nature, by most excellent reasons, providing against the lubricity of that tender age. For, though prescription be introduced *in odium ejus qui jus suum prosequi negligit*, yet negligence can never hurt a minor, who is reputed *non valens agere*. And the arguing, that if the Parliament had designed to except minors, they would have expressed it, is fallacious and inconclusive; for the Act 1474, introducing prescription, where personal rights are not prosecuted within the 40 years, does not except minors; and yet the Lords, by their constant tract of decisions, have always excepted them. And the Act 1617, establishing the 40 years' prescription in heritable rights of lands, gives a period of 13 years to interrupt, where minority is not excepted, as it is in the first part of that Act; yet the Lords, on the *5th July* 1666, *The Earl of Hume* against *his Wadsetters*, found minority behoved to be deduced from these 13 years, though not expressed: and Sir George Mackenzie, in his Observes on these Acts of Parliament, introducing short prescriptions in 1579, remarks, that some of our Acts notice minority, and others do not, yet it is virtually included in them all; and, being founded on common law, *inest de jure*.

The Lords thought the Act, freeing cautioners after seven years, an innovation of our ancient law, and unfavourable, and deserving no extension; yet, being a new law, they resolved to hear the point in November, ere they fixed what should be the rule for minors in time coming in such dubious cases.

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1712. *June* 24 *and July* 26. STEWART of FINTALLOCH *against* MACWHIRTER of GARRIEHORN.

June 24.—THOMAS Stewart of Fintalloch being debtor to John Macwhirter of Garriehorn in 1100 merks, by bond; and, being charged, he suspended on compensation and other grounds. And, during the dependance, before it was fully discussed, Fintalloch having gone to Norwich with a drove of cattle, he is arrested by young Garriehorn, likewise there, for the debt suspended, upon a letter of attorney or commission, given him by his father, and put in prison, till Kennedy of Daljaroch, Heron of that ilk, and some other Scots gentlemen accidentally there, bailed him, under the penalty of no less than £800 sterling. Fintalloch, on his return, gave in a complaint to the Lords of this outrageous affront, and the manifest contempt of the Lords' authority, to incarcerate him during a standing suspension. And, during the trial of this riot, he denying that he ever gave such commission to his son, and Fintalloch, wanting the same, refers it to his oath; who compears, and denies he ever gave such commission; which he thought would liberate himself, though it left his son in the guilt of wrongous imprisonment; but he, to shun it, had retired abroad: yet, afterwards, Fintalloch recovers the principal letter of attorney, and gets the writer and witnesses, who saw it produced at Norwich, examined, and they clearly deponed anent the verity of it. Which probation coming this day to be advised, Fintalloch craved that Garriehorn, elder, might be condemned to refund his damages, which were very considerable.

ALLEGED,—All that was before the Lords was allenarly the contempt for proceeding during the depending suspension; for the commission, now pro-

duced, is since the complaint, and so no part of it. And, at worst, he had sworn he minded no such thing, and verily believed it was forged; and, being now *juratum parte deferente*, no farther inquiry can be made.

ANSWERED,—When the complaint was first tabled, they had not then the principal commission, and so were forced to refer it to his oath, when he was pleased to forget it; and, this being incident and emergent, it naturally falls under the Lords' cognizance, though the perjury will belong to another court; and therefore craved he might be sisted personally, to see what countenance he would put on, and they more surely recover their damages.

The Lords thought the matter so ill coloured, that it was necessary to have him present. Some moved to begin with a citation, but it was judged too soft; therefore they granted warrant to sheriffs and messengers to apprehend and bring him to Edinburgh, and then the Lords would declare how to dispose of him. But the crime being bailable, they allowed him to come in without being made prisoner, on his finding sufficient caution to appear within six sederunt days after. And, it being started what should be the penalty, by the 6th Act, 1701, anent wrongous imprisonment, it was found to be 3000 merks for a landed gentleman; and so that was made the certification in the said warrant directed against him. *Vol. II. Page* 742.

July 26.—GARRIEHORN being brought in by virtue of the warrant granted against him *supra*, 12th June 1712; but his son not having sisted himself: in respect of his absconding and flight, the father took the confidence to deny his subscribing any commission to his son to arrest Fintalloch at Norwich; and that his son had forged it; and choosed rather to tash and brand his son as an open falsary, than to leave himself exposed to perjury: for, if the commission was not his, then his son was a forger; but, if it was a true deed, then he was perjured; for he had denied, on oath, that he ever gave any commission to his son to seize and arrest Fintalloch. So his defence resolved into this single point: you, not having recovered the principal commission, but only a copy, referred it to my oath, that I had given a warrant and procuratory or attorney, of that or the like tenour, empowering my son to arrest Fintalloch; and I have deponed *negative*, that I never gave any such warrant; so it is *juratum reo deferente*, after which there can be no farther inquiry but *an juratum sit?*—an oath, by the divine law, being the end of all controversy. And, if one have sworn falsely, he incurs the punishment due to perjury, but can never be liable in any civil process to make up the parties' damages; for their voluntary reference of the point in debate to his oath of verity *simpliciter*, and he deponing *negative*, it puts a final close to the controversy; and he fell to be assoilyied here from Fintalloch's expenses and damages, but prejudice to insist for the perjury, if they thought there was ground for it: but that was *alterius fori*, belonging to the Criminal Court, and not to the Session. By the Roman law, an oath was an absolute decision of the case, and that without the remeid of appeal, review, or rescission, without inquiring if the claim or demand was *ab initio* just. Thus it is decided, *sect.* 11. *Institut. de Act.* if one, *postulante adversario*, has sworn the money is truly due to him, *non amplius quæritur an ei pecunia debeatur, sed solum an juraverit;* and this affords an exception, *sect.* 4. *Instit. de. Except.* He who suffers his adversary to swear, is presumed to renounce all other allegeances competent before the oath, and which might have stopt his deponing: and

the generality of the doctors and commentators on these texts make a *duplex vinculum* where the party refers it to oath; not only the tie of religion, but that of convention, paction, and final transaction, by which he who voluntarily defers, agrees that the oath shall be the only rule: and this the Roman law has extended so far, that not so much as on the pretext of writs newly found, can the oath be quarrelled or rescinded, *L.* 31 *D. de Jurejur.* Where the judge, *ex officio*, takes the oath, the cause may be redintegrate on new discoveries; but if it be *adversario deferente, non conceditur retractatio.* And *L.* 21, 22 *D. de Dolo malo*, where the point was referred to oath by the party, Labeo thought there remained still an action *de dolo*, that he should not lucrate by his own fraud: yet Pomponius and Marcellus differed; for *standum est religioni jurisjurandi;* which in law is reputed as good as payment, though the perjury still may be punished.

Answered,—This doctrine would open a door and give vast encouragement to perjury, if their venturing on damnation, by swearing falsely, shall free them from repairing the parties' damages arising from their perjury. And there can be nothing more contradictory in nature than his oath, and the principal commission now produced. And it is villanous in him to load his son (because out of the way,) with forging it, and to deny his subscription; for that is evident to conviction. 1*mo*, It is produced and used by his son, *a persona conjunctissima.* 2*do*, He fortified it, by showing other letters and papers to that purpose; which evinces a tacit mandate, (as in the case of procurators,) though there were no writ. 3*tio*, His subscription is astructed, by comparing it with others now in process; and one egg is not more like another than they. 4*to*, The gentlemen present, when he was arrested, have deponed, That they verily believe it to be a true deed; so the perjury is cleared to a demonstration. All that remains now to be evinced is, that he is liable to make up the party's damages. It is true some texts in the Roman law insinuate that *standum est jurejurando*, without any farther effect in the civil court: yet the Emperor Justinian, in *L. ult. C. de Reb. cred.* has clearly decided this point. One pursues for a legacy left him in a testament; and, being referred by the adverse party to his oath, he swears *affirmative*, and gets payment: the testament afterwards is found, and no such legacy is in it: he is pursued for repayment: his defence is,—You choosed my oath, and so must stand to it. Yet the Emperor determines against him in thir words,—*Nobis melius visum est repeti ab eo legatum, nullumque ex hujusmodi perjurio lucrum ei accedere debere.* It is pretended that testaments had a special privilege; but this is a trifling difference, and the parity of the present case with the Emperor's decision is evident. It is acknowledged the lawyers are divided; but Fintalloch has some of great eminency on his side, such as Antonius Faber, *Cod. Sabaud.* Domat, Tiraquell, Mornacius, Voet, &c. But, not to multiply citations, I shall content myself with the words of Groenevegen, *de Legibus Abrogatis*, who being provoked by the words of *L.* 22 *D. de Dolo, (stari debet religioni jurisjurandi,)* he breaks out in this reflection:—*Futiles mehercule tantisque juris-consultis indignæ rationes, quas non sine animi indignatione legere et expendere potui: scælestum enim perjurium contemptu religionis præstitum religio vocari non meruit.* And then he commends Justinian's decision, that such *turpe lucrum est ab eo extorquendum.* And so have the judicatures of France and Savoy found; as Papon, Autumnus, and others observe. And the Emperor Charles V.'s constitution runs the same way, that

perjurium dolosum can never be profitable to the delinquent, *ne lucretur ex suo dolo.*

When this case came to be argued among the Lords, some observed that crimes can be pursued either *ad civilem vel criminalem effectum.* Falsehood is competent, *in prima instantia,* either before the Session or the Justice-court. Deforcement of messengers can be pursued, either criminally, to infer escheat of moveables, or civilly, to pay the debt in the caption. And, where parties are come to that boldness, to venture on perjury, either *in damno vitando,* or *lucro captando,* it is time to load them with more penalties to deter them. Others reasoned, on the contrary, that, after an oath deferred, to subject them to damages was to shake a fundamental principle in law; that after an oath there can be no more inquiry as to civil effects; and were to wreathe a snare to catch innocent people: for how oft have we heard parties threatened that there was writ under their hand contradicting their oath, and kept up to inveigle, when the writ may be false. And Stair, *book* 4, *tit.* 44, is very positive, that, after an oath deferred, no more is to be inquired but *an juratum sit.* And that there is no remeid but by the criminal action; for reference is a contract and stipulation to stand to the oath, and no appeal can be sustained against sentences proceeding on voluntary deferred oaths.

Some thought the oath could not preclude damages, being but an oath of calumny on the matter; but, being read, it was found a peremptory positive *negative,* and could not be reconciled with the commission. It was argued by some, there were presumptions enough to prove the subscription to be his. Others said they were very pregnant, yet could not amount to a full probation. Therefore the Lords continued him under caution, and adjourned the advising till November; to see if his son could be apprehended; and to give the pursuer an opportunity to pannel him criminally in the mean time.

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1706, 1708, *and* 1712. Sir Andrew Kennedy of Closeburn *against* Sir Alexander Cuming of Culter, Advocate.

1706. *January* 3.—Sir Andrew being made conservator of the Scottish privileges in the Netherlands, by a gift from King William in 1689; some years after, there were several complaints exhibited against him by the States of Zealand and magistrates of Campvere, both to King William and Queen Anne, and to the royal boroughs; and they having named a committee for trying the matter, there is a report thereof transmitted to the Queen; which being considered by her, she grants a new gift and commission of the said office of resident and conservator, in favour of Sir Alexander Cuming, bearing, that, after trial and cognition of Sir Andrew Kennedy's malversations in his said office, she had laid him aside, and conferred the same on Sir Alexander Cuming. Sir Andrew, being informed of this gift, raises a reduction and declarator before the Lords of Session: and, in September last, applying to the Parliament, he got a remit from them to the Session, summarily to discuss both the point of right and possession: and which action being called, Sir Andrew did, *primo loco,* insist to have his possession declared; and that the Lords might find Sir Alexander had unwarrantably intruded into