No 42. would render the act of Parliament useless; but only that upon the construction of the act the heir is obliged to depone; and if he should acknowledge he saw his father subscribe, or the like, it would be the same as if the subscriber had, while in life, acknowledged his own subscription.

Fol. Dic. v. 4. p. 155. Kilkerran. C. Home.

*** This case is No 26. p. 9417. *voce* Oath of Party.

No 43. 1747. *December* 15. Thomson *against* Magistrates of Dunfermline.

A Minister pursued the Magistrates of a burgh for manse-mail, allocated to him by a decree of the Commissioners 1683. *Objected*, That the Minister produced only a copy of a pretended decree, with some receipts more than forty years old.—The Lords found, that a horning, of date 1685, upon the decree, was a sufficient title.

Fol. Dic. v. 4. p. 156. D. Falconer.

*** This case is No 445. p. 11275. *voce* Prescription.

1752. *June* 4. Campbell *against* M'Lauchlan.

This day the following case occurred in the Ordinary action roll.

No 44.
Whether, or in what case, a party's subscription to a missive letter, not holograph, can be proved by witnesses? And whether a cautionry obligation can be proved by witnesses?

Leith, tacksman from Campbell of the lands of being to remove at Whitsunday 1751, and being in arrear of his rent, as also debtor to his master in the price of a certain quantity of bear, which he had bought from him off other farms, M'Lauchlan, who had let a farm to Leith, to which he was to go on his removal, was said to have written a letter to Campbell to the following effect: 'That understanding Leith, who was to remove, was debtor to him in 'an arrear of rent, as also for his farm-bear, as Leith was coming to a room of 'his, and could not presently pay, he desired he would let him bring away his 'effects, and he, M'Lauchlan, should be forthcoming for what Leith should 'grant bill for to him, upon stating their accounts.'

So it happened, that no account being stated between Campbell and Leith, Campbell pursued him for payment of what he owed before the Sheriff-depute of Argyle, and obtained decree for L. 25 Sterling, whereof Leith procured a suspension; and Campbell having, at the same time, pursued M'Lauchlan on his letter, and the process being conjoined with the suspension, M'Lauchlan's defence was, that the letter was improbative, not being holograph, acknowledging, at the same time, that he had subscribed a letter to Campbell, of the hand-writing of schoolmaster at in which

letter he had agreed to become forthcoming for Leith's arrears of rent; but averring, that there was nothing therein contained as to the farm-bear; and that the subscription to the letter now produced, which mentions also the farm-bear, was none of his subscription. No 44.

A proof having been allowed to the pursuer before answer, for bringing what evidence he could for proving the defender's subscription to the letter in process, he adduced the said schoolmaster, who deponed, that the letter in process was the very letter which the defender had desired him to write, and that he saw him subscribe it.

The proof coming now to be advised, when neither of the Lawyers were prepared, the Lords, who had resolved to grant no delays, reasoned the case themselves, in which a variety of things occurred.

And, in the *first* place, All agreed that there was this difference between deeds falling under the act 1681 and missive letters; that, when deeds falling under the act 1681 are informal, as, *e. g.* wanting the designation of a witness, it will not support the deed, that the granter own he subscribed it; for, at the same time that he owns the subscription, he may object the nullity, which the Judge must sustain. But that the case of missive letters is different. They do not fall under the act 1681; and as, when holograph, there is no question, so, when not holograph, there is as little question, that they are obligatory, if the party acknowledge his subscription. For a long time, indeed, practice carried the matter no farther than to sustain missives not holograph, subscribed by the party, only *in re mercatoria;* but the later practice, ever since the case of Crawfurd *contra* Wight, (16th January 1739, *voce* WRIT.) has been to sustain all missives where the party owns his subscription; Foggo against Milliken, 20th December 1746, *voce* WRIT.

So far the matter was clear. But then the present case was new, and, so far as could be remembered, had never occurred, How far a party's subscription to a letter, not holograph, could be proved by witnesses? Some pointed at this, that the subscription, as in other cases, was of itself probative, unless the party disproved it. But as that would have been to give a naked subscription the effect of a probative writ, it was agreed that the subscription must be proved. And, as to the manner of proof, it was also agreed, that wherever the subject matter of the letter is such as can be proved by witnesses, the subscription may also be proved by witnesses; for this reason, that where the subject matter is capable of proof by witnesses, then the subscription to the letter, as a part of the transaction, may also be so proved; and the only question was, Whether or not the subject matter of this letter was probable by witnesses? No doubt being made but that if it was, the subscription itself was proved by the defender's acknowledgment that he had subscribed a letter of the hand writing of the schoolmaster, and the schoolmaster's oath that the letter in process was by him written at the defender's desire, and that he had seen him subscribe it.

No 44.

This question again turned upon this, How far cautionry obligations are probable by witnesses? As to which, the old decisions, particularly that on the 19th January 1672, Deuchar against Brown, Div. I. Sect. 9. *h. t.* and which is marked by Lord Stair in a manner more than commonly solemn, carries the matter so far, that a cautionry obligation, though interposed *unico contextu* with the bargain between the parties, can only be proved *scripto vel juramento* of the cautioner; it being then thought that no more was necessary for the facilitating of commerce, than that witnesses should be admitted to prove the bargain between the parties themselves, and that a bargain which one did not make for himself, but wherein he became cautioner for another, was of the nature of a gratuitous promise, not otherwise probable than by writ or oath of party. And so far there is no doubt, but at this day, where security is undertaken for an old debt, (and such every debt is in that sense admitted to be, where the security for it is undertaken after the bargain is concluded between the parties,) it can only be proved by writ or oath of party; but where the cautionry obligation is a part of the original bargain, as it tends to facilitate commerce, it is just that it should be capable of the same proof as the bargain itself.

And so far the Lords were in this case unanimous, and differed only in the application of it; the minority considering it only as a part of the bargain, where it was interposed *in ipso actu* or *unico contextu* with the bargain itself, which but for one's becoming cautioner, might not have been concluded; in which case, it conduced to facilitate commerce, that it should be admitted to proof by witnesses. For which they gave this reason, that where one becomes bound as cautioner *in ipso actu* of the bargain, witnesses are less apt to misapprehend the meaning of the words uttered by the person undertaking as cautioner, than when he is said to undertake as cautioner when the principal is not present, and making the bargain. But the majority considered it as no less a part of the bargain, where it was undertaken previous thereto, and that the bargain proceeded upon the faith of the security. And one of the Lords remembered a case, where a cautioner had been found liable upon a proof by witnesses, that he had said to the seller, if such a man buy your sheep, I will see you paid; which is very analogous to the present case.

Accordingly, upon this reasoning, (wherein the only difference, as has been said, was, whether a cautionry obligation could be proved by witnesses, where it was not interposed *in ipso actu* of the bargain,) the vote being stated, Whether the missive was in this case obligatory? It carried by the plurality of one vote, that it was obligatory.

So much has been marked rather for the sake of the reasoning, than that it can be considered as a decision, as it had proceeded without a word said from the Bar, and the interlocutor was not reclaimed against; owing, as it was understood, to this, that the defender's Lawyer came to know that he was bound as cautioner for Leith in his suspension of the decree against him, and so it was indifferent to him how the present question should be determined.

N. B.—Our old decisions, and even law books, seem to suppose, that by law even a gratuitous promise, where it is within the value of L. 100 Scots, may be proved by witnesses; but it is thought that no such thing now obtains with us. No 44.

Fol. Dic. v. 4. *p.* 155. *Kilkerran*, (PROOF.) *No* 16. *p.* 449.

1754. *February* 28.

THOMAS DUNCAN *against* His MAJESTY'S ADVOCATE.

No 45.
In a claim upon a forfeited estate, contained in a bill, the creditor offered a proof by witnesses, that the debt was not a new contraction of the date of the bill, but was the balance of an old debt, contracted many years before the term of the vesting act 20th Geo. II. cap. 41. The Lords found the proof was competent, and sustained the claim.

DUNCAN entered a claim upon the forfeited estate of Sir James Kinloch-Nevoy for L. 100 Scots, contained in a bill accepted by Sir James, dated 28th August 1745. He offered a proof, by witnesses, that this debt was not a new contraction of the date of the bill, but was the balance of an old debt, contracted many years before the 24th June 1745, the term of the vesting act 20th Geo. II. cap. 41.

Objected for his Majesty's Advocate; 1*mo*, That the claim was not relevant; because, supposing the balance of an old debt was the cause of granting the bill, yet the bill was an innovation of the debt; and the date of it being posterior to the term when the estate was legally vested in his Majesty, the estate could not be burdened with it. And as an argument analogous, it was urged, that a disposition falling under the bankrupt act 1696, or under an inhibition, could not be supported upon this ground, that it was a *surrogatum* to an old debt. In a competition of infeftments, a creditor under a second infeftment could not plead preference to a first infeftment, because his infeftment had come in place of one which had been prior to the first.

Answered for the claimant; That, in terms of the vesting act, this was a debt which was binding on the forfeiting person, and might have affected his estate before the respective days and terms whereon the same was vested in his Majesty. That, in the claim of Mr John M'Farlane upon the estate of Lovat, 12th July 1751, the objection here made had been repelled by one of their Lordships as an Ordinary, after having advised with their Lordships, and uniformly by their Lordships as Ordinaries, in many other cases. That the cases of the bankrupt act, of inhibitions, and infeftments, were not parallel; because, in all these cases, the law is express, and in the two last, the record is held to be notice of the circumstances of an estate, and they who give trust after such notice *sibi imputent*.

Objected, 2*do*, for his Majesty's Advocate; That a proof by witnesses was not competent in this case; because thereby a door would be opened to fraud; for that persons intending to rise in rebellion would always, when they granted bonds, take care to say before witnesses, that these bonds were for prior debts.

Answered for the claimant; That the vesting act has not prohibited a proof