

and fellow-subjects, and no enemy privateer would have touched so convenient purchasers.

SWINTON. I never can bring my mind to think that there was any moral turpitude in the conduct of Hutton. It was as lawful to buy the ship from the French captor on the high seas, as after condemnation. The owner may reclaim the property, but then he must pay the value disbursed.

JUSTICE-CLERK. Had Hutton made the purchase for the benefit of Palmer, something might have been said; he might have had good action or retention for a recompense: But here lies the difficulty,—there was an illegal transaction. Hutton interposed for his own behoof alone, and withheld the property from the right owner. If, under the name of recompense, you give Hutton indemnification, the consequences will be fatal: *who* can know whether the bargain was fair? This will open a door for frauds innumerable, and strike at the security of the commerce of this nation. Hutton cannot be entitled to any thing more than a salvage.

ESKGROVE. To award L.150 paid by Hutton for the ship, would be to subvert the former judgment. Had Hutton been acting in the sense of a *negotiorum gestor*, he might have had action for indemnification; but he has destroyed his claim, by showing his intention to keep the ship to himself.

On the 3d February 1784, “The Lords found a recompense due;” adhering to the interlocutor of the 4th July 1783.

Act. A. Abercrombie. *Alt.* B. W. M'Leod.

Diss. Braxfield, Eskgrove, Hailes, Henderland.

[Afterwards, without a vote, they found that the recompense cannot exceed legal salvage and the expenses laid out on the ship.]

1784. February 3. WILLIAM SCOTT *against* ANDREW GRAY.

BILL OF EXCHANGE—PRESCRIPTION.

A partial payment made and marked on the back of the Bill, after the running of the sexennial prescription, by the representatives of the debtor, saves from the prescription.

[*Fac. Coll. IX.* 218; *Dict.* 11,126.]

BRAXFIELD. The Act of Parliament is not accurately worded: it goes no farther than to a presumption of payment; but this is not an extinction of the

debt,—still probable by writ or oath. The supposed debtor must say that he paid, and he is not entitled to add qualities. I am not obliged to go to his *oath*; his *writ* is as good as his oath. The acknowledging a debt to be due before the six years have elapsed, is nothing; but, after the six years, it is good to interrupt. Any acknowledgment by *writ* is sufficient, and *that* we have here.

HAILES. I doubt whether words written by a man, not in his own name, but to assist another, be writ in the sense of the statute.

SWINTON. I cannot make a distinction between promise of payment, *within* the six years, or after. Payment was made by the heir of the debtor, who might possibly have been ignorant of the facts.

GARDENSTON. A promise to pay, during the currency of the years of prescription, is an argument of the debt having been paid within those years, because otherwise the promise would have been enforced; but the case is very different when the promise or acknowledgment is made after the years of prescription have run.

ESK GROVE. My doubt is as to the payment being made by the heir of the debtor. An heir, or an executor, may sometimes know that the debt subsists; but *that* is not generally the case. *Resting owing*, in the case of an executor, must be different from that in the case of the original debtor. The executor can only swear as to belief,—the original debtor can swear from knowledge.

JUSTICE-CLERK. I have no occasion for the *oath*, since I have the *writ* of the debtor admitting the debt to be due.

HENDERLAND. An heir or executor can only go on the information of others.

On the 3d February 1784, “The Lords sustained the action, and repelled the defences.”

Act. A. Wight. *Alt.* H. Erskine. *Reporter*, Stonefield.

1783. December 4. Mrs JEAN M'CONOCHIE, and HER HUSBAND, *against* JAMES MARSHALL and THOMAS RUTHVEN, Cumming's Creditors.

SERVICE OF HEIRS.

Necessity of a General Service in order to transmit personal rights in burgage tenements.

[*Faculty Collection*, IX. 210; *Dict.* 14,446.]

ESK GROVE. I doubt whether magistrates in burghs can give such infeftments in personal rights.