No. 223. the Romans, which in privileged cases had some relaxation as to their forms, where the defect was ratione solennitatis, non voluntatis, as to allow fewer witnesses, and the like; but none of them totally dispensed with writer, witnesses, time, and place.

Fountainhall, v. 2. p. 482.

1710. *December* 22.

GEORGE GORDON of Buckie *against* WILLIAM M'INTOSH of Borlam.

No. 224.
Payment of a bond found not to have been instructed by a missive letter, not holograph nor *in re mercatoria.*

George Gordon of Buckie as representing John Gordon of Buckie his father, having charged William M'Intosh of Borlam, for payment of 900 merks of principal, and annual-rents thereof, contained in a bond granted by him in the year 1677, to the said John Gordon; he suspended upon this reason, That the bond was paid; and offered to instruct payment by a missive letter subscribed by the charger's father, and directed to the suspender in November 1675. The Lords found, that the missive letter not being holograph, not in re mercatoria, instructed not payment of the bond charged on, and therefore decerned.

Forbes, p. 466.

*** Fountainhall reports this case:

1711. *January* 11.—Gordon of Buckie pursues William Mackintosh of Borlam for the sum of 900 merks, contained in bond granted by Borlam to Buckie's father in 1675, which he had confirmed. Alleged, Paid and discharged by a letter under Buckie's hand shortly after it, containing an apology and excuse why he had sent back his principal bond, because it was lying in Glastyrum's hand, where it should be taken up and sent him. Answered, That a bond could not be taken away but *scripto vel juramento;* and the writ must be as solemn and formal as the bond; whereas here there was nothing produced but a missive letter, acknowledged not to be holograph, and so can never be probative of the payment, there being no exceptions allowed from this excellent rule by our law, save only three, viz. bills of exchange, letters among merchants relating to their trade, and masters' discharges to tenants, which we allow, though neither holograph nor before witnesses. The Lords found the letter produced, not being holograph, could not instruct payment of this bond, not being *in re mercatoria*, nor betwixt strangers, but a bond of borrowed money betwixt two country gentlemen. Then Borlam alleged, that though the letter *per se* might not be relevant to take away the bond, seeing it was not holograph, yet the same might be fortified, adminiculate and astructed by several pregnant qualifications he condescended on; such as, that he offered to prove there was delivery of bags of money to Buckie, about the time he wrote that letter containing the discharge; 2*do*, That it was in Glastyrum's

No. 224.

hands, which was the cause why he could not send it, and that this same pursuer got it from him; and that it is not the body of the writ, but the subscription which infers the *vinculum juris* and obligation, and if that be true, it binds the subscriber whether it be holograph or not; and the 9th act 1669, making holograph writs prescribe in 20 years, relates to actions thereon, but does not preclude them from being founded on by way of defence or exception, even after that, any time within 40 years; and that the Lords have found so, as Dury observes, 12th July 1632, Pyronon against Ramsay's Executors, No. 208. p. 16963. where a missive letter, though not holograph, was sustained to prove a debt, being adminiculated by concurring circumstances; and the like was found, in 1671, Earl Northesk, No. 212. p. 16967; and Borlam is in the same case, for he adduces most strong and violent presumptions to enforce the verity of the letter; and it is known that missives never use to have witnesses adhibited thereto; and likewise few Noblemen or Gentlemen write the whole body of their letters, but dictate them to their servants or secretaries, and only subscribe them, and we daily see matters of great importance depending upon letters; and therefore craved the Lords may, before answer, allow a probation of these pregnant adminicles to fortify and astruct the verity of the letter, which, if holograph, would have needed no other adminiculation but *comparatio literarum*, that it was all his hand-writ. Answered, That the supporters offered to prop this letter, could not be regarded; for not being holograph, it is a pure *non ens* in the eye and construction of law, and so incapable of support; *non entis nulla sunt accidentia nullæ qualitates*, and therefore must continue a nonentity as it was *ab initio*. It is true, no writ binds without it be subscribed; but the naked subscription does not infer the obligation, unless it be done *habili modo et in terminis juris*, that either the whole paper be wrote by him, or witnesses adhibited to the subscription. And as to the decisions, that of Ramsay and Pyronon was betwixt merchants *in re mercatoria*; and the Lords inclined to the contrary opinion on the 14th February 1627, No. 204. p. 16960. but it noways meets this case. And Northesk's decision was *inter illustres personas*, who use not to write the whole context and body of their letters; and Stair is very positive, Book 4. where he only excepts bills of exchange *favore commercii*, and tenants discharges *ob rusticitatem*, and though it may be difficult to forge a whole letter, yet Hunter and many of late have attempted to add subscriptions where there were no witnesses added, so all means of discovering the falsehood are cut off; and his imaginary qualifications can never cut off nor enervate my bond. The Lords refused to admit his condescendence, for supporting his missive letter to probation, and therefore decerned.

Fountainhall v. 2. p. 623.