

was antedated, for a reasonable cause, to exclude the usurpers from sequestration; and, therefore, found it relevant, that it was duly subscribed during the marriage, and revoked by the husband as a donation to the wife; and reserved the other point, which needed no probation, till the close of the cause.

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1677. *November 8.* BARBARA GRANT *against* JANET CUTHBERT.

BARBARA Grant, being executrix confirmed to her husband, did make payment to Archibald Neilson, her son, of a bond granted by the defunct his father, to him and Janet Cuthbert, his future spouse, and the heirs betwixt them; which failyieing, Archibald's heirs;—whereupon she obtained decret before the Sheriff against the said Janet Cuthbert, to exhibit and deliver the said bond, as satisfied. Janet Cuthbert raises suspension and reduction, on this reason, That the Sheriff had committed iniquity in decerning her to deliver up a bond of a sum provided to her in liferent by her husband's father before her marriage; which sum he could not uplift, nor the debtor pay, without the liferenter's consent, unless the debtor had seen the sum securely re-employed for the wife's liferent.

It was ANSWERED, That the husband was fiar, and *dominus bonorum*; and the executrix having made payment upon sentence, payment made *bona fide* should secure her; and the wife ought to pursue her husband's executors to re-employ.

It was REPLIED, That the tenor of the bond put the executrix *in mala fide* to pay without the relict's consent.

The Lords found, That the husband could not lift, nor the debtor pay, the principal sum, without the wife's consent, or re-employing it sufficiently for her behoof; and, therefore, reduced and suspended the decret for delivery.

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1677. *November 13.* THOMAS WILSON *against* GEILES FERGUSON and Her SPOUSE.

THOMAS Wilson pursues Geiles Ferguson, for payment of an account of ale and beer furnished to her by the space of six years; and also her husband, for his interest.

The defender ALLEGED, That the libel was only probable *scripto vel juramento*, by the Act of Parliament declaring all counts to be so probable after three years; and so no article of this account can be sustained, it being three years preceding, to be proven by witnesses.

It was ANSWERED, That the Act of Parliament allows counts to be proven by witnesses, being pursued within three years; which three must be accounted from the last article of the count; and so must not severally relate to every article, but to the account, consisting of more articles.

It was REPLIED, That though the currencies of counts have been found rele-

vant in merchants' accounts, that have books where discharges use to be taken, yet it ought not to be extended to vintners; otherwise all people who have been so furnished may be put to count, though for twenty years past. And there was a practick produced out of Durie, who, in a pursuit by a vintner against a taverner, who had passed from his service unquarrelled; the Lords would not sustain the process to be proven by witnesses, that the ale was tapped by the servant, it being presumed that the vintner received the money by daily and weekly accounts; unless it were proven, by the servant's oath, that the same was resting.

The pursuer DUPLIED, That if this parallel hold, witnesses will be excluded from proving one year's furnishing, as was in that servant's case; which cannot be drawn to the case of another person, where there is no presumption of payment. And the constant decisions of the Lords have sustained a count current probable by witnesses, though it lasted for many more than three years, if pursued within three years after the ending of the account; and that not only to merchants, but to apothecaries, tailors, &c. and writers; upon which all parties have rested secure. It is true, the interval amongst the articles of a merchant's count may be larger than a vintner's count, which is ordinarily weekly, and a merchant's count but yearly furnishing; but, so long as the account is current, it is but one count.

The Lords sustained the account to be proven by witnesses, being pursued within three years after the ending of the count-current.

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1677. November 23. VANS against The LADY BAIRFOORD.

GEORGE ROSS, having obtained decret against the Lady Bairfoord, she suspends, and raises reduction, and craves to be reponed to her oath;—and ALLEGES, That she never received advertisement to compear to depone; whereupon she offers to make faith. Her advocate also disclaimed his compearance, and alleged that the decret was made up by collusion; and that she and her son, being both called for a debt of her husband's, and both decerned, the compearance might have been only for her son.

It was ANSWERED, That, albeit the Lords do ordinarily repon parties to their oath, when they are holden as confest, and compear not, yet, where they compear, produce writs, and dispute, such parties cannot be reponed; especially in prejudice of singular successors, acquiring *bona fide*, for onerous causes, and resting upon the Lords' decret *in foro*. Neither can any respect be had to the advocates' disclaiming of their appearance, or dispute; which would evacuate all decreets. But, if any collusion can be proven, it must be *per membra curiæ*, by the Lords or clerks, whose assertions, *ex intervallo*, long after decreets are extracted, will not be received against the same, but the oath of the party only; unless it were in the time of extracting, or immediately after. And, in this case, advocates cannot disclaim their compearance, seeing the decret bears, "writs produced for the defender;" and, as to the son, there is nothing said for him at all.

The Lords ordained the clerks to be examined upon oath.

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