

and I having no dealing with your father, you must only be liable; unless you prove, either by my oath, that I followed his faith in furnishing you the goods, or that you acted only in that capacity as a servant and trustee of your father's, and prove it *scripto*, by a written commission and mandate from him.

REPLIED,—That the common law, from which we have borrowed thir actions, called *exercitoria et institoria*, required no commissions in writ, but it was enough, if, from the *tractus negotii*, and the method of management, there appear such qualifications of trust as make it evident they act not *nomine proprio*: and here there were plain convictions of a preposition, such as, that Robert Kyll quitted his former employment, made himself a burgess and guild-brother, paid stent as such, took prentices by written indentures, paid the shop-maill after his wife's death, put his daughter Katharine, bred up to that employment, in the shop, paid both inland and foreign bills, kept the count-books, and once every week took in the accounts, and received from his daughter the money which was the product of every week's sale: and the creditors were so conscious of this, that they took a disposition from the said Robert to the ware of the shop as his.

ANSWERED,—Where a wife drives a trade, it is confessed that law presumes she only acts as *præposita* by her husband, because she is *sub manu et potestate mariti*: But it is not so with children, who, if allowed to trade apart, are, in so far, reputed forisfamiliated, and what they acquire, *sibi, non patri, acquirunt*; we having no *peculium profecticium* or *adventitium* with us. And he offers to prove, That Katharine Kyll had as full and free an exercise of merchandizing as any merchant in Edinburgh, in buying and selling ware, in drawing and accepting bills and precepts, and giving discharges, in her own name, and never mentioning her father, and subscribed balances of accounts, and paid them; so the pursuer was *in bona fide* to contract with her, and thought himself *in tuto* to furnish her goods, and knew no other body to be his debtor but herself; and with such sham pretences of preposition creditors ought not to be defrauded: and the accepting a disposition from Robert Kyll was no passing from his claim against Katharine the daughter; for it bears an express reservation, that it shall be but prejudice thereof.

The Lords, before answer, allowed Mrs Gordon and her husband to prove the qualifications from which she inferred her being only *præposita*; and, on Simpson's desire, he got likewise a conjunct probation of the circumstances of fact he condescended on to redargue her articles, and to prove she acted as *domina* and for herself, and was so reputed and holden; and, at advising, the Lords would consider where the most pregnant probations lay. *Vol. II. Page 264.*

---

1705. February 3. The MACERS against THOMAS KENNEDY and JOHN JOHNSTON.

ONE of the Session maces, belonging to Andrew Graham, last admitted in John Deuchar's place, being stolen, there was first an information given in against Richard Rae, goldsmith, that he had been seen to have the letters W and R, which used to be on the maces, signifying *William Rex*; and he, being called,

was, on some presumptions, ordered to prison till farther trial ; but he offering bail, it was accepted, conform to the late Act of personal liberty in 1701 ; and he standing on his denial of his knowledge and accession thereto, the Lords appointed the Queen's advocate to insist against him, and called the deacon and several others of that trade, and advertised them to be more cautious when broken silver work was brought to them to be sold, to detain it when they did not know the bringer and had a suspicion of its being stolen, whether the party who had lost it had caused book it in their records or not.

Then the macers gave in a bill against Thomas Kennedy and John Johnston, the two keepers of the Session-house, to make them liable, for suffering the mace to be stolen, whereof they had the custody and trust.

ANSWERED,—That they acknowledged they had the charge of the Lords' and advocates' gowns, and had a salary for it, but never looked upon themselves as concerned to answer for the maces, whereof they had no trust ; the macers leaving them lying on the bench, or on chairs and trunks, and oftentimes lending them to the Privy-council macers, when they had not brought their own. And they had no salary nor allowance from the macers, who had their own servants to look after them ; and, *esto* they were *depositarii*, it being merely gratuitous, they ought only to be liable *pro dolo et lata culpa*.

The affair was compounded and taken up, and so came not to a decision ; though it were very fit it should be known whether the macers should be answerable, and losers in such a case, or the keepers of the house. Since the institution of the College of Justice, which is upwards of 160 years, the like theft had never been attempted before.

*Vol. II. Page 265*

1705. February 8. WILLIAM HAMILTON of WISHAW against The CREDITORS of CLELAND of that ilk.

THE competition among the Creditors of Cleland of that ilk was advised. The Laird of Cleland being owing more than the value of his estate extended to, he granted a disposition, on the 17th of January 1702, to William Hamilton of Wishaw, his father-in-law, and some other friends, who stood bound as cautioners for him in many of his debts, conform to a list then given in, and on this they were infest on the 23d of January that year. But Sommerveil of Kennox, and sundry others of his lawful creditors, being omitted out of that list, they raise a reduction of the said disposition on the Act of Parliament 1621 ; but, they instructing the onerosity of their debts, though it was *inter conjunctas personas*, the disposition was sustained. Then Kennox insisted, on the 5th Act of Parliament 1696, that either he was bankrupt at the time of his making that disposition, or at the taking of the seasine, or at least within sixty days of the date of the seasine. And, this being debated, it was found relevant for Kennox to prove that the common debtor was under diligence, by horning and caption, the time of the disposition and seasine ; and that *scripto* : as also that, within sixty days thereafter, he was either imprisoned, or retired to a privileged sanctuary, or absconded, or forcibly defended his person against the messengers, each of them relevant *separatim, prout de jure* : but, as to the alternative of absconding