ever may be the practice as to signing *ex intervallo*, here there are no regular warrants at all.

PRESIDENT. We have nothing to do either with the deposition or with the settling of another minister; but here we have no evidence of deposition at all.

On the 6th February 1768, the Lords found the letters orderly proceeded, in regard that no evidence of the deposition was produced.

Act. A. Elphinstone. *Alt.* A. Wight. *Rep.* Stonefield.

1768. *February* 17. GEORGE SKENE of Skene, JOHN ERSKINE, Younger of Dun, and OTHERS, *against* DAVID WALLACE and OTHERS.

MEMBER OF PARLIAMENT.

Interrogatories competent to be put to Freeholders against whom complaints are depending.

[*Dictionary*, 8758.]

AUCHINLECK. I am not fond of multiplying oaths, but we must determine cases of this kind, when oaths are demanded. This *oath of trust and possession* cannot be called an oath of calumny. In many particulars it is an oath of verity, not credulity. It is also, in some particulars, an oath *in jure*. The oath may be put as often as the freeholders choose, which is inconsistent with an oath of verity. If a man swears not resting owing, I suppose that he means, not that the sum was never due, but that he has compensation to plead in such case. When he deposes in general, he may be brought to answer special questions, in order to explain his general averment; for, if he meant not resting owing by reason of compensation, it is extrinsic, being *in jure*. So it was determined, in *February* 1751, upon report of Lord Woodhall, probationer. *Here* the petitioners are still better entitled to put the special questions; for the oath of trust and possession is not a reference in the proper sense of the word. Although there may be no back-bond granted, yet there may be an understanding between the parties that is equivalent in law.

MONBODDO. With respect to the common law, there is no great difficulty in allowing re-examinations, when a man swears either in general or ambiguously. The decisions to the contrary are put upon this,—that the party seeking to re-examine had it in his power at the former examination to have put the questions more particularly, and neglected it. A witness, indeed, who once answers, cannot be bound to answer the same questions over again. But the questions now proposed are not precisely the same with those sworn to in the trust-oath. If there were any doubt at common law, it is removed by the statute. The oath 7th Geo. II., is an oath of investigation, and does not exclude any further proof. That oath must be put precisely in the words of the statute. The freeholders

can make no further investigation. *Here*, the freeholders could not examine otherwise than they did. An oath of reference can be put but once. This is not the case as to the oath 7th Geo. II.: it is also an oath *in jure*; for there are law-words in the oath, as to the import of which even lawyers and judges differ.

BARJARG. This is an oath of verity upon a matter of fact, although it resolves into a question of law; and, therefore, it is not an oath to be repeated. It may indeed be repeatedly put, but not twice at one meeting. An alteration of circumstances may happen between one meeting and another; and, therefore, the oath may be repeatedly put, in consequence of such possible alteration.

COALSTON. From the several statutes concerning elections, two things appear necessary: 1. Infeftment and possession; 2. Holding for one's own behalf. The oaths are introduced *ob majorem cautelam*: they do not exclude other proof: a proof of trust by a back-bond would be received. In one case, that of *Sutherland*, a proof by witnesses was allowed. The only difficulty is, that the persons who require this oath, were the same who, at the meeting of freeholders, put the oath 7th Geo. II. This is not an oath *parte deferente*; for then it would not be allowed to be taken away by any other evidence. The case that comes nearest to it, is that of *Creditors in a Ranking and Sale*. A creditor depones upon the verity of his debt: This oath may be defeated either by writing or by special questions. None of the freeholders can put any question for explaining the oath, so that it is not an oath *deferente adversario*; but, even upon that footing, I still think it competent to put the questions, so far as special facts are deponed to. A man may not be bound to swear again, but he may be bound to explain facts from which he has drawn a wrong inference. Freeholders, not present at the meeting, have a different interest: they may insist to have the questions put. When one freeholder brings a complaint, it is in the name of the whole; and each freeholder may take the benefit of the complaint, and state himself a party.

ELLIOCK. This is not an oath *in jure*, but an oath as to facts consisting with a man's own knowledge. I cannot think that a man ought to be convicted of perjury by his own oath. It is true that the Oath, 7th Geo. II., may be repeated; but that is, because there may be an alteration of circumstances between one meeting and another.

KAIMES. The Oath, 7th Geo. II., is an oath partly of fact, partly of law. The same questions as to facts must not be put again; but new facts may be inquired into, from which inferences in law may arise.

PITFOUR. If the inquiry now sought is rendered fruitless, it is owing to the freeholders' own blunder: Still there is a difficulty as to putting the oath at the instance of the party who put the trust-oath. But the questions may be put at the instance of third parties, who were not original complainers. There is no great danger of perjury, for they who took the trust-oath may have a wrong apprehension of the consequences of facts; and thence might consider that vote to be *real*, which the law understands to be *nominal*. The only danger of perjury is, if there be a back-bond; and *that* is not a probable case.

STONEFIELD. The oath is an oath upon facts. If one freeholder puts the oath, another cannot: all the freeholders are thereby understood to be preclud-

ed. An oath put to a creditor in a ranking is different from this case; for *there* the oath is put by the Court, not by a party.

Hailes. Notwithstanding all that I have heard, I still hesitate as to the competency of putting the new questions at the instance of the very same persons who had the oath, 7th Geo. II., put to the respondents. It was peevish in the freeholders to put that oath, and it could serve no good purpose; by it they have brought the Court into difficulties. I do not relish the requiring a man first to swear *en gros*, and then to swear *en detail*; but I think that the new complainers may crave to have the questions put. They were not present when the oath was put formerly, so that they cannot be precluded by it. They had no occasion to prefer a complaint, because they saw that others had preferred a complaint. If the original complainers had dropt their cause from collusion, *they* could have taken it up. If the original complainers are barred by a personal exception, *they* may proceed who are not so barred.

Auchinleck. In a complaint for not inrolling, one freeholder may be called as defender, to save the trouble of calling the whole; but, in a complaint for enrolling, all the freeholders, except the person complaining, are understood to acquiesce.

Monboddo. The freeholders are as much concerned to take one off the roll who has no right, as to keep off one who has no title. As the four months are not expired, the new complainers may be admitted.

Coalston. Formerly all the freeholders were made parties, either as pursuers or defenders. The later statutes only give an easier method of complaining. A complaint once brought brings all the freeholders into the field. The objector is trustee for the whole freeholders.

President. The new complainers may be received. The complaint once brought into court becomes the complaint of all the freeholders concurring: were it otherwise, the consequences would be dangerous. The accidental death of the complainer would quash a complaint, however just. As to the question itself, I think this oath is an expiscatory oath. In England, all proceedings in Chancery are upon oath, and yet they may be and are daily redargued. Thus, again, by the Act 20th Geo. II, a claimant on a forfeited estate may be called upon oath to instruct his debt, and yet, the next day, the oath may be redargued. The oath, 7th Geo. II, was made as a check upon claimants: they themselves were in so far allowed to be judges, whether they had such an estate as entitled them to vote. This is matter of opinion: if they give a wrong opinion, there is no perjury. I know no case where a fact may be proved by witnesses, and yet may not be proved by oath of party: the oath may be repeatedly put at different meetings: It is then an oath put anew; for a man must swear as to the right on which he stands enrolled. Were this oath to be the only test, the regulations of the law would be eluded: any friend of the party might request him to take the oath, and, it being once taken, all further disquisitions would be precluded.

On the 17th February 1768, The Lords found the questions competent; but pronounced no special interlocutor as to their competency at the instance of the original complainers or of the new complainers.

Act. Ilay Campbell, J. Swinton. *Alt.* A. Wight. *Diss.* Barjarg, Stonefield, Elliock.

1768. *February* 24. KATHARINE TAILOR *against* WILLIAM WRIGHT.

PRISONER.

One in Prison for a fine, damages and expenses, *ex delicto*, not entitled to the benefit of the Act of Grace.

[*Faculty Collection, IV*, p. 129; Kaimes's *Select Decis.* p. 334; *Dict.* 11,813.]

MONBODDO. This case is well stated, and determined by Voet against the pursuer.

KENNET. Will's case cannot aid the pursuer; for part of Will's sentence was to ask pardon at the church door, which he could never do, so long as he remained in prison.

JUSTICE-CLERK. The case of *Malloch* is strong: *there* the king's pardon was found not to give the benefit of a *cessio* to those who were committed to prison for payment of damages arising from delicts.

GARDENSTON. The aliment is only by statute; and there is nothing in the statute which makes creditors liable to aliment persons in the condition of Katharine Tailor, imprisoned for damages the consequence of a delict.

COALSTON. Were it not for the train of decisions, I should have had doubts as to the interpretation of the statute.

PITFOUR. The question is, Whether this damage arose from a crime or from a fault, *levis* or *levissima?* If from a fault, Whether that *fault* is to be considered as a *crime quoad* its consequences?

On the 24th February 1768, The Lords found Katharine Tailor not entitled to the Act of Grace, adhering to the interlocutor of Lord Kennet.

Act. A. Murray. *Alt.* A. Rolland.

1768. *March* 1. MARY VEITCH *against* ALEXANDER PRINGLE.

SERVICE AND CONFIRMATION.

An elder brother intromitting with the effects of the younger, on his death; found to have vested in himself a provision, with which he was burdened.

[*Faculty Collection, IV.* p. 343; *Dictionary*, 14,401.]

MONBODDO. I consider the Commissary Court as a relict of popish tyranny. The clergy supposed that they had a right in testaments, and a jurisdiction concerning them: this right of jurisdiction was, by degrees, diminished. It was an excellent law which made confirmation not necessary. We have got into