

No 191. 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. Douglar.*

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

oath of knowledge respecting it, unless he has seen it while executing. But the statute itself, in the manner stated above, shows this to be a mistaken idea. How else would there be more safety in permitting the authenticity of a holograph writing to be presumed for a limited period only subsequent to its date, than during any length of time? Or, why have writings which are holograph, been thus privileged beyond such as are not holograph? It is evident, that the law considers the identity of hand-writings to be as much matter of certain knowledge, as the identity of persons, or of other external objects. As the defender's knowledge, therefore, of the writing in question may be such, the pursuer is entitled to make the trial by his oath.

THE LORD ORDINARY pronounced the following interlocutor: ' Finds, That the missive letter libelled on, said to have been granted by the defender's father, falls within the vicennial prescription established by the statute 1669; and that the writer of that missive, being now dead, the defender, his representative, is not bound to swear as to the verity thereof.' But

THE COURT altered that interlocutor, and found, ' That it was competent for the pursuer to take the oath of the defender.'

In consequence of this interlocutor, the defender emitted the following oath: ' That he has often seen, and is perfectly well acquainted with the hand-writing of his father; and that he thinks the missive-letter that is shown to him, and on which the action is founded, is very like the hand-writing of his father, and such, both in the body and subscription, as he was in use of writing; but that he cannot swear positively to its being his writing; and that he could not swear to his own writing, it being different at one time from what it is at another. And being interrogated, Whether, upon an inspection of the foresaid paper, he does believe it to be holograph of his father? he depones, That in consequence of what he had already said, he cannot have a doubt of that.'

' THE LORD ORDINARY having considered the foregoing deposition, found, That the defender's oath was only an oath of credulity; and therefore assilzied him from the action.' But

THE COURT ' found, That the oath did sufficiently prove the verity of the missive-letter.'

A reclaiming petition preferred against this judgment was refused without answers.

Lord Ordinary, *Ankerville*. Act. *Nairne*. Alt. *Maclaurin, M'Cormick*. Clerk, *Menzies*.
S. *Fol. Dic. v. 4. p. 99. Fac. Col. No 178. p. 280.*