

S E C T. II.

Oath of the Debtor, if good against his Creditors ?

No 305. 1627. February 2. LORD BALMERINO against LD LOCHINVAR.

A CAUTIONER in loosing of arrestment being pursued for payment of the debt after it was constituted against the principal debtor, the oath of the person in whose hand the arrestment had been laid was found a good proof of what he was owing to the common debtor at the time of the arrestment, in order to make the defender liable for the same.

Fol. Dic. v. 2. p. 237. Durie.

. This case is No 126. p. 789, *voce* ARRESTMENT.

1674. December 11.

ELPHINSTON against HUME and the LAIRD of STENHOPE.

No 306.

The oath of an arrestee not good against an arrester.

THE LAIRD of Stenhope being debtor to Captain Johnston's son, as executor confirmed to Captain Johnston, assigns the same to Mr James Elphinston, who having shown the assignation to Stenhope, he promised payment; and upon the assignation and promise, he obtained decret against Stenhope before the Sheriff of the shire. George Hume having arrested the sum in Stenhope's hand to be made furthcoming for payment of a debt due to him by Johnston, obtained decret before the Lords for making furthcoming. Stenhope suspends on double pointing; in which competition it was *alleged* for the arrester, That he had arrested before any intimation of the assignation, and so is preferable. It was *answered* for the assignee, That Stenhope having accepted of the assignation, and by his promise become debtor before the arrestment, he was no more debtor to the cedent, nor could any arrestment for the cedent's debt, after he ceased to be debtor, become effectual; and if this were not sufficient, Stenhope's promise could not be loosed, seeing he had rested thereupon.

THE LORDS found that the acceptance of the assignation before the arrestment is relevant to prefer the assignee, but that is not probable by Stenhope's oath, but either by writ or oath of knowledge of the arrester; and if it be not so proved, they found that Stenhope was only liable in single payment, unless there had been transaction or undertaking of the hazard.

Fol. Dic. v. 2. p. 236. Stair, v. 2. p. 292.

. Dirleton's report of this case is No 66. p. 863., *voce* ASSIGNATION.

No 306.

. For the same reason, as in the above case, in a special declarator of escheat the rebel's oath was not sustained against the donatar, to prove that the bond pursued for was paid before denunciation, 10th February 1663, Montgomery against Montgomery, No 5. p. 3615., *voce* ESCHEAT.

1680. February 10. MORTON against GILCHRIST.

WILLIAM ANCRUM and James Grieve having bought a parcel of iron from Arthur Udney; James Gilchrist arrests the price, and obtains a decret for making forthcoming, in satisfaction of a debt due by Udney to him, and obtains payment thereupon. Andrew Morton pursues the same persons for payment to him of the price, because the iron belonged to him, and Udney was only his factor, and for proving thereof, hath produced an assignation from Udney to the price, bearing expressly, That it did belong to Morton, and that he sold it as a factor, with a letter to the same purpose. It was *alleged* for Ancrum and Grieve, absolutor, because they had made payment *bona fide* to Gilchrist, before this pursuit; but seeing Gilchrist compeared, the Lords considered the competition between him and Morton. It was *alleged* for Gilchrist, That Udney's acknowledging the property to belong to Morton, cannot be respected, because Udney before that time was broken, at least Gilchrist had used diligence against him by horning.

No 307.
Found, that the seller of goods having become bankrupt, his evidence could not be received to prefer one party to another.

THE LORDS found the allegiance relevant for Morton, That the property of the iron belonged to him, and that Udney was only his factor, and found the same proved by Udney's acknowledgement in his assignation or letter, unless he was bankrupt, or incapacitated by diligence before the same, in which case they found the property of the iron to belong to Morton probable *prout de jure*.

Fol. Dic. v. 2. p. 237. Stair, v. 2. p. 754.

1683. March. COCKBURN against TURNBULL.

WALTER TURNBULL surgeon merchant, having become cautioner to Mrs Reidman for Janet Watt, her taverner, by which he was obliged to hold count and pay whatsoever wine or other liquors should be vented by the said Janet Watt, after just count and reckoning made betwixt Mrs Reidman and the said Walter; and Mrs Reidman having counted with the said Janet Watt by herself, and the balance being assigned to John Cockburn; who having pursued Walter Turnbull, and the Representatives of Janet Watt for payment; and it

No 308.
Where a party had become cautioner for a servant in a tavern, for any balance of accounts to be settled by the cautioner and the taverner.