as if it were merely a blank paper, but only to afford an objection or ground of reduction, which the party has in his power to pass from, or which he may be barred from pleading by homologation, by competent and omitted, or by acknowledging his subscription.

And to explain the meaning of the legislature upon this point, it is proper to be premised, that the term nullity bears different senses in our statute law. Sometimes it means an intrinsic nullity; but for the most part, no more is intended by it but to afford an exception or a ground of reduction. I take the liberty to stop a moment for a few instances out of an endless number. A disposition granted by a bankrupt to a confident person without a necessary cause, is declared null and void; and yet the Court of Session never sustains this as an *ipso jure* nullity, but always requires a formal reduction. The like of deeds granted within threescore days of notour bankruptcy, though declared null and void by the statute. Vassals failing to pay their feu-duties for two years, are declared by the statute to forfeit their feu-right *ipso facto*; and yet in this case, the Court always requires a declarator and reduction. With respect to entails, many contraventions are declared to have the effect of an *ipso facto* forfeiture, both by the statute and by the tenor deeds of entail; and yet such a contravention has never been sustained otherwise than by a declarator and reduction.

And now to shew that the terms mentioned above in the statutes, of nullity and of making no faith, are not to be strictly interpreted with respect to writs that serve only for probation; and that no more is intended by such expressions, but to afford an exception or a ground of reduction, will appear from the following considerations. 1*mo*, In general, the law is never presumed to enact a severe or rigid certification, when one more mild is equally effectual. The defence of a defect in solemnities afforded by statutes to guard a defender against forgery, is as complete a remedy as he can reasonably wish, considering, that the objection is not to be overcome otherwise than by proving that he has owned the writing to be a true deed, whether by appearing in Court without objecting the nullity, or by homologation, or more directly by acknowledging his subscription. And for that reason, any deeper certification is with respect to him unnecessary; and with respect to his party, it may happen to be unjust and destructive; for it is not possible always to avoid mistakes and oversights; and it would be extremely hard to deny a remedy in such a case, especially where the remedy proposed is safe and salutary, and in particular, can never subject the defender to any hardship if he intend nothing but what is fair and honest. It is for this reason, that in the cases

No 47. mentioned above, the Court has given no effect to the statutory nullities further than to found a reduction. 2*do*, We meet with an antagonist still less formidable in the expression, " that a writ defective in solemnities shall make no faith," for the natural meaning of this expression is, that the writ *per se* shall make no faith; which does not exclude collateral or additional evidence. It is no sort of deviation from this certificatian to admit a writ that is in itself no good evidence, to be supported by the party's acknowledging it to be a true deed. 3*tio*, By the certification of nullity in the act 1681, we have no reason to suppose any thing further intended than by the certification in the former statutes " of making no faith." Neither can it go further than the certification in a former clause of the same statute, " that none but subscribing witnesses shall be probative," which certainly does not exclude the acknowledgement of the party; for when a party acknowledges his subscription, there can be no need of witnesses to prove it.

And, after all, when it is considered that a subscription acknowledged is more to be relied on than all the checks that have been devised to prevent or to detect forgery, and also considering that from the beginning of our law, such acknowledgement has been held sufficient to make the writ effectual; it will require more express words than are found in the act 1681, or in the former statutes, to make an alteration in this branch of our law, so rational in itself, and so firmly established by length of time.

Having endeavoured thus to unfold the true meaning and sense of the statutes with respect to writs used as evidence, we proceed to what was promised above, which is to show in manifold instances, that the construction here given to the statutes has been adopted by the Court of Session; and also to show, that such writings, when defective in the statutory solemnities have always been allowed to be supported by proper evidence.

The *first* instance is of actions that are every day sustained upon bonds and contracts though defective in solemnities, the designation of a witness for example, or of the writer. It is never held *pars judicis* to take notice of such objections, but to leave them to the defender. If there be no compearance, a decree in absence passes of course; which is not null and void, but requires a suspension as in ordinary cases. And if adjudication have passed upon such a decree with possession, the objection to the bond will be cut off by the negative prescription. Now, none of these things can follow, if a bond defective in solemnities were null and void, so as not even to found an action; for upon that supposition, every judicial proceeding following upon the bond would be no less null and void than if the process were founded upon a newspaper or upon any other insignificant writing. *Next*, If a party be sued for payment of the contents of a bond understood to be subscribed by himself, and a decree pass against him, repelling every one of his defences; the want of the designation of the writer or of a witness, will not be sustained to him in a suspension; for this objection will be found competent and omitted. This

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shows evidently that it is not *pars judicis* to take notice of such defects, unless they be stated by the defender; for competent and omitted relates to defences only, and never bars the defender from objecting any intrinsic nullity. *Third*, Such a deed has always been capable of homologation; witness among many others, a decision in Bruce's Collection, 17th February 1715, Sinclair *contra* Sinclair, *voce* WRIT, where it was objected to a bond, that one of the witnesses was not designed, and therefore that the bond was null by act 1681, cap. 5.; the Court repelled the objection, the bond having been homologated by payment of the annualrents, and part of the principal sum. A bond subscribed by two notaries before three witnesses only, where four are requisite, is not less null than the writing under consideration; and yet this bond was found homologated by payment of interest. 20th November 1627, Lockie, *voce* WRIT. And even deeds signed but by one notary are capable of homologation. 7th March 1612, Boswell, *voce* WRIT; 23d November 1699, Grierson, IBIDEM. A bill of exchange bearing annualrent and penalty is null; and yet such a bill was found homologated by a partial payment, February 1733, Brown *contra* Irvine of Wiseby, *voce* WRIT.

And agreeable to the doctrine above laid down, there are many decisions upon the precise point under consideration. A contract null upon the act 1681, as being subscribed by one witness only, was found supplyable by referring the verity of the subscription to the party's oath. 26th December 1695, Beatie *contra* Lambie, *voce* WRIT; a decision that ought to carry the greater weight, as being recent after the 1681, when it is probable that several of the Judges who assisted in framing the act were still alive. And the same has always been the rule in similar cases. A discharge null, as being subscribed by one notary only, was supported by referring to the creditor's oath his command to the notary to subscribe for him. 22d June 1611, Redpath, *voce* WRIT. A strong authority to the case in hand, because a deed subscribed by the parties without witnesses, is truly not so defective as a deed subscribed by one notary only, where two are made requisite by the act 80th parl. 1579. The like, 29th November 1609, Weir, *voce* WRIT; 8th July 1623, Sheriff of Cavers, IBIDEM; 4th July 1739, Corsbie *contra* Sheill, IBIDEM.

To conclude upon this head, there cannot in the nature of things be better evidence of a contract than a minute of it subscribed by the contractors, and acknowledged by them to be so subscribed. And therefore it were at least to be wished that there should be no law to make such a deed improbative. Such a law must be hurtful to commerce, without serving any good end or purpose. And from the arguments above urged, we have reason to be satisfied that there is no such law.

The *second* point shall be discussed in a few words. It is *objected*, That this deed which is null by the act 1681 cannot bar the privilege of repentance; and therefore that there is still *locus pœnitentiæ*, the bargain being about an heritable subject. This objection is in effect obviated in the answer to the

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.