1785. *November* 19 *and* 28. THOMAS DALZELL and JOHN RUTHERFORD *against* JOHN, LORD LINDORES.

PRESCRIPTION.

Whether the verity of a Holograph Deed can be proved by the Oath of the Granter's Heir, relative to the Handwriting alone?

[*Fac. Coll. IX.* 280; *Dict.* 10,994.]

SWINTON. Prescription is not run as to one of the payments, for twenty years have not elapsed since the term of payment. In the negative prescription of forty years, prescription only runs from the term of payment. Should not the same be the case here?

BRAXFIELD. By no means. In the case of the long negative prescription, the creditor is *non valens agere* until the term of payment; and, consequently, the prescription cannot begin to run before that term. But the vicennial prescription is of a different nature: it only limits the efficacy of imperfect, or less solemn deeds, to twenty years, in order to secure against forgery, and to prevent deeds, not carefully drawn up, from being probative too long.

JUSTICE-CLERK. I have only to add, that it would be absurd to find one-half of the subscription genuine and not the other. [This observation is lively, but it goes too far; for then Lord Lindores, the defender, would be excluded from swearing that the letter was not of the handwriting of his father.

ESKGROVE. As to the import of the Act 1669, it speaks of defender, not of original obligant.

PRESIDENT. An heir may, in many cases, be able to swear with precision that a deed was written or was not written by his predecessor. It is fit first to hear the oath, and the Court will afterwards judge of its import.

On the 19th November 1784, "The Lords found that the oath of the defender must be taken;" adhering to the interlocutor of Lord Ankerville.

Act. W. Nairne. *Alt.* Edward M'Cormick.

1785. *November* 28. BRAXFIELD. The statute does not respect an oath of credulity, but an oath of knowledge.

ESKGROVE. The reason why, in a former case, the Court allowed the heir of the debtor to be examined, was, that an heir might perhaps be in the knowledge of the deed having been executed, because he was present at its execution.

SWINTON. Any man acquainted with Lumquhat's handwriting might have said all that his heir has said, and yet *that* would have been no evidence.

JUSTICE-CLERK. The heir swears that he has *no doubt* of the subscription being his father's. It would be going far to hold that this is no more than an oath of credulity.

MONBODDO of the same opinion.

GARDENSTON. The Act of Parliament requires proof of the verity of the writing; and can we have a better proof than this oath? Shall we not believe what the party himself believes?

On the 28th November 1785, "The Lords found that the oath does sufficiently prove the verity of the missive-letter founded on, and therefore found the defender, Lord Lindores, liable for payment of the one-half of the principal sum, and interest libelled;" altering the interlocutor of Lord Ankerville.

On the 14th December 1785, they refused a reclaiming petition and adhered.

Act. W. Nairne. *Alt.* Ed. M'Cormick, J. M'Laurin.

Diss. Eskgrove, Swinton, Henderland, Rockville, Braxfield, (Ankerville, Ordinary, absent.)

1785. *December* 9. ROBERT WALKER *against* ROBERT DUNCAN.

WRIT.

Acknowledgment of Subscription.

[*Fac. Coll. IX.* 428; *Dict.* 17,057; *Note.*]

HAILES. All the argument on the fact, from the suspicions raised against the subscription, "*Robert Duncan,*" is nothing to the purpose; for *that* subscription is still connected with the rest of the paper. [A circumstance never attended to by the lawyers in this cause.] And, supposing it to have been separated from the paper, the tops of the original letters are still visible on the paper; and the art of man could not have pasted any subscription so as to correspond with those tops. As to the cause itself, there is a difference between a deed *inter mercatores* and a deed *in re mercatoria.* When merchants engage in transactions, not necessarily connected with commerce, they must observe the same forms that the law requires in solemn deeds.

ESKGROVE. In various cases, which do not necessarily require writing, acknowledgment of subscription may be sufficient; but the case is different where a formal writing is necessary to constitute the obligation. An obligation of relief is a cautionary obligation for producing action.