

## SECT. IV.

## Creditor's Oath, if sustained against Third Parties having Interest.

1628. July 24. EXECUTORS OF EDWARD EDGAR *against* NICOL EDGAR.

A DEBT given up by umquhile Edward Edgar in his testament, to be resting owing to Nicol Edgar, conform to the defunct's bond, which debt the Executors paid without any decret obtained against them, and only reported the defunct's bond, which they negligently cancelled, the same was allowed by the Lords to the Executors, the said Nicol giving his oath that it was a true debt resting by the defunct, and that he was paid thereof by the Executors after his decease.

*Item*, There were allowed to the said Executors datives given up by the said defunct owing to some of his servants, factors for him, whereupon there was no bond nor decret recovered, the said persons creditors giving their oaths that the debt was truly owing to them, and truly paid by the Executors.

*Fol. Dic. v. 2. p. 239. Auchinleck, MS. p. 71.*

1629. March 7.

FALCONER *against* BLAIR.

THE relict of a defunct, who by an heritable bond was addebted to his creditor in a sum of money, being executor to her husband, and having paid the said debt, after her husband's decease, and reported the bond from the creditor, and having thereafter cancelled the same; she pursuing the heir of her husband, as he who should relieve the executor of that heritable sum for re-payment thereof to her, seeing it was *ratione et naturæ consentaneum*, that as the executor is obliged to pay the defunct's moveable debts, off the first end of his moveables, so that the heir, out of his lands and heirship, ought to pay the defunct's heritable debt, *nam quem sequuntur commoda, debent etiam sequi incommoda*; this action was sustained at the executor's instance, against the heir, albeit he *alleged*, That she ought to have no relief, nor repetition of that payment, which she made *scienter, volenter, et sponte*, without any charge or compulsion used by the creditor against her; specially the bond alleged satisfied by her being now produced by her cancelled, whereupon neither the heir, nor any other could be distressed by the creditor, and no discharge being produced, granted to her by the creditor; for it might be that the defunct's self had paid the debt therein contained in his own lifetime, or that the creditor had otherwise cancelled the bond, and that the relict could never have been distressed therefor; which allegiance was repelled, and the action sustained; and the LORDS found the payment alleged made by the relict, after her hus-

No 341.

No 342.

An executor paid an heritable bond, and cancelled it, without taking a discharge. Found, that the payment might be proved by the creditor's oath, and that the bond was subsisting and uncancelled.

- No 342. band's decease, might be proved by the creditor's oath, and that the bond was wholly uncanceled at that time, and after his decease might be proved by the heir's oath; which manner of probation was sustained to infer repetition to the relict, although the bond was cancelled; and the LORDS declared, that they would not respect any qualification, which the defenders should adject to their depositions, anent conditions made betwixt them and the relict, at the time of the said payment, but simply would take their oaths, upon the two points foresaid, which were sustained as relevant, viz. that she herself made payment since her husband's decease, and that the bond was then uncanceled.

Act. *Nicolson & Aiton.*

Alt. *Advocatus & Nairn.*

Clerk, *Gibson.*

*Fol. Dic. v. 2. p. 240. Durie, p. 434.*

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1632: July 7. LD. RENTON *against* LD. WEDDERBURN.

No 343.

Two sisters having right to a bond, as representing their father, the executions of an inhibition served thereupon were challenged in an improbation as false; and the pursuer succumbing in his probation, did afterward insist that his witnesses were bribed and corrupted by the two sisters. This allegiance was not found relevant to be proved by the oath of the one sister against the other sister's husband.

*Fol. Dic. v. 2. p. 240. Durie.*

\*.\* This case is No 224. p. 6787. *voce* IMPROBATION.

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1676. June 8.

IRVINE *against* FORBES.

No 344.

A THIRD party founded upon a clause in a writ conceived in his favour. It was *alleged* against him, That the writ was never a delivered evident, which was offered to be proved by the creditor's oath. This was repelled; for since the writ was out of the debtor's hands, it was found, That the benefit of the clause could only be taken away by his oath in whose favour it was conceived.

*Fol. Dic. v. 2. p. 240. Stair.*

\*.\* This case is No 5. p. 7722. *voce* JUS QUÆSITUM TERTIO.