

No 119. it appeared, from the proof, it consisted with their knowledge, they might be liable in expenses.

THE LORDS found the account not probable otherwise than by the pursuer's oath.

C. Home, No 91. p. 143.

1750. December 1. MAXWELL against the TRUSTEES of CHALMERS.

No 120.
A party, against whom decree has been obtained as holden confessed, may be reponed on paying expenses.

AGNES and Ann Maxwells being pursued by the Trustees of Chalmers of Fingland, upon the passive titles, as representing certain of their predecessors, to make payment of certain debts due to Chalmers of Fingland, to which the pursuers had right by disposition from him; the passive title insisted on was, as charged to enter heir; and a day being taken for them to renounce, and that day again prorogated; and, last of all, a petition to the Lords refused, craving that the extract of the circumduction pronounced on the 21st February might be superseded till the 5th June last; and they having after all failed to renounce; the circumduction was extracted, and became a decree *in foro*.

Of this decree a bill of suspension was now presented, wherein it was *alleged*, That the complainers had never employed either the agent or procurator who had appeared for them, which was offered to be proved by their oaths; an allegiance which could not have been listened to, however such procurator and agent upon their acknowledgements might have been subjected to the complainer's damages. But another ground occurred to the Lords, namely, that in all decrees, however *in foro*, proceeding upon being held as confest, parties are reponed upon payment of the expense; and as there was no doubt of the complainer's now giving in a renunciation, it was remitted to the Lord Ordinary to pass the bill, upon caution.

Kilkerran, (PROCESS.) No 12. p. 438.

1797. June 20.

THOMAS GILMOUR against The REPRESENTATIVES of Captain MATHEW STEWART.

No 121.
A defender in an inferior court, to whose oath the libel had been referred, having been held as confessed for not appearing to depone, and

THOMAS GILMOUR, in June 1793, brought an action before the Sheriff of Ayr, against Captain Mathew Stewart, for payment of L. 1 : 13 : 3, being the amount of an account for tea and sugar, alleged to have been furnished to Jane Stewart, the defender's sister, in the years 1781 and 1782, at which period she kept his house.

Gilmour produced orders in Miss Stewart's hand-writing, but without dates, for the quantities of tea and sugar stated in the account. Miss Stewart had

been married, and settled in a different part of the country, several years before the action was raised.

The Captain, in defence, *pleaded* the triennial prescription, on which the pursuers referred the libel to his oath.

The Sheriff fixed the 11th March 1794 for the defender to depose, but he having failed to appear, and no excuse being made for him, the term was on that day circumduced, and, on the 18th, decree was pronounced in terms of the libel.

The decree was extracted on the 24th July, and a charge on it being threatened, Captain Stewart presented a bill of suspension, which was passed of consent.

At the first calling of the suspension, decree in absence was pronounced, finding the letters orderly proceeded.

Captain Stewart, in a representation against this judgment, expressed his willingness still to give his oath, in terms of the reference before the Sheriff.

In answer, Gilmour *contended*, 1mo, That the furnishings being proved by Miss Stewart's written orders, the point to be referred to the defender's oath was solely whether he had paid the debt; 2do, He contended, that he was entitled to prove resting owing by the oath of Miss Stewart, as *præposita negotiis domesticis* of her brother when the articles were furnished.

THE LORD ORDINARY " recalled the interlocutor in absence, represented against; found that the account decerned for in the inferior court is prescribed, and that the writings produced and founded on by the charger, and the other evidence which he offers to adduce, are insufficient to save the account from falling under the statute; and in respect the charger does not now offer to prove, by the suspender's oath, that the said account is resting owing, suspends the letters *simpliciter*, and decerns, but finds no expenses due to either party."

To this judgment the LORD ORDINARY repeatedly adhered.

After this, and when the suspension had depended for a year, Captain Stewart died; on which Gilmour called his representatives, by an action of transference, and afterwards, in a reclaiming petition,

Pleaded, Captain Stewart's Representatives cannot be reponed against the decree of the Sheriff holding him as confessed. By his death the charger is deprived of the benefit of his oath, and it would be unjust that his Representatives should gain by his contumacy; Durie, 16th June 1629, Coill against Lochbouie, No 97, p. 12027.; Fount. 11th February 1710, Mackay against Paton, No 115, p. 12039. And although he was reponed against the circumduction by the Lord Ordinary, as he died before making oath, presumptive confession must remain good against his successors; January 1686, Wright against Lord Rutherford, No 111. p. 12036.

2do, At all events, the account may be proved by the oath of Jane Stewart. As a debt may be created against the constituent by the deed of the *præposita*, so also may its subsistence be established by her oath, which is justly considered not as that of a witness, but of a party; 6th March 1630, Barclay against Binnie, *voce* PROOF;—see No 224. p. 6018.

No 121.

having offered, in a suspension, to give his oath, but afterwards died before doing so, the circumduction in the inferior court was found not to afford evidence against his representatives.

No 121.

The suspenders, besides stating that Captain Stewart was confined by indisposition when the circumduction went against him,

Answered, Captain Stewart expressed his readiness to make oath a year before his death; and as his not having done so, arose entirely from the charger declining to renew the reference formerly made before the Sheriff, there is no ground for subjecting his Representatives on account of the previous circumduction; Fountainhall, 21st June 1701, Kincaid against Blair, No 113. p. 12036.

2do, The triennial prescription can be elided only by the oath or writ of the party, 1579, c. 83. But a *præposita*, who has no patrimonial interest in the cause, cannot be considered as the party, in terms of the statute; 11th February 1724, Guthrie against Marquis of Annandale, No 304. p. 11101.; December 1765, Bruce and Company against Beat, No 314. p. 11109. It is indeed impossible for a *præposita* to depose on the general reference of resting owing, because the goods, although furnished, may have been paid by the constituent. Besides, to admit her oath in such cases as the present, would be extremely dangerous, by putting it in the power of dismissed servants to raise up prescribed debts against their masters which they had paid, although, trusting to the triennial prescription, they had destroyed the discharges.

The Court thought the case attended with difficulty. Several of the Judges at first observed, that it would bear extremely hard on shopkeepers, if they could not establish small debts by the oath of the *præposita*, as the master might often be *in optima fide* to swear to his ignorance of the furnishings, although they had been truly made. Others thought the conduct of Captain Stewart afforded real evidence of the existence of the debt. But the Court at last came to be almost unanimously of opinion, on the grounds stated for the suspenders, that a prescribed debt can be proved only by the oath or writ of the debtor.

THE LORDS, (24th December 1796,) before answer, "remitted to the Lord Ordinary to remit to the Sheriff to take the oath of Mrs Jane Stewart, as *præposita* of her brother."

Afterwards, on advising a reclaiming petition for the suspenders, with answers, the following interlocutor was (3d March 1797) pronounced: "Having considered the whole circumstances of this case, find it unnecessary to take the oath of the *præposita*; and remit to the Lord Ordinary to repel the defence stated for the representatives of Captain Stewart; and to find the letters orderly proceeded, and to decern; and also to find the respondent entitled to his expenses."

But, on advising a second reclaiming petition for the suspenders, with answers, the Court returned to the judgment of the Lord Ordinary, suspending the letters *simpliciter*, and finding neither party entitled to expenses.

Lord Ordinary, *Glenlee*.

For the Charger, *Greenshields*.
Clerk, *Colquhoun*.

Alt. *Hay, Gillies*.

R. D.

Fac. Col. No 39. p. 92.