No 20.

Christie suspended; And, *inter alia*, *pleaded*, That he ought not to be liable in any penalty for the last ten trees, in respect it was not proved they were cut by him, or his order, or by persons in his family. Mr Stirling offered to refer to his oath, that they were cut by his order. Christie *objected*, That facts affecting a person's fame, and inferring a crime and penalties against him, cannot be referred to oath of party; for which the authorities of Stair, B. 4. T. 44; Bankton, B. 4. T. 32; and Erskine, B. 4. T. 2. § 9, were quoted.

"THE LORD ORDINARY found the allegation not relevant to be proved by the suspender's oath, in respect the charger is insisting for penalties."

"THE LORDDS adhered."

For Charger, *Walter Stewart.* For Suspender, *J. Dalrymple, Burnett.*

N. B. In this case it was debated, but not decided, Whether the tenant is liable for wood cut on his farm, unless he shall prove that the wood was cut by a third party?

J. M. *Fol. Dic. v. 4. p. 22. Fac. Col. No 99. p. 221.*

1772. *November* 13.

OSWALD CAMPBELL, *against* DOROTHEA Countess of FIFE, and Earl FIFE, Her Husband.

No 21.

In a process against a Peer, a certain point was referred to his oath. He emitted a declaration, but insisted, as a Peer, that he was not obliged to swear. After his death, the Court found, that there was no foundation for the privilege claimed as a Peer, but allowed his representatives still to prove that the declaration was true.

IN the issue of a litigation between the pursuer's predecessors and the late Earl of Caithness, the defender's father, it having been finally settled that the Earl's possession was to be ascribed to certain adjudications which he had acquired over the lands in question, the pursuer, in order to make up a charge against the Earl, and to show that his adjudications were paid, having given in a rental of the lands adjudged, stated at a specified sum, and referred the same to the Earl's oath, the LORD ORDINARY, upon the 16th July 1763, "Ordained him to depone thereupon, and granted commission for taking his oath." The commission was afterwards renewed at his request. This commission was extracted; but, instead of deponing, the Earl emitted a declaration, upon the ground, that, as a Peer, he was not obliged to swear; but which the Lord Ordinary refused to sustain, and held him as confessed upon the rental as given in by the pursuer. The Earl, in a representation, *contended*, That the declaration should be received in lieu of his oath, in respect of his being a Peer, and so not obliged to answer on oath, but only upon his word of honour; or, at least, that he should be reponed against the circumduction, and allowed a further time for deponing. THE LORD ORDINARY, on the 6th March 1764, "Before answer, as to reponing the representer against his being held as confessed, granted commission for taking his oath upon the rental, to be reported against the first sederunt day of June then next; reserving the consideration of what effect the said

deposition would have until advising the same." But the Earl having allowed this third term to expire without deponing, the LORD ORDINARY, July 7. 1764, pronounced this interlocutor: "In respect the time within which the defender should have deponed, is expired without his deponing, refuses the desire of the representation, and adheres to the former interlocutor. Finds it presumed, that the rental upon which he is held as confessed, was the rental from the time the defender's predecessor entered into possession of the lands; and, therefore, finds, that the adjudications produced by him are paid and extinguished." No 21.

Against this interlocutor the Earl gave in a representation, which was appointed to be answered; but the Earl having died, the cause was transferred against his heirs, the Countess of Fife, and others; and the LORD ORDINARY "adhered to his two former interlocutors, and decerned."

Pleaded in a reclaiming petition, upon the point of holding as confessed; It is not a settled point, whether Peers are obliged to make oaths in courts of justice, or if it is not enough that they give their declaration upon honour? In a very late case before this Court, viz. the case of Mr Nimmo's daughter against Mr Sinclair, a noble Lord, of very extensive knowledge and abilities, though he submitted to be examined upon oath as a witness, entered a protestation in the minutes, that this should not be construed into a departure from his privileges. The defenders shall not say whether this is a right or a wrong notion; but surely it must sound a little harsh, that they should be held as confessed upon a rental given in merely at random by the other party, and which their predecessor declared upon his honour to be false, but declined giving his oath about the matter, from the opinion he had conceived about his privileges; when they do here actually offer proof in support of the Earl's declaration, and to show that the real rent was no more than what he sets it forth to be. It is not usual in this Court to tie down parties by strict form against material justice, where any colourable excuse can be offered. The Earl may have been mistaken; but surely there was some foundation for his mistake; and circumductions of the term, or interlocutors holding parties as confessed, are more easily got over than any other form whatever; because the only consequence of opening them is to admit parties to a full and fair proof of the fact.

2dly, Supposing the Earl's refusal to depone were held as conclusive against the defenders, this can, at no rate, go any further than holding them as confessed upon the rental exhibited by the pursuer, which is given in as the rent presently payable out of the lands, not what they paid a century ago. The interlocutor upon the presumed confession goes much farther than it would have done on a real one; for the Earl, supposing he had appeared and deponed, could only have said what the lands do pay; and the rental exhibited by the pursuer himself goes no further; but the interlocutor has given this a retrospect to the very beginning of the possession obtained by his predecessors, which, in other words, holds him as confessed upon a fact of which he could have no

No 21. knowledge, and likewise goes to presume, which is very improbable, that there has been no rise of rent in the country for a century back.

Answered; The Earl's idea of his privilege as a Peer, if he ever seriously entertained it, was destitute of any authority in reason, or in the law or practice of this country. It can receive no justification from what is said of the protest taken by another noble Lord, upon a similar occasion; as that Lord, though unwilling to renounce any privilege that had been said or thought to have belonged to the Peerage, did very wisely give immediate obedience to the established law and practice of this part of the united kingdom. Lord Caithness, too, was fully and repeatedly apprised that no such privilege could be allowed, by the Lord Ordinary's repelling his claim to it, and, at his own desire, giving him no less than three successive terms for deponing, and as often holding him as confessed for not doing it, which consumed a whole year. When a party, to whose oath a reference is made, happens to die, under a holding as confessed, after full opportunity for deponing; and, after he has, from mere obstinacy, refused to swear, it would be most adverse to practice, principles, and expediency, to repone his heir, and throw the whole open, after the other party has thereby lost his mean of proof.

What is said as to the length of time to which the rental is drawn back, and the improbability of the rents being the same in the 1694 as the 1764, might have some plausibility, were it made in the case of a person holden as confessed, who had newly entered to the possession, and who had either been accidentally hindered from deponing, or who had declined to make oath, merely in respect of his ignorance. But not one of these circumstances occur at present. The Earl's refusal proceeded from the merest obstinacy, after full opportunity given him. It is also certain, that he himself had held the natural possession of the lands, almost as far back as the 1694, at least from about the 1706, when he was of age, and that his memory was still perfectly entire. He was likewise confessedly possessed of all the rentals, tacks, and other vouchers for ascertaining the rents, since the time of his predecessor's entry, and even before it; of which, on the contrary, the pursuers and their predecessors were entirely ignorant. At any rate, no more was demanded of him, than to have deponed so far as his knowledge extended; and, as he contumaciously refused to swear to what he certainly did know, the legal presumption arising from his refusal must be, that he was conscious that the rental was substantially just, even when drawn back to the commencement of his possession; or, at least, that it did not exceed, however much it might fall short of the true rent, during that period. Had the pursuers known as much of the matter as the Earl himself, they perhaps would not have had recourse to this mean of proof, either of the antient or modern rent; but as the reverse was the case, they were obliged to resort to that sort of proof, which was most undoubtedly competent, and the least exceptionable that could be on the part of the Earl. And justice cannot permit, that, through the wilful fault of their party, they should be ir-

retrievably forfeited of the benefit of that evidence, to which they were legally and justly entitled. The Earl is now gone; his papers are dispersed; his succession is divided. The defender, his daughter, can know nothing of the matter; and it cannot be supposed, that any witnesses now living can have access to know this rental, near so far back as the 1706, far less for ten or twelve years before that period. No 21.

"THE LORDS adhered to the Lord Ordinary's interlocutor, and refused the desire of the petition; without prejudice to the defender's still proving that the rental is less than that upon which he (i. e. Lord Caithness) is held as confessed; reserving to the parties to be heard, if any expenses are incurred by his refusing to depone.

Act. *Rae.* Alt. *Ilay Campbell.* Clerk, *Kirkpatrick.*

Fol. Dic. v. 4. *p.* 22. *Fac. Col. No* 27. *p.* 70.

1792. *February* 4. MARGARET DALZIEL *against* JOHN RICHMOND.

No 22.
Oath on reference competent, after the adducing of parole proof.

MARGARET DALZIEL having raised a declarator of marriage against Richmond, several witnesses adduced by her in support of her libel were examined. The Commissaries, however, found this evidence insufficient, and assoilzied the defender.

She afterwards preferred a petition, praying that the libel might be referred to his oath. This the Commissaries refused; and she, having brought the point under review of the Court,

Pleaded; It is indeed reasonable, that before reference to oath, the party referring should renounce all other evidence; because if such oath be not necessary as a means of proof, his only object must be to ensnare his adversary into perjury. But, on the other hand, when all farther proof has been relinquished, the reference is competent and right, notwithstanding that some evidence may have been already brought; the adversary as to this being put on his guard; Voet, lib. 12. tit. 2. § 11.

By certain old decisions, it is true, a reference in these circumstances was denied; for which it is the more difficult to account, as it was always admitted in cases where proof by writing had been attempted; Ersk. b. 4. tit 2. § 3. But the point was unalterably fixed 24th June 1747, in the case of Law *contra* Lundin, *voce* PROCESS, in which it was found, "That a libel might be referred to the party's oath, notwithstanding the depositions of the witnesses."

Answered; He who makes a reference to the oath of his adversary ought to be actuated by an expectation that the truth will thereby be declared, having confidence that the adverse party is not disposed to commit the crime of perjury. Were a person impressed with the opposite sentiments, to insist on his