

1715. July 28. The EARL of LEVEN *against* MAJOR ARNOT.

THE Earl having raised a process against Major Arnot, for payment of L. 120 Sterling, contained in two holograph missives, the Major proponed a defence of prescription, in regard that no process was raised upon them within 20 years; and the pursuer having *answered*, That the act 1669 having indeed introduced a prescription of such writs, not being pursued within 20 years; yet it also established an exception in these words, Except the pursuer offer to prove by the defender's oath, the verity of the said holograph bonds and missive letters, and subscriptions in count-books; and the pursuer offered to prove in the terms of the said exception, the verity of the said missive letters by the defender's oath. And here the question turning upon the meaning of the said exception, and whether the missives in question be so far prescribed, that action cannot be thereupon sustained, unless the verity of the debt, and that the same is resting owing, unpaid, be proven by the defender's oath? Or if it be sufficient to be proved by his oath, that the said missives are true deeds, holograph and subscribed by the party?

It was *alleged* for the defender, *imo*, That prescription by its nature *perimit obligationem*, so that unless the pursuer could make it appear, by the defender's oath, that the debt is resting, the action must evanish; for seeing the exception of prescription presupposes the verity of the deed, the meaning of the exception must be, that it prescribes, unless resting owing be proved, &c. *2do*, By another clause in that act, it is provided, that merchant's accounts, ministers's stipends, mails and duties, &c. prescribe within five years, unless resting owing be proved by oath; and by the act 1579, servants' fees, merchants' accounts, &c. are declared prescribable in three years under the same exception. So that the verity of the debt, and not of the deed, is to be understood in the exception of the said acts.

*Answered* for the pursuer, *imo*, That *omnis præscriptio non perimit obligationem*, for then after running of any prescription, there could be no proof by writ or oath of party, seeing an extinct obligation can afford no action; so that we must distinguish betwixt the long prescription of 40 years, and short ones, *quibus modus tantum probandi perimitur*. *2do*, Before the act 1669, such writs were probative until the long prescription, and must still subsist, except in so far as limited by that act. *3tio*, Prescription does not in all cases acknowledge the verity of the obligation, since it may be opposed to a false as well as true obligation. *4to*, A correctory law must be explained, according to the genuine meaning of the words, which here mention only the verity of the writ, not the debt. And as to the other clauses in the act, and the act 1579, *answered*, That these other instances widely differ from this, for they concern debts not constituted by writ, which law presumes the creditor will not lie out of for any considerable time; and therefore a prescription in such cases is justly establish-

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The vicennial prescription of holograph writs is only *quoad modum probandi*, therefore it is sufficient to prove the verity of the subscription by the defender's oath, and the pursuer is not bound to prove resting owing.

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ed, after a certain number of years, with this exception, unless the pursuer prove resting owing, by writ or oath, which is plainly distinct from the present case.

THE LORDS found it relevant by the defender's oath, to elide the defence of prescription, that the missives are true and holograph, and subscribed by him.

Act. *Fleeming*.Alt. *Hay*.Clerk, *Mackenzie*.

*Fol. Dic. v. 2. p. 113. Bruce, v. 1. No 133. p. 175.*

1725. July 3.

WALTER GRAHAM of Kilmardinny *against* COCHRAN of Kilmarnock.

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MR WILLIAM COCHRAN of Kilmarnock granted a holograph bond to Walter Graham of Kilmardinny, and after 20 years Kilmardinny pursued the heir of Kilmarnock for payment, who *objected*, That the bond was prescribed by the act of Parliament of King Charles II. concerning prescriptions, which requires, 'That holograph bonds be pursued within 20 years, otherways they prescribe, unless the verity of such bonds is offered to be proven by the oath of the defender,' which Sir George Mackenzie interprets to be the oath of the subscriber; and in this case, the mean of proof being lost by his death, the bond falls.

THE LORDS find, that the word defender might be justly applied to the heir, who was defender in this action; and that his oath of knowledge of the verity of the bond was sufficient to support it.

Reporter, *Lord Milton*.For Kilmardinny, *Arch. Murray*.

*Fol. Dic. v. 4. p. 99. Edgar, p. 184.*

No 191.

The vicennial prescription, in terms of act 1669, c. 9. of a holograph missive letter of relief found to commence precisely from its date; and that the act admits not of any latitude

1773. January 19. ALEXANDER HOME *against* ALEXANDER DONALDSON.

THIS action was laid upon a letter of relief granted to the pursuer's father by the father of the defender in these words: 'August 20. 1742. Sir, As, at my desire, you have, of this date, accepted a bill with James Craw brewer in Canongate, for L. 20 Sterling, payable against Candlemas next; therefore, I hereby promise to keep you free from payment of the said sum, interest and damages that may follow thereon. (Signed) *Alexander Donaldson*.' Directed, 'To Mr John Morison-Hume of Law, residenter in Canongate.' The pursuer subsumed, that, in the year 1759, he, in order to relieve his father, and upon being applied to for payment of the relative bill by Messrs Hogg, to whom it was accepted, his father being then *non compos mentis*, had accordingly