1728. *February.* DUKE of MONTROSE *against* GRAHAM.

No. 228.

A contract of marriage, bearing date since 1681, in which the witnesses were not designed, was found null, though marriage had followed upon it; and the defect was not allowed to be supplied by a condescendence of the designations. See APPENDIX.

Fol. Dic. v. 2. p. 546.

1739. *January* 16. CRAWFURD *against* WIGHT.

No. 229.
A missive letter not holograph found probative, the party acknowledging his subscription.

One having become bound by a missive letter not holograph, as cautioner for the rent of a house during the tacksman's possession, and being pursued before the Bailies of Edinburgh upon the said letter, the Bailies found that the letter, not being holograph, was not obligatory; whereupon the pursuer having referred his allegation to the defender's oath, and the defender having deponed, that he had agreed to be cautioner for one year only, but having in his oath acknowleged his having subscribed the letter, adding that he had signed it without reading that part of it which bound him during the tenant's possession, the Bailies "Found him liable for the whole years in terms of the letter."

In a suspension of this decree, "The letters were found orderly proceeded," though several of the Lords were of a different opinion.

See this decision justified, December 20, 1746, Foggo against Milliken, *infra.*

Kilkerran, No. 3. p. 605.

1739. *December* 18. GOODLET-CAMPBELL *against* LENNOX.

No. 230.
A missive letter not holograph, acknowledged to have been subscribed, found obligatory *in re mercatoria.*

A missive letter of credit acknowleged to be subscribed by the party, though not holograph, was found obligatory, being *in re mercatoria.*

This was a letter wrote by one country gentleman to another, recommending one as a sufficient merchant for his victual; and so was in effect *in re mercatoria.*

Kilkerran, No. 5. p. 606.

*** See C. Home's report of this case, No. 171. p. 16932.

1746. *December* 20. FOGGO *against* MILLIKEN.

No 231.
A missive letter not holograph

Foggo pursued Milliken for payment of the rent of a farm for the crops 1740 and 1741 upon his missive letter, whereby he had not only become bound, that

No. 231. found probative, the party acknowledging his subscription.

Johnston, Foggo's tenant in said farm, should remove at Martinmas 1741, but also obliged himself for the payment of the rent of the said two crops.

Milliken acknowledged that he had subscribed the missive, but as it was not holograph, and therefore improbative, he alleged that he could be no farther bound, than he should acknowledge to have been the communing, which he averred to have been no other than this, That he should be bound that Johnston the tenant should remove from the ground, which accordingly he had done.

But notwithstanding this quality adjected to his acknowledgment, "He was found liable in terms of the letter."

The Lords took up the case on the difference between writs which need the solemnities required by the act 1681, and missive letters; and were of opinion, that where a writ is null, as wanting the solemnities required by the act 1681, as the nullity is by that act declared not suppliable, it is not relevant to support the deed that the granter acknowledge his subscription. But as before the act 1681, all nullities were suppliable by the granter's acknowledgment of his subscription, so in missive letters when improbative as not holograph, as they do not fall under the act 1681, that nullity is supplied by the granter's acknowledging his subscription; and that it is a mistaken notion which some have entertained, that where the granter acknowledges his subscription, and at the same time declares he did not mean or intend to bind himself but to this or that part of it, that the declaration only, and not the letter, is the proof; for that the letter itself becomes probative by his acknowledging his subscription, as before the act 1681 the defects of all writs whatever were thereby supplied.

Kilkerran, No. 11. *p.* 609.

*** D. Falconer reports this case:

James Foggo of Townhead being tacksman of certain lands, subset part of them to Richard Johnston of Eastfield, and differences arising between them, there was a meeting held for the adjusting them, by the mediation of Alexander Milliken of Duncanziemore, at which a letter was drawn up by John Hamilton a writer, and signed by Milliken, obliging himself that Johnston should remove from the arable land at Martinmas 1741, and from the houses and grass at Whitsunday following, and also binding himself to pay the rent of the year 1740, and the current rent of 1741, which latter obligation Milliken affirmed was inserted without direction from him, and the letter signed without his knowledge thereof, he being drunk at the time, as they had drank largely at the communing.

Foggo obtained decreet against Milliken before the Sheriff of Ayr; in a suspension whereof the defender declared that there was a previous communing, and that, at his desire, John Hamilton was to write a letter, but whether it was read to him or not, he did not remember, being then dull with drink, but acknowledged he signed the same, and added, that he admitted he was to consent to the tenant's removing, but was not to become bound for the rent; and John Hamilton de-

poned, that the letter was written at the desire of both parties, and read over before signing, and the suspender did not appear to him to be drunk. No. 231.

The Lord Ordinary, 14th July, 1746, "Having advised the depositions of the suspender and John Hamilton, writer of the letter, repelled the reasons of suspension, and, 6th December, refused a representation, in so far as it reclaimed against the letter's being at all binding, in respect it was admitted there was a previous communing, and that a letter was drawn up and signed by the suspender, and the suspender owing his subscription to the letter produced."

Pleaded in a reclaiming bill: That writings not signed before witnesses subscribing bore no faith, except in cases of bills, receipts to tenants, and holograph writs; and it was found, that a letter not holograph, was not sufficient to infer an obligation on the subscriber, though it related to the tocher of a married child, and was insisted on as coming in place of a contract of marriage, which was favourable, 25th February, 1728, Strachan against Farquharson, No. 227. p. 16978; and in a late case, wherein Muir of Cassincary was pursuer, it was found that a letter, the subscription whereof was acknowledged, but which was not holograph, could not produce action.

In the present case it was not admitted that the communing was agreeable to the conception of the letter, as it now appeared, or that there were orders to draw it up in these terms; so that the question came precisely to the point in law, Whether a letter not holograph were a binding obligation, when the subscription was owned.

The Lords refused the petition.

Pet. *Boswell.*

D. Falconer, No. 149. *p.* 187.

1748. *June* 28. NEILL *against* ANDREW.

No. 232.

The acknowledgment of the subscription to a missive letter renders the missive obligatory, though not holograph. *Vide* PERSONAL AND TRANSMISSIBLE, *eodem die inter eosdem*, No. 84. p. 10406.

Kilkerran, No. 15. *p.* 612.

1749. *November* 7.

ALISON *against* The REPRESENTATIVES of WILLIAMSON.

No. 233.
Whether debentures, as they pass by blank indorsation, have

Williamson having in the year 1722 obtained a salt debenture from the custom-house at Kirkcaldy, indorsed the same blank to Henry Crawfurd, who transferred it as it stood to James Blair of Ardblair; and Blair having filled up his own name in the indorsation, transferred it to Alison in security of a debt.