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.'

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Mrs Rose, on the other hand, granted another missive, of the same date, to Barron, obliging herself to pay the price at the term of her entry; it was, however, neither holograph nor attested by witnesses.

James Barron afterwards brought an action, concluding against her to fulfil the bargain.

In defence, she *urged*, that as her own missive was not holograph, she was entitled to depart from it; 26th February 1761, Fulton against Johnstone, No 46. p. 8446.

The LORD ORDINARY found, 'That the counter missive by the defender not being holograph, or otherwise probative, the bargain, which related to an heritable subject, was incomplete, and the defender at liberty to resile, and therefore assoilzied her.'

In a reclaiming petition the pursuer

Pleaded; It is no doubt a settled point, that in bargains respecting heritage, there is *locus pœnitentiæ* till they are completed by a formal writing. But, as the defender's missive related merely to the price, and had no reference to the conveyance of heritage, it was not necessary that it should be holograph; on the contrary, a verbal obligation proved by her oath, would of itself have been sufficient. The delivery and acceptance of the regular missive, obliging the pursuer to convey the subject, completed the transaction, and barred *locus pœnitentiæ*; Stair, b. 1. tit. 10. § 9.; Rem. Dec. 23d November 1748, Lord Kilkerran against Paterson, No 43. p. 8440.; 10th August 1759, Muirhead against Chalmers, No 45. p. 8444.

Observed on the Bench; A bargain concerning heritage may indeed be completed by an unilateral obligation. But the present is not a case of that kind. It is a mutual contract, entered into by missives, which must be binding on both or neither of the contracting parties. This is the rule in all bargains concerning heritage, as has been solemnly decided; 29th November 1764, Park against M'Kenzie, No 47. p. 8449.; 22d May 1790, Macfarlane against Grieve, No 51. p. 8459. &c. Lord Kames thought otherwise, which led him, in reporting some of those cases, to give them a different turn. That of Lord Kilkerran against Paterson, 23d November 1748, No 43. p. 8440. proceeded entirely upon specialities, though it has erroneously been supposed to be a decision upon the general point of law.

The COURT refused the petition without answers.

Lord Ordinary, *Polkemmet.* For the Petitioner, *M. Ross.* Clerk, *Gordon.*

R. D. *Fol. Dic. v. 3. p. 395. Fac. Col. No 98. p. 218.*