

ton : who charging the Earl, he SUSPENDS, That he had paid 1800 merks of it ; in so far as his said brother, before the assignation, or at least before the intimation, had drawn a bill upon him for that sum, and which he had accepted and paid.

ANSWERED,—The sum in the bill nowise meets the bond charged on, but relates expressly to a letter of advice ; which letter bears that he had drawn a bill on him for £100 sterling, for which he had his lordship's bond ; and if he made good payment, this should be a discharge to him ; so the bill relates to another bond of £100 sterling, seeing his accepting and paying the bill with that qualified advice clearly acknowledges that the Earl was debtor to his said brother in a separate bond of £100, besides this 2000 merks. Likeas, the bill is before the term of payment of the said 2000 merks bond ; and it is neither probable nor presumable that he would draw a bill to pay before it were due.

REPLIED,—The letter of advice instructed no different debt : For, he that is owing 2000 merks, is certainly owing 1800 merks, the lesser sum being comprehended *sub majore* ; and, though he adds the words, “ for which I have your bond,” that does not necessarily imply a separate debt. And that it shall be held for payment may very well be understood, that he shall allow it in payment *pro tanto* ; and it is impossible for my Lord to prove a negative, that there were no other grounds of debt betwixt them save only this 2000 merks bond.

The Lords thought the presumption lay against the Earl ; but, for clearing the matter, they ordained him, *ex officio*, to give his oath of calumny if he had reason to deny but he was owing 1800 merks to Mr Hugh at the time of the bill, over and above this 2000 merks bond. And, as to the paying before the term, the Lords observed, there was nothing in that argument ; because, though the bill was drawn before the term of payment of that bond, yet it was not made payable till after. Some urged, his oath of calumny would be all one with an oath of verity here, being *in facto proprio* ; but the case not being recent, but sixteen years ago, the Lords thought this expiscation might be tried before answer.

*Vol. II. Page 258.*

1705. February 3. JAMES SIMPSON *against* KATHARINE KYLLE and HUSBAND.

I REPORTED James Simpson, merchant in Edinburgh, against Katharine Kyle, and John Gordon, one of the tellers in the bank, her husband. James having sold a parcel of merchant-ware to the said Katharine, in August 1701, who then kept a shop, he took her obligation at the foot of the account, extending to £857 Scots, acknowledging all the articles to be just and truly furnished to her, and to be resting owing by her ; and, on this, Simpson pursues her, and Mr Gordon her husband, for payment.

ALLEGED,—She did not deny the account, nor her signing the obligation ; but neither she nor her husband could be liable ; because what she acted therein was not *nomine proprio*, *sed institoris*, being *præposita* by her father in the administration of the shop, the goods being his ; so the preposition made the debt his, and nowise obliged herself.

ANSWERED,—You having, by a writ under your hand, become debtor to me,

and I having no dealing with your father, you must only be liable; unless you prove, either by my oath, that I followed his faith in furnishing you the goods, or that you acted only in that capacity as a servant and trustee of your father's, and prove it *scripto*, by a written commission and mandate from him.

REPLIED,—That the common law, from which we have borrowed thir actions, called *exercitoria et institoria*, required no commissions in writ, but it was enough, if, from the *tractus negotii*, and the method of management, there appear such qualifications of trust as make it evident they act not *nomine proprio*: and here there were plain convictions of a preposition, such as, that Robert Kyll quitted his former employment, made himself a burgess and guild-brother, paid stent as such, took prentices by written indentures, paid the shop-maill after his wife's death, put his daughter Katharine, bred up to that employment, in the shop, paid both inland and foreign bills, kept the count-books, and once every week took in the accounts, and received from his daughter the money which was the product of every week's sale: and the creditors were so conscious of this, that they took a disposition from the said Robert to the ware of the shop as his.

ANSWERED,—Where a wife drives a trade, it is confessed that law presumes she only acts as *præposita* by her husband, because she is *sub manu et potestate mariti*: But it is not so with children, who, if allowed to trade apart, are, in so far, reputed forisfamiliated, and what they acquire, *sibi, non patri, acquirunt*; we having no *peculium profecticium* or *adventitium* with us. And he offers to prove, That Katharine Kyll had as full and free an exercise of merchandizing as any merchant in Edinburgh, in buying and selling ware, in drawing and accepting bills and precepts, and giving discharges, in her own name, and never mentioning her father, and subscribed balances of accounts, and paid them; so the pursuer was *in bona fide* to contract with her, and thought himself *in tuto* to furnish her goods, and knew no other body to be his debtor but herself; and with such sham pretences of preposition creditors ought not to be defrauded: and the accepting a disposition from Robert Kyll was no passing from his claim against Katharine the daughter; for it bears an express reservation, that it shall be but prejudice thereof.

The Lords, before answer, allowed Mrs Gordon and her husband to prove the qualifications from which she inferred her being only *præposita*; and, on Simpson's desire, he got likewise a conjunct probation of the circumstances of fact he condescended on to redargue her articles, and to prove she acted as *domina* and for herself, and was so reputed and holden; and, at advising, the Lords would consider where the most pregnant probations lay. *Vol. II. Page 264.*

---

1705. February 3. The MACERS against THOMAS KENNEDY and JOHN JOHNSTON.

ONE of the Session maces, belonging to Andrew Graham, last admitted in John Deuchar's place, being stolen, there was first an information given in against Richard Rae, goldsmith, that he had been seen to have the letters W and R, which used to be on the maces, signifying *William Rex*; and he, being called,