

merchant-burgess of Edinburgh, and Helen Wishart, his spouse, and the longest liver of them two, their heirs and assignees, and assigned to the charger by her, as the survivor; the said David Hardie suspended upon this reason, That James Arbuckles, merchant in Edinburgh, having arrested in his hands, all sums he was owing to the charger's cedent, and having in a furthcoming before the Bailies of Edinburgh, where the cedent, the arrester's debtor, was called for her interest, referred the debt to the suspender's oath, who deponed, that at the time of the arrestment, he was only owing to the cedent, L. 171: 17: 8, which, by decret of the said Bailies, was paid to the arrester, he could be no further liable, the matter being *res judicata et jurata*. So the defender, in a furthcoming, who had deponed at an arrester's instance, was assolizied from a pursuit afterwards for the same debt;—February 13. 1664, *Russel contra Cuningham*, No 13. p. 14028.

Answered for the charger; The foresaid decret of furthcoming was *res inter alios acta*; and the arrester's referring the verity of the debt to the suspender's oath, could not prejudice the creditor in the bond, who was only called for her interest to object against the arrester's debt, and was not obliged to furnish him with instructions that David Hardie was her debtor. The cited decision is not to the purpose; for there the creditor had no other mean of probation to instruct his debt but the debtor's oath, who had deponed *negative*, and therefore was not obliged to swear over again.

Replied for the suspender; The charger's cedent being cited in the furthcoming for her interest, it was certainly her interest to furnish the arrester with all the instructions she could for proving the debt, and to notice the manner of probation he made use of, as much as if she had been pursuing herself. For payment to the arrester was equivalent to payment made to herself; seeing she was thereby exonerated of so much of what she owed to him; and the defender's oath in the furthcoming must hinder her to recur to any other probation, as well as if she had assigned to the arrester for his security what was due to her by the suspender, and he the arrester had in an action for payment at his instance against the suspender (wherein she was called for her interest) referred to his oath what he was owing; a furthcoming upon an arrestment being a legal assignation.

THE LORDS repelled the reasons of suspension.

Fol. Dic. v. 2. p. 347. Forbes, p. 191.

1708. January 2.

MARTHA WRIGHT, and Ensign DAVID KINLOCH her Husband, *against* ALEXANDER LINDSAY, Merchant in Edinburgh.

IN a process at the instance of Martha Wright and her husband, against Alexander Lindsay, for payment of L. 813 Scots, contained in a bond granted

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debtor was called for his interest, having referred to the defender's oath what he was owing to the pursuer's debtor, and he having deponed, that oath was not found to hinder the pursuer's debtor to seek payment of what more the deponent truly owed him than was acknowledged in the oath.

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An oath emitted before arbiters chosen by the de-

No 19.
 ponent and another party for clearing merchant-dealing betwixt them, conform to a submission, bearing a consent to take their oaths, probative of a ground of compensation therein acknowledged, to meet a debt charged for by the deponent's assignee, altho' the submission broke up without taking effect.

by him to the deceased Alexander Wright, merchant, and assigned by him to the said Martha Wright, his daughter; Alexander Lindsay proponed compensation for the sum of L. 541, acknowledged by the cedent to be due by him to Mr Lindsay, in his oath given before Sir William Calderwood and Mr William Forbes, advocates, arbiters chosen by both parties, for clearing of merchant dealing betwixt them, conform to a submission bearing a consent to take their oaths; which oath is signed by the deponent and arbiters.

Alleged for Martha Wright; An extrajudicial oath cannot found a reason of compensation.

Replied for Mr Lindsay; *1mo*, It is laid down as a principle by my Lord Stair, B. 4. Tit. 44. § 7, That even extrajudicial oaths of verity afford both action and exception, whether ultroniously emitted, or upon transaction or reference of parties; yea, it is only since the act 19th, Parl. 3d, Charles II., that minors could be restored against their extrajudicial oaths, and *casus omisus habetur pro omisso*; *2do*, This may be termed a judicial oath, being emitted before arbiters authorised by law, and express consent of parties in the submission to take the oath; and there is a great difference betwixt a consent to take an oath of party as in this case, and the taking of witnesses' oaths; *3tio*, Though such an oath of party taken by arbiters were not probative as an oath, it is a sufficiently probative acknowledgement of the debt, being subscribed by the deponent and arbiters, who were as good as witnesses. And if a simple extrajudicial subscribed declaration would be probative against the granter; such a declaration upon oath subscribed by the deponent and two arbiters, cannot be less obligatery.

Duplied for Martha Wright; The oath having been emitted upon a view of ending all debates by the submission, and the submission having broke up without taking effect; the oath as *accessorium* must fall in consequence. *2do*, The distinction betwixt taking oaths of witnesses, and the oaths of parties, is groundless; for the taking oaths being *actus jurisdictionis*, such a power granted by private parties is *a non habente potestatem*.

THE LORDS found, That the oath emitted before the arbiters is probative.

Fol. Dic. v. 2. p. 349. Forbes, p. 217.

1709. November 30.

Mrs SOCHAN *against* WALTER BOSWELL of Balbarton.

No 20.
 An oath emitted before arbiters *deferente adversario* sustained to prove *contra deferentem*, as

JOHN SOCHAN and Balbarton having submitted all differences betwixt them in a count and reckoning to two arbiters, and Mr Sochan having died before any decret was pronounced, but after giving in of claims *hinc inde*, by way of charge and discharge, formal minutes of debate upon the articles, interlocutors as to relevancy, and the defunct had deponed *negative* as to some articles refer-