

ALEXANDER COOPER, Appellant.—*Robertson.*

No. 8.

ALEXANDER HAMILTON, Respondent.—*Keay—James Campbell.*

*Appeal—Costs—Triennial Prescription.*—1. Appeal entertained, and costs awarded on affirming the judgments complained of, where the interest of the Appellant amounted to twenty-four shillings, and L.30, 5s. 8d., being expenses of process; and where doubts were entertained as to the soundness of part of the judgments—the appellant having limited his appeal to the part affirmed.

2. Held (affirming the judgment of the Court of Session) that a party having, on a reference to oath, deponed that he believed a prescribed account had been paid by his factor, and was certain it was paid from having settled accounts with him; and these accounts not showing such payment, this was sufficient to elide the triennial prescription.

HAMILTON, a writer, raised an action before the Sheriff of Ayr-  
shire against Cooper, for payment of an account, consisting of 19  
articles, and amounting to L.16, 18s. Cooper pleaded prescrip-  
tion; and a reference was made to his oath by Hamilton. After  
much delay on the part of Cooper, he emitted an oath, in which  
inter alia he deponed, ‘that the 1st and 2d articles of the account  
‘libelled by the said Alexander Hamilton, the deponent believes  
‘to have been paid by Mr Wodrow (his factor), and otherwise;  
‘and he is certain they are paid, from having settled accounts  
‘with Mr Wodrow, and otherwise, and from the receipts in pro-  
‘cess.’—The Sheriff assoilzied Cooper, but did not find him en-  
titled to expenses. Cooper then advocated as to expenses, and  
Hamilton on the merits. In Cooper’s advocacy, the Court  
remitted simpliciter; but in Hamilton’s, a diligence was granted  
to recover the accounts referred to in Cooper’s oath, from which  
it did not appear that the debt had been paid. Ultimately, the  
Lord Ordinary decerned against Cooper for 13 out of the 19  
articles composing the account, including the two articles above  
deponed to; but found no expenses due to either party. Cooper  
petitioned, and the Court, on the 20th Feb. 1824, adhered,\* and  
found him liable in the expenses of the answers, which were  
modified to L.30, 5s. 8d.

Mar. 14, 1826.  
2D DIVISION.  
Lord Pitmilley.

*Lord Justice-Clerk.*—I see no sufficient grounds for altering the interlocutor. Cooper pleaded the triennial prescription; and when a reference was made to his oath, he delayed for years to appear and depone. I lay out of view everything except his

\* See 2, Shaw and Dunlop, No. 670.

Mar. 14, 1826. oath, and the accounts there referred to as the grounds of his oath. But these accounts do not support the oath, and therefore I think the interlocutor right.

*Lord Robertson.*—I concur. After a long litigation, Cooper made oath. That oath, however, is merely one of credulity—that he believes the two first articles to have been paid; and he refers, in support of this, to the circumstance of their having been paid by Wodrow, and that he had settled with him. But, on examining these accounts, no such thing appears.

The other Judges concurred.

Cooper appealed against these interlocutors, ‘in so far particularly as the appellant has been thereby subjected in payment of the two first articles of the said account pursued for, and in the expenses of the answers.’ The amount of the two first articles was £1, 4s. Sterling.

*Appellant.*—These two items are proved, by the oath and documents produced, to have been paid—the account is in other respects erroneous, and the judgments complained of unwarranted.

*Respondent.*—The appellant’s oath does not prove payment, neither do the documents to which he refers. The two first items are the only items touched by the appeal.

The House of Lords ordered and adjudged, that the interlocutors complained of be affirmed, with L.100 costs.

LORD GIFFORD.—My Lords, This is really an unfortunate case, and a case that one cannot but regret should ever have been brought by appeal before your Lordships’ House. But I fully concur in the observations made by the appellant’s counsel, that the case being brought here, your Lordships cannot decide it in consequence of the smallness of the sum against the appellant; but that you must apply the same principles to this case that you would to a case where a very large sum was involved. My Lords, I feel it very difficult to support the interlocutors to the full extent to which they have gone. The grounds upon which they have disallowed the third and fourth items, appears to be applicable to the fifth and sixth, laying out of consideration whether the decision is right upon the first and second, which depend upon a different statement on the oath of the party. This question is to be decided entirely upon the oath of the party; and the question is, whether that oath does establish as to the first and second and fifth and sixth (those are the only items in dispute) *resting owing* on the part of the appellant to that extent. As to the fifth and sixth, if the Lord Ordinary has been right in finding, and the Court of Session in affirming his interlocutor, that the oath is not sufficient to establish the third and fourth items, it seems to me extremely difficult to

say it can establish the fifth and sixth, because the language is exactly the same, namely, that the party believes the sum to have been paid either by himself or Mr Wodrow. The great difficulty that presses upon my mind, is how to deal with the costs of this appeal, supposing your Lordships should be of opinion that the Court below has been right either as to the fifth and sixth, or the first and second items. Supposing those should be disallowed, there is a balance due to the respondent, and he would be entitled to the judgment. As to the remaining items, and supposing the appellant wrong upon the first and second, and right in the objections to the fifth and sixth, never having stated them to the Court below, but first at your Lordships' bar, the question is, whether your Lordships would visit him with the full costs, or whether it is consistent with your Lordships' practice, where interlocutors have been found wrong to a small extent, and have been varied, to visit the appellant with costs. One cannot but extremely deplore that the case has ever been brought to your Lordships' Bar. The whole amount in dispute is only four pounds, and as many hundreds have been spent in costs. The offer made by the respondent was extremely creditable, to leave the whole matter to arbitration, and to the determination of the appellant's own counsel. However we may regret that offer was not accepted, if, upon considering this case, your Lordships should determine there was a mistake as to some of these items, and you are obliged to alter these interlocutors, it will then be a question whether it is your Lordships' practice to award costs against the appellant. As to giving him costs, it is quite out of the question, where a party has so litigated, and succeeding to so small an extent as he will, supposing your Lordships are of opinion the Court below is wrong in those items. Your Lordships can never visit the respondent with costs. The only question is, whether your Lordships can relieve the respondent?

Upon these grounds, I should propose to your Lordships to adjourn the further consideration of this case till Friday, when I shall again attend your Lordships. As to the fifth and sixth articles, my apprehension is, that the oath of verity does not establish the *resting owing*—the first and second depend upon a different statement.

The question will be, whether, looking at the whole of the oath, there is a sufficient statement of *resting owing*, or whether he has not referred to Mr Wodrow's vouchers as evidence of their not resting owing, and thus made the case to depend on these accounts. It is to be regretted that the respondent should have been at the expense of contesting this at your Lordships' bar; but I am afraid your Lordships must decide this as every other case, not with a view to the hardship of the case, but looking at the principles of law to be applied to it. Between this and Friday, I will look more minutely into the oath of verity as to the first and second items, and state what my impression is; and in the meantime consider whether, consistently with your Lordships' practice in proceeding upon appeals, if your Lordships are under the necessity of varying these interlocutors, your Lordships can visit the appellant with costs.

LORD GIFFORD.—My Lords, there is a case which was heard before your

Mar. 14, 1826. Lordships in the course of last week, and which presents to your Lordships one of the strongest instances which has come under my notice of the length to which parties will carry their litigation on very trifling matters. This case has arisen out of certain proceedings which originated in the Sheriff Court of Ayrshire, which were carried afterwards into the Court of Session. The respondent, Mr Hamilton, having, as he conceived, a demand against the appellant, Mr Cooper, to the amount of £16, 18s., for various business done by him for Mr Cooper; and disputes having arisen between them; and Mr Cooper having instituted an action against Mr Hamilton for a demand supposed to be due by him, this action was raised against Mr Cooper in the Sheriff's Court. The demand consisted of various items for business done in the year 1806 and following years, such as extending a new tack of Temple Bogwood, 15s. 6d.; copy for the tenant, 8s. 6d., and various small items of that sort, closing with a charge 'for trouble and expense in management while you were absent with your regiment for eighteen months, ten guineas;'—constituting, as I have stated to your Lordships, a charge of £16, 18s.

My Lords, in defence Mr Cooper pleaded what is called in Scotland the triennial prescription, that this demand having existed for more than three years, was barred; and that plea was allowed. It then became competent for Mr Hamilton to put Mr Cooper on his oath as to the existence of the debt claimed to be due from him. He therefore called upon Mr Cooper to depone upon this subject; and proceedings were carried on for some time; and finally, Mr Cooper was examined upon his oath. The Sheriff conceived that what Mr Cooper had deponed upon his oath was sufficient to exonerate him from certain items of this demand, and therefore the Sheriff pronounced in favour of Mr Cooper, the present appellant; but although he considered him exonerated from the demand, he did not give him the expenses incurred in opposing it. Mr Hamilton not being satisfied with that decision, carried the matter before the Court of Session. It went, in the first instance, before the Lord Ordinary; and, on investigating the case, the Lord Ordinary adjudged that Mr Cooper had successfully defended himself to the extent of £12. He had sworn that there was no such demand due by him to Mr Hamilton, but with respect to several items, 13 in number, amounting to no more than the sum of L.4, 17s., he determined in favour of Mr Hamilton. His Lordship, however, found expenses due to neither party. The respondent, Mr Cooper, was not satisfied with that judgment, and particularly as the Lord Ordinary had not awarded him the expenses; and he complained, that, inasmuch as he had succeeded in resisting the greater part of this demand, he ought to have had the expenses of the proceeding adjudged to him.

Mr Cooper, being therefore dissatisfied with that judgment, brought the matter before the Inner House, who concurred in opinion with the Lord Ordinary, and thinking that the proceeding before them was a vexatious proceeding, they gave against Mr Cooper—not the former costs, the matter as to them having been adjudged by the Lord Ordinary, who had decided that no expenses up to the close of the proceeding before him

should be paid by either party to the other—but the costs of that hearing; and they pronounced to that effect. Mar. 14, 1826.

Against that judgment Mr Cooper has appealed to your Lordships' House. It is important that your Lordships should attend to the manner in which he has appealed. It has been insisted at your Lordships' bar by Mr Cooper, not only that the Lord Ordinary was wrong in respect of the two items which he has allowed, and which are referred to in the papers before your Lordships, but he has also contended, that the Lord Ordinary was wrong in two other items. On looking, however, at the petition of appeal before your Lordships, I think your Lordships will be of opinion that he has confined his objection to those two items, and to that part of the judgment which awarded costs against him in the Court of Session. His petition is to this effect: 'That your petitioner being advised that the said interlocutors of the Lord Ordinary,' (enumerating them by date,) 'particularly as your petitioner has, by the said three last mentioned interlocutors, been subjected to the payment of the two first articles of the said account pursued for, and in the expenses of the answer by the said Alexander Hamilton to his last mentioned petition, presented to the Court of Session, and modified to the above-mentioned sum, and in so far as they did not find that the petitioner is entitled to the costs in the said action, are contrary to law;' he prays that your Lordships will reverse, vary, or alter the said interlocutors appealed from as far as complained of.

Now, it does appear to me, that by his petition he has restricted himself to those subjects of complaint which he has enumerated in that petition; and I think your Lordships will not be inclined to give any great latitude of construction to this petition of appeal. Thinking as I do, that he has confined himself to those matters which he has made the subject of appeal, it appears to me that this is not a case in which your Lordships will be inclined to look beyond the terms of the petition of appeal; and I mention this, because certainly, with respect to two other items which have been stated at the bar, there is matter which might in some measure influence your Lordships' minds, if you were at liberty to go into it.

This account consisted of 19 items, and, as I have stated, there are two items which the appellant has particularly enumerated in his petition of appeal, amounting to £1, 4s.; so that this is, in effect, an appeal brought to your Lordships' House, in respect of a sum of £1, 4s., and the costs, amounting to about £30, of that last proceeding before the Court of Session. I do not mean to intimate, my Lords, that the smallness of the sum furnishes any objection to the right of the party to appeal from that part of the kingdom to your Lordships' House, when the grounds on which that appeal is brought are satisfactory. My Lords, Mr Cooper being put to his oath, deponed as to these first and second items, that he believed them 'to have been paid by Mr Wodrow, and is certain they are paid, by having settled accounts with Mr Wodrow, or

Mar. 14, 1826. ' otherwise, and from the receipts in process ;' then he goes on to say, ' that he does not recollect to have examined Mr Wodrow's accounts as ' to these articles ; and being specially interrogated, whether he has the ' accounts settled between him and Mr Wodrow during the time he was ' his factor, and if he has, to produce them, or transcripts of the entries of ' any sums paid to the pursuer or his brother ; he objected that the pur- ' suer is bound to prove resting owing by the defender's oath, and he ' must abide by that mode of probation. He is not entitled to tease the ' defender, and call for production of papers, which it would be difficult to ' find. To that it was answered, that as Mr Cooper had founded his be- ' lief in some measure on the accounts, he was bound to produce them.' The Lord Ordinary was of opinion, and the Court of Session affirmed that finding, that looking at the whole of this answer, it was to be taken that that sum had been paid, as would appear by the accounts of Mr Wodrow, or otherwise, and from the receipts in process. Now, the receipts in process did not prove any such fact. They proved a settlement of the account in the year 1806, by which the sum of £1, 4s. had been allowed to Mr Hamilton ; and it was said that £1, 4s. being the amount of these two items together, that was conclusive evidence that it was the same two items. But there was no evidence to show the nature of those items ; and with respect to Mr Wodrow's accounts, as he had referred to them in his deposition, the Court of Session were of opinion that they might be referred to. Now, on referring to them, they did not show this money to have been paid ; and therefore the Court held that it was a sort of qualified oath, referring to extrinsic matter, and to be proved by that extrinsic matter ; and therefore they adjudged against him upon that ; and, my Lords, after a good deal of consideration upon that subject, it does not appear to me that the Court of Session were wrong in that.

My Lords, I think your Lordships will be of opinion that this judgment ought to be affirmed with costs ; because, if a gentleman will indulge himself in this spirit of vexation,—if he will come to your Lordships' bar to complain of a judgment for £1, 4s.—and if, being so come to your Lordships' bar, he does not establish clearly and satisfactorily to your Lordships that the Court of Session are wrong ; I say, if a party chooses to come with such a frivolous complaint, and he fails to establish it, he ought to be at the expense of such proceeding.

My Lords, with respect to two other items, the answers to the third and fourth were in the following terms :—' That the deponent believes that ' they are satisfied and paid, but cannot recollect whether by himself or ' Mr Wodrow.' Now, the Lord Ordinary was of opinion, that, inasmuch as he swore he believed they were paid, and inasmuch as it was necessary to establish by his oath, not only that the debt once existed, but still subsisted, that swearing to his belief was sufficient to exonerate him ; and therefore he adjudged for him in respect of those items.

With respect to the fifth, he deponed in the very same terms,—that he believes the same to be satisfied and paid, but cannot recollect whether by himself or Mr Wodrow ; and with respect to the sixth, he deponed that

he knows nothing about it. My Lords, whether it was from some oversight, or from what other cause, it is unnecessary now to determine; but the Lord Ordinary was of opinion he was entitled to the effect of that statement. However, it is not necessary to go farther than to say, that the petition of appeal does not point to these matters, but confines the matter of appeal to those which I have stated to your Lordships. I should have very much regretted, if there had been any slip which had prevented your Lordships doing substantial justice; but, I trust, that if we were enabled to have the whole case properly before the House, it would appear that that was not the fact. The matter of the appeal, however, being confined to the two first items of the account, and to the expenses upon those points, I have no doubt whatever as to the judgment which I ought to advise your Lordships to adopt. He complains, that the expenses were adjudged against him, because, he says, he had established a good defence to the greater part of the demands. If he had rested satisfied with the judgment of the Lord Ordinary, he would have had no expenses to pay. The Court of Session, considering the Lord Ordinary to be right, and affirming his judgment, were of opinion that he had brought the other party unnecessarily before them, and that, therefore, that party was entitled to his costs. They did not touch the antecedent expenses, for they had already been determined upon by the Lord Ordinary; and they did not at all interfere with his decision. If the appellant chose to quarrel with the decision of the Lord Ordinary, and he was not justified in doing that, it ought certainly to be at his own expense. I think your Lordships will be of opinion, that the Court of Session did not exercise a very unsound discretion in adjudging the costs against him. These being the circumstances of the case, which I have thought it necessary to detail to your Lordships; in consequence of the case being somewhat singular in its circumstances, I would conclude with moving your Lordships that these interlocutors be affirmed.

J. CAMPBELL—J. RICHARDSON, Solicitors.