

1802. December 2.

YOUNG, TROTTER, and COMPANY, *against* PLAYFAIR.

No 340.
It is competent to prove resting owing by the oath of the wife, relative to all furnishings where she is *præposita*.

YOUNG, TROTTER, and Company, upholsterers, brought an action before the Sheriff of Edinburgh against Robert Playfair, writer, for certain furnishings made to his wife, according to an account, the last article of which was furnished in July 1797; and as the citation was in October 1800, the triennial prescription was pleaded in defence.

The Sheriff accordingly found (4th February 1801) the furnishings proveable only by the writ or oath of Mr Playfair or of his wife.

The pursuers made this reference to the oath of Mrs Playfair.

A suspension of this judgment was discussed before the LORD ORDINARY, who dismissed the bill, (13th July 1802.)

Playfair reclaimed, and

Pleaded; After the lapse of three years, it is incumbent upon a merchant, who sues upon a shop-account, to prove by the oath of the debtor, not only that the furnishing was made, but also that the debt is still owing; Ersk. B. 3. Tit. 7. § 18. The furnishings being of a domestic nature, it might be competent to prove by the wife's oath that they really were furnished; but resting owing cannot be proved in the same way, as it must be impossible by her to prove that the debt was not paid by the defender himself, who is the proper debtor in all debts or accounts incurred by his wife, and he is ready to swear that he did pay this debt.

Answered; Resting owing must be referred to the oath of the party who contracted the debt. The particular articles furnished were unquestionably such as it fell within the province of a married woman to purchase, thus making her husband her cautioner for them; and in all questions arising out of her management, as being *præposita negotiis*, her oath must be competent as well with regard to resting owing as to the question of furnishing.

It was mentioned on the Bench, That it has already been found, that in those affairs where the wife is *præposita*, her oath is probative of furnishing, not as the oath of a witness, but as the oath of a party; Cochrane against Lyle, 22d July 1740, No 224. p. 6018.; and Paterson against Taylor, 23d January 1771, No 339. p. 12485.; and that the same principle applies to admit the reference, so far as regards resting owing. Being *præposita* as to furnishing, she must also be *præposita* as to paying for these furnishings. Accordingly,

THE COURT adhered to the judgment of the Lord Ordinary, and admitted the reference to the oath of Mrs Playfair.

Lord Ordinary, *Craig*. For Pursuers, *Maxwell Morison*. Agent, *David Thomson, W. S.*
Alt. *Maconochie*. Agent, *Party*. Clerk, *Gordon*.
F. *Fac. Col. No 66. p. 150.*