No 336. cially when they are 18 or 20, as she was; so on the other hand, they may vent their trinkets and superfluous ware on children, when too ready to comply with their vanity and prodigality, and get their accounts subscribed or a bond for the price, and let it lie over for some years, and then pursue the father, when his mean of probation may have perished, that his sons or daughters, minors *in familia* at the time, were sufficiently furnished in apparel when they took off this account, and so for not proving that he shall be liable.—See Recompence.

*Fol. Dic. v. 2. p. 239. Fountainhall, v. 1. p. 813.*

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1707. *July* 16.

Daughters of William Waddel *against* William Wadderstoun of Haugh.

No 337.
A bond granted, payable to two co-tutors *nominatim*, for the use and behoof of their pupils, in contemplation of a disposition granted by these tutors, of some moveables belonging to their pupils, being assigned to them after their majority, it was found that the debtor could not prove payment by the oath of the surviving tutor, one of the cedents, the other being dead, and both *officio functi*.

William Wadderstoun of Haugh having granted a bond for 1030 merks, payable to Thomas Waddel and James Wadderstoun, uncles and tutors to the three daughters of umquhile William Waddel in Gilmertoun, for the use and behoof of the said pupils; and William Wadderstoun being charged to make payment of the bond at the instance of the said three daughters and their husbands, as assignees constituted after their majority by their two tutors; he suspended upon this reason, that he offered to prove by the oath of James Wadderstoun, one of the said tutors yet alive, that the sums in the said bond were satisfied and paid to him and the co-tutor, except the odd thirty merks.

*Answered* for the chargers, That, however, during the tutory any charge at their tutors' instance might have been taken off by their oaths; now the office being expired, the tutors who are *functi* cannot depone to the prejudice of their former pupils, to whom they granted *virtute officii* the assignation charged on; more than if after count and reckoning a tutor found liable in a balance, having granted in payment thereof an assignation to any effects due to himself, it could be pretended that his oath could prejudice the assignee; 2*do*, One of the tutors who were conjunct in the administration being now dead, the other's oath can no more be taken than he could act by himself; and both being co-creditors in the bond, as one of them could not charge without the other's concourse, neither can one discharge without the other; nor could this tutor's oath afford recourse against the representatives of the other tutor. And here the surviving tutor and the suspender are brothers-in-law, who may collude to the charger's prejudice.

*Replied* for the suspender, The manner of probation by the tutor's oath is in this case most competent; because the bond charged on was granted to the tutors *nominatim*, in contemplation of a disposition granted by them to the suspender, of some moveables belonging to their pupils. And as the suspender could have been charged for payment at the tutors' instance, it is competent to him to instruct any reason of suspension by the tutor's oath. And the oath

of any one of the tutors is sufficient, seeing that would give recourse to the chargers, against the other's representatives. No 337.

THE LORDS found, that the tutor's oath could not prejudge the chargers.

*Fol. Dic. v. 2. p. 238. Forbes, p. 183.*

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1724. *February* 11. GUTHRIE *against* The MARQUIS of ANNANDALE. No 338.

AN account of horse-furniture and saddle-work furnished to a Nobleman, though subscribed by his master of horses, *præpositus tali negotio*, within the three years, was yet found to fall by the triennial prescription.

*Fol. Dic. v. 2. p. 239. Edgar.*

*** This case is No 304. p. 11101. *voce* PRESCRIPTION.

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1771. *January* 23. JAMES PATERSON *against* WILLIAM TAYLOR. No 339. Oath of the wife competent to prove furnishings made to herself or the family.

PATERSON pursued Taylor for payment of an account of furnishings to Taylor's wife and daughter, and to other persons, it was said, in consequence of express orders from Mrs Taylor. Taylor *pleaded* prescription; upon which the pursuer offered to instruct the furnishing by Mrs Taylor's oath; which the LORD ORDINARY found to be a relevant mode of proof.

In a reclaiming petition, Taylor *maintained*,

That no relevant proof was offered; Mrs Taylor could not be referred to on oath as a party, and it was incompetent to adduce her as a witness against her husband; Erskine, B. 4. T. 2. § 22.; Lord Stair, B. 4. T. 43. § 7.; Fountainhall, 23d July 1700, Erskine of Pittodry, *voce* WITNESS.

The pursuer *answered*,

That the oath of the wife was good proof against the husband, and sufficient to subject him in payment of such furnishings as were made to the wife, either when they were of such a nature as to fall under the presumed *præpositura negotiis domesticis* of the wife, or in matters where she acted in consequence of the express order or direction of the husband; as to which she must be considered as a party; Bankton, v. 1. p. 125.; Erskine, B. 1. T. 6. § 15.—*See* HUSBAND and WIFE, Div. VI.

THE LORDS pronounced the following interlocutor: "Find it relevant for the pursuer to prove the articles of the account libelled, so far as the same were furnished to the defender's wife and his family, by the oath of Mrs Taylor; but find that, *in hoc statu*, the other articles of the account must be proved *aliunde*."

Lord Ordinary, *Gardenstone.* For Paterson, *Elphinston.* For Taylor, *Boswell.* Clerk, *Ross.*

*R. H.* *Fac. Col. No 67. p. 199.*