

\* \* \* Fountainhall reports this case.

No 2.

THE Lady Dowager of Down being debtor to the Laird of Grant in a considerable sum of money by bond, and being thereafter married to the Earl of Sutherland, and now deceased, Grant pursues Sutherland for payment of her debt, on these grounds, that he was a vicious intromitter with the Countess's jewels and paraphernalia, to a great value, and was also *lucratus* by the marriage, over and above what may be reputed a competency *ad sustinenda onera matrimonii*, and to defray the expense of the marriage and her funerals; and having referred the whole to the Earl's oath, who being at London, a commission was craved by his lawyers to depone here, which was directed to be executed by the Earl of Seafield, Chancellor of North Britain, but being neglected to be reported, the term was circumduced against the Earl for not deponing; whereupon a bill was given in for his Lordship, representing, that he being a member of the Parliament of Great Britain, he was absent *reipublicæ causa*, and could not be convened in any cause, or obliged to answer during his attendance there. *Answered, imo*, They knew no such privilege competent to the Peers sent up, for they had it not when the Parliament of Scotland used to sit; and at most, it could only extend to new actions raised against them, and not to such as were depending against them before; *2do*, His procurator had craved a commission, and did plead no such privilege, *et quilibet potest renuntiare favori pro se introducto*, and so he cannot retract now. *Replied*, The advocate had no mandate from him to do it. THE LORDS would not repon him now after a commission sought, but stopped extracting of the decret of circumduction till the 10th of June, that my Lord might either depone at home, or on a commission, if he pleased; to have loosed the circumduction, was to make Grant lose his only mean of probation, if my Lord died *medio tempore*; whereas now, in case of his decease before deponing, the decret stands firm against him; by which middle temperament, the LORDS shunned deciding whether they had the privilege of not being obliged to answer as *absentes reipublicæ causa*.

*Fountainhall, v. 2. p. 432.*

1709. January 5. LADY GREENOCK against Sir JOHN SHAW of Greenock.

No 3.

THE LORDS ordered a process at the Lady's instance against her son, Sir John Shaw, to be enrolled, albeit he was absent at London as a Member of Parliament, and claimed his privilege; because, the privilege that Members of Parliament cannot, during the sitting thereof, be sued at law, hinders not to expedite the preliminaries or preparatories of processes, which pass of course.

June 22.—THE LORDS, January 1709, having ordained a process at the instance of the Lady Greenock and her son, to be enrolled, albeit the defender was

No 3.

attending the Parliament, in respect the advocate that was marked for him at the first calling, refused to take out the process ; when the cause came in by course of the roll, the defender *alleged* no process, because, he had neither seen the process, nor was obliged to see or notice it, during the sitting of the Parliament, conform to the 12th and 13th William III. cap. 3.

*Replied* for the pursuer, That statute doth not expressly provide, that process should not be commenced and prosecuted against members of Parliament, during the sitting thereof, but only that suits may be commenced and prosecuted after the rising of Parliament ; which argument *a contrario*, and from implication, ought to be understood of commencing and prosecuting *cum effectu* by judicial acts, that oblige the party to appear in judgment, and make defences under a certification in case of failzie ; and not of the preliminaries of a process for bringing it into judgment, which are performed by the clerk, without trouble or diversion to the party. And albeit by the English law, effectual prosecution commenceth from the day to which the *subpœna* is served, or at which the defendant is to appear, and give in his answers or defences ; yet in Scotland, where the first diet of appearance is not peremptory, and the defender is not obliged to put in defences till after the usual *induciae* of seeing, returning, and enrolling the process, a cause cannot be understood commenced till after elapsing of that preparatory interval, which is not observed in the English form, to which the statute is adapted. *2do*, The most that the defender can claim, is only to see the process six days, without any new enrolment ; seeing after returning of the process, he is presumed, and ought to be ready. The enrolment was not introduced as a privilege to the defender, but only to prevent anticipating of causes, by some pursuers unjustly getting the start of others whose processes were first returned ; and the rest of the lieges who are pursuing causes have no ground of complaint, seeing the Lady Greenock's hath already run the course of the roll, by order of the LORDS' interlocutor.

*Duplied* for the defender, When a process is returned by an advocate as not for the party ; or when the advocate marked for the party refuseth to take out the process, it ought to be called *de novo*, and enrolled in the regulation roll. The act of Parliament doth not distinguish betwixt preparatory interlocutors, and those *in causa* ; and though it may be questioned, if citations passing of course may be sustained, sure it is, that no interlocutor of a judge can be pronounced against a Member of Parliament claiming his privilege. So in the case of Sir Andrew Kennedy against Sir Alexander Cumming, the LORDS would not so much as ordain Sir Andrew's petition offered against Sir Alexander, to be seen and answered, in respect the latter was attending the Parliament. See No 6. p. 8567.

THE LORDS sustained the dilatory defence founded on Sir John Shaw's being a member of Parliament ; and therefore found the process must be given out to be seen and enrolled again in common form.

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No 3.

January 6. 1709.—Dame Heleonora Nicolson pursues Sir John Shaw of Greenock, her son, in a process for payment of her bygone jointure; and having called her summons, and an advocate being marked, she gave out her process to him to be seen, who returns it back to her doers, without a return in writing on the back of it; for want whereof she could not get it enrolled, and so requires him by a notary before witnesses to give her a return in common form, which he refused, in regard Sir John having gone to attend the Parliament as a Member in the House of Commons, he was *absens reipublicæ causa*, and not obliged to answer in any process. Upon this, my Lady gave in a bill, craving, that his advocate might be ordained to give a return of her process, to the effect she may get it enrolled; and, in case of his refusal, to cause enrol it of the date of the instrument and protest taken against him. *Answered* for Sir John Shaw, He opposed his privilege, which secured him against any procedure, either in form or matter till his return; and the law, by the regulations 1695, had provided a remedy in this case, where none appeared for a defender in a process to crave a sight, it was a summons in absence to be enrolled in the regulation-roll, which my Lady might do; and no sort of interlocutor can be pronounced against him during his attendance of the Parliament. The design was to stop its enrolment till the summer-session, and then it could not come in by the course of the roll till November 1709, and then his Parliament privilege revived; and if he had interest to get himself chosen to the next triennial Parliament again, he might postpone and delay her long enough. *Replied*, It was time enough to found upon his privilege, when my Lady insisted in her cause. All she craved at present was only the *initialia et præparatoria judiciorum*, which neither infringed nor encroached on his privilege, if he had any; and when she craved a decret, then was the season to propone his exception, as *impeditiva litis ingressus*, I am not bound to answer, because I am a member of Parliament. Some of the Lords doubted if there was any such privilege competent, for it is certain, when we were an independent sovereign kingdom by ourselves, the members of the Scotch Parliament had no such privilege. THE LORDS, by plurality of six *contra* five, found this defence not receivable *hoc loco*, and that the privilege could not extend to this case; and therefore ordained the cause to be enrolled of the date of the instrument.

Fountainhall, v. 2. p. 478.

1709. November 15. GEORGE LIVINGSTON against MORISON of Prestongrange:

IN the action at the instance of George Livingston against Prestongrange, the LORDS sisted process against the defender, as being a Member of Parliament, al-

No 43