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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 Kilmaronock.

No 190.

Mr William Cochran of Kilmaronock granted a holograph bond to Walter Graham of Kilmardinny, and after 20 years Kilmardinny pursued the heir of Kilmaronock 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.

1773. *January* 19. Alexander Home *against* Alexander Donaldson.

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

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

paid the same, while ignorant of the letter of relief his father had got from Donaldson, which he had at length found among his father's papers, but not till the death of his mother, who, being proprietor of the estate of Law, had, for several years after her husband's decease, which happened in 1762, continued in possession of the estate, and of all her husband's writs and repositories; and, upon this letter, he now insisted against the defender, as representing his father, for payment of the contents of the principal bill.

No 191. in that respect, even in a question with the heir of the creditor, pleading both ignorance of his right, and that it was, in its nature, not an absolute obligation, but pendent upon a condition; and therefore the prescription could only begin to run from the time of the distress, as in the case of warrandice.

Pleaded in defence; That the letter of relief in question, which is a holograph writ, fell under the vicennial prescription, and was not actionable. The statute 1669, cap. 9. enacts, 'That holograph missive letters, and holograph 'bonds, and subscriptions in count-books without witnesses, not being pursued 'for within 20 years, shall prescribe in all time thereafter, except the pursuer 'offer to prove, by the defender's oath, the verity of the said holograph bonds, 'and letters, and subscriptions in the count-books.'

Answered; It appears from the letter of relief sued on, that the obligation constituted by it, depended upon the existence of a future event. It was altogether uncertain, whether this event should ever exist; and, therefore, the letter of relief was not a pure, but a conditional obligation in the proper legal sense of the phrase. Hence it follows, that prescription can only be understood to commence from the period of distress; for, at that time only could the condition be said to be purified; and no relief that could be demanded prior to distress could preserve the co-obligant in the bill from payment to the creditor.

It is true, that the act of Parliament with regard to holograph bonds and holograph missives, may, at first sight, be understood to strike against the letter of relief in question, as being dated in the year 1742; but the same rules and defences competent to be made in other questions of prescription, ought to be admitted in this case. There is a strong analogy between an obligation of relief and that of warrandice; and there is nothing in law more certain, than that, in obligations of warrandice, the prescription is accounted to run from the period of distress, or eviction only; and the reason of prescription, which is particularly expressed in the act of Parliament, is the not following the right; and, therefore, it is a just inference, that prescription is not to be accounted to run till the right could be followed; Stair, b. 2. tit. 12. § 27. Hence the prescription pleaded in this case, commences to run against the pursuer only from the year in which he made payment of the debt in question; for, before that period, there can be no reason for supposing that he had relinquished any claim competent to him, in consequence of Mr Donaldson's letter of relief.

Observed on the Bench; The vicennial prescription affords a good defence. The law had a doubt of such obligations; therefore, does not allow them to be probative after 20 years, unless the verity of the subscription be supported by the oath of the granter; and the holders have occasion to pursue sooner; because, unless sued on, they will not be probative. The case here is very dissi-

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milar to that of warrandice; and, were the pursuer's plea to be listened to, the act of Parliament would be eluded.

"The Lords sustained this defence, and assoilzied the defender."

Act. *Ja. Grant.* Alt. *Jo. Douglas.* Clerk, *Campbell.*

Fol. Dic. v. 4. *p.* 99. *Fac. Col. No* 46. *p.* 122.

No 192.

Whether the verity of a holograph deed can be proved by the oath of the granter's heir, relative to the hand-writing alone?

1784. *November* 19. Thomas Dalziel *against* Lord Lindores.

Dalziel sued Lord Lindores in an action founded on a holograph obligation granted by the father of the latter, upwards of twenty years preceding: The pursuer offering to establish the verity of the writing by the oath of the defender;

Pleaded for the defender; The statute of 1669, cap. 9. enacts, 'That holograph missive-letters, and holograph bonds, and subscriptions in count-books without witnesses, not being pursued for within 20 years, shall prescribe in all time thereafter, except the pursuer offer to prove, by the defender's oath, the verity of the said holograph bonds and letters, and subscriptions in the count-books.' By the oath of the defender must here be meant that of the granter of the deed, who is the only person to whom inspection of the writing can afford a sufficient cause of knowledge of its verity. Such is the opinion of Sir George Mackenzie, in his observations on this statute, p. 430. If, however, the fact of granting the obligation were know to the heir, this might perhaps be referred to his oath, which of course would be an oath of knowledge; whereas any observation relative to the hand-writing could warrant nothing further than an oath of credulity, by which the verity of the deed would not be proved; Bankton, b. 2. tit. 12. § 36.; 17th July 1741, Brown *contra* Crawford, No 26. p. 9417. In the present case, a reference to the defender's oath, who never heard of the writing before, would be vain and useless.

Answered; It is not the debt itself, but the probative quality of the holograph voucher, that is thus prescribed; and the principle of the enactment accordingly is obvious. After the lapse of 20 years, there may not, so easily as within that period, be found persons whose acquaintance with the hand-writing of a party will enable them to detect any suppositious deed which may be ascribed to him. This reason seems to indicate, that the oath of the granter's heir, rather than that of himself, was in the view of the statute; because, during his own life, the knowledge of his hand-writing would not naturally be lost. The observation of Mackenzie appears thus to be ill-founded; and it is farther contradicted by the decision of 3d July 1725, Graham, No 190. p. 10992, by which the oath of an heir was admitted in a like case. From that passage of Lord Bankton, indeed, in which he speaks of an oath of credulity on this point, as affording no evidenc, the defender argues as if it were a maxim in law, that no one person can certainly distinguish the hand-writing of another, nor emit an