to set up at Glasgow, and put an end to all the privileges of the trades there. Much is said of the odiousness of corporations. They are not odious in their origin and nature, but in consequence of their by-laws and by-drinks. In themselves, as religious and political societies, they are useful; and it is the abuse alone which we ought to complain of. At any rate, it is plain that the legislature meant to take an exclusive right from one set of persons, and communicate it to another; and therefore I cannot presume that it meant to take away more than it expressed. The statute, as interpreted by the defenders, ought to have been entitled "an act for the more speedy and effectual marrying of soldiers' widows." The fancy of making a husband journeyman under his wife is ingenious.

On the 24th February 1790, "The Lords found that Daniel Cameron, husband of Elizabeth M'Martin, had incroached upon the privileges of the shoemaker trade of Perth;" adhering to the interlocutor of Lord Justice-Clerk.

Act. J. Drummond. *Alt.* H. Erskine.

[Detained by indisposition from the Court, 27th February, 11th March.]

1790. *May* 26. JAMES GRIEVE *against* MALCOLM M'FARLAN.

LOCUS PŒNITENTIÆ—WRIT.

The acknowledgment of subscription not sufficient to supply the want of any of the statutory solemnities of deeds.

[*Fac. Coll. X.* 45; *Dict.* 8459.]

DREGHORN. Had parties contracted on the faith of a *series rerum judicatarum,* I should have hesitated; but the reverse is the case here,—so no plea of *bona fides.* The object of our law is to guard against forgery, not to secure deliberation; for the writing itself implies deliberation. There is no *locus pœnitentiæ* in holograph writings: how can such a writing bear more faith than an acknowledgment of a man having granted the obligation? Hence, after 20 years, a holograph writing, although become prescribed, may have its subscription proved by oath of party. See the decision in Bruce, *Major Arnot.* [His exordium and conclusion did not agree.]

PRESIDENT. The learned author of the Dictionary had formed to himself a particular notion as to the Act 1681, and this has infected his reports of decisions on that act. The case in Bruce is misunderstood. Bruce speaks not of *subscription* but of the *whole writing;* and there is a decision in Edgar to the same purpose. If you allow of acknowledgment of subscription in informal writings, you make *informal* more probative than holograph writings.

ESKGROVE. There is great force in the former decisions. The Act 1681 principally respected forgeries: it does not exclude a proof by oath of party in

every case. In questions with third parties, the proof by oath of party will not be allowed. There is a *jus quæsitum* to the objector in a competition. Should the same thing occur in moveable subjects between granter and acceptor, the law would allow oath to prove the bargain. I am not of that opinion as to heritable or landed property; in such cases there must be probative writing sufficient by itself without any collateral evidence. When there is no probative writing there is still *locus pœnitentiæ*. The *locus pœnitentiæ* may be excluded by *rei interventus*, &c. Suppose a man were to acknowledge that he had signed his name, he has still the privilege of resiling. As to the case of cautioners, the Court has found it to be on the same footing as heritable rights, whenever it was agreed that cautionary obligations should be in writing.

JUSTICE-CLERK. Where writing is essential to a deed, the Court has found that acknowledgment of subscription will not render it valid; and I hold that there is a *series rerum similiter judicatarum* to that purpose: but it is against good conscience not to fulfil bargains; and therefore I wish to have the case tried again. Decisions are quoted with respect to cautioners, but they are not to the purpose; for cautionary obligations may be without writing. The Act 1681 relates only to such writings as require writer's name and witnesses. It says that the writings shall be "void and null." No law requires witnesses to a holograph deed. No witnesses can make a deed better than the acknowledgment of the party makes it. A testing clause is no part of the deed. [This is singular; for the law requires that it shall be in the body of the writ.] It is only used to authenticate the deed. There is no occasion to authenticate a deed which is already authenticated by acknowledgment: hence it has been found that the filler up of a testing clause need not be designed. I make no distinction between one sort of writing and another: there must be *verba solemnia;* but the names of writers and witnesses are not *verba solemnia*. It may be a different question, How far in land rights the acknowledged subscription of the party will be good against singular successors?

SWINTON. According to the opinion now given, all the solemnities of writing will be at an end. If a *nudum pactum* is to be held as good as a *congrua interrogatio et responsio*, all the forms of the Roman law are at an end: they must be held as nugatory. Every thing must be judged by honour and conscience The clause in the Act 1681 has no reference to the preamble. I will not presume to judge contrary to the words of the Act of Parliament and to a series of decisions. The attestation is the form of the deed,—that which makes it valid.

MONBODDO. The law has not said, that that which is void and null shall not be supplied by the acknowledgment of the party. Had that been the meaning of the law, a very few words added would have left no dubiety. What evidence have we of a holograph writing being a man's deed but his own assertion: can it be better than his oath? [In a holograph writing we have the additional evidence of *comparatio literarum*, which is also the thing that gives validity to the subscription of witnesses: besides, the question here is not as to the existence of a writing, but as to its legal effect.]

DUNSINNAN. I think that the decisions admitted to have been given are right: they proceed not on abstract principles, but on the construction of an Act of Parliament. A decision so far back as 1686 applies to this case. All the

argument, as to there being no danger of forgery, was applicable there. That judgment was pronounced within five years after the date of the Act of Parliament.

PRESIDENT. I am called upon to lay aside decisions and authority: this is going too far. All that can be expected is, that we do not slavishly follow decisions and authority. In consensual contracts, consent, anyhow adhibited, is sufficient; by writ, witnesses, or oath of party. If by oath, the party may qualify the fact with every thing of an intrinsic nature: if writing is in the case, *that* writing is the best evidence, supposing it to be such as the law authorises. The formality of writings is regulated by law. If the writing be formal, it speaks for itself, unless, by exception or reduction, it be proved false. If it be necessary to support the writing, we must support it according to law. A payment of money may be proved otherwise than by writing; for example, by collateral circumstances, or by oath of party containing intrinsic qualities. I cannot refer to oath that there was a debt, without also allowing that oath to prove payment. There are two cases in Durie to this purpose, 1633 and 1634, which prove that acknowledgment of subscription is not sufficient; you must take my oath that a debt is owing. If I can add any thing to relieve myself, I am authorised so to do. It is said that the statute alludes to the case of forgery. The preamble of a statute may bear an inductive cause though not the only one. The Act 1681 goes upon another ground also,—the forgetfulness of witnesses. In heritable rights you must have writing. A bargain may be good *in foro conscientiæ*, though not in law. There is always some ceremonial necessary to make a deed good. A transaction *in nudis finibus contractus* serves no purpose. If matters be entire there is *locus pœnitentiæ*. To admit that the writing has been subscribed, is not enough. In heritable rights it is a contradiction in terms to say that something else than writing may give a good right. This is admitted as to sasines; but it is said that sasine is a solemnity: the subscription of witnesses not witnesses, &c. are solemnities as well as sasines are. It is no matter whether my oath be qualified or not: I am entitled to say "I resile," even without cause shown. It has been found that reference to oath may be admitted when there are one notary and witnesses subscribing. I cannot see the ground of that judgment; but it proves that the judges who pronounced thought that *one* notary and witnesses were necessary, in order to establish a relevancy by oath of party. The authority of Craig and of Stair are express. An *instrumentum* is *in mundum redactum* when it is formally executed, and not otherwise. Before the Act 1681, suppletory proofs were allowed: one great purpose of that act was to exclude them. In the case of *Campbell* against *MacLauchlan*, Lord Kilkerran observes, that all the judges agreed that a writing, falling under the Act 1681, could not be made good by the acknowledgment of parties; but the Court made a distinction as to missive letters, although not *in re mercatoria*,—a distinction which is now admitted to have no meaning. *Locus pœnitentiæ* seems to be too much overlooked in the argument. It is not always the knavish man who wishes to retract. By the argument used on the one side here, a living man may be bound by reference to oath; a dead not. Suppose two cautioners,—one is dead,—reference is made to the oath of the other, and he acknowledges the debt; what is to be done then? Is the living cautioner to be liable in the whole debt? There may be much collusion in

confessing and denying. As to holograph writings, they have always been admitted to be probative: that is a fixed rule, and it is recognised by the statute 1669; but the duration of their efficacy is limited to twenty years, unless the party refer the writing, as well as the subscription, to oath; but the reference, the whole, must be re-authenticated. Hence it follows, according to some arguments used to-day, that holograph writings would have less authority than even writings the most informal.

ANKERVILLE. Considering the long train of decisions, and the force of the arguments used from the chair, I have changed my former opinion.

On the 26th May 1790, The Lords found "that no action lay;" adhering to the interlocutor of Lord Dreghorn, which was founded on the series of decisions, not on the merits of the question.

Act. R. Blair. *Alt.* G. Ferguson.

Hearing in presence.

Diss. Justice-Clerk, Monboddo, Dreghorn.

1790. *May 27.* WILLIAM GRAY *against* ROBERT AITKEN.

PRISONER—ACT 1695, C. 32.

A person, to whom a *Cessio Bonorum* had been refused, admitted to the benefit of the Act of Grace.

[*Fac. Coll. X.* 263; *Dict.* 11,819.]

JUSTICE-CLERK. A man imprisoned for a civil debt must be alimented by his creditors. The law will not suffer any person to starve. When a man is imprisoned for a crime, the public, not the private party, must aliment.

ESKGROVE. The question is not between the party and the creditor, but between the public and the creditor.

PRESIDENT. The proceedings before the Sheriff were rather summary, and not altogether legal.

On the 27th May 1790, "The Lords found aliment due, [adhering to the interlocutor of Lord Stonefield] and modified the aliment to 6d *per diem*, free of jailor's fees.

Act. Wemyss. *Alt.* Allan M'Conochie.
