

1741. February 7. Sir ROBERT PRINGLE *against* BIGGAR.

IT was found relevant for the arrestee, to prove against the arrester by the oath of the common debtor, that the debt due by the arrestee to the common debtor was won at play, and that although the common debtor was bankrupt. See No 302. p. 12461.

No 316.

*Fol. Dic. v. 4. p. 154. Kilkerran, (PROOF.) No 3. p. 441.*

1745. July 9. BLAIR *against* BALFOUR.

ROBERT BLAIR in Errol, as creditor to Paterson of Dunmuir, having arrested in the hands of Henry Balfour of Dunboog, and in the forthcoming referred to the arrestee's oath, what he was owing to the common debtor, the arrestee deponed that he was resting L. 2000 Scots by bond, whereof he had paid a part; and as to the residue, offered to prove by the common debtor's oath, that he had sold to him certain goods at a price yet resting. And the Ordinary having assigned a day to the common debtor to depone before answer, the arrester reclaimed upon this ground, that though regularly compensation be relevant by the common debtor's oath against an arrester, yet there is an exception where the common debtor is bankrupt or utterly insolvent, which was not denied to be the present case. On which ground, Nov. 23. 1725, Sir William Nairn of Dunsinnan *against* Captain Drummond, No 314. p. 12468. the allegiance by the arrestee, that his bond to the common debtor was granted *spe numerandæ pecuniæ*, was not admitted to be proved by the common debtor's oath. And though the act be before answer, frustra probatur quod probatum non relevat.

No 317.  
The oath of the common debtor, tho' bankrupt, admitted against an arrester.

THE LORDS argued the point upon the relevancy, and "refused the bill;" notwithstanding it was *pleaded*, That where the common debtor is insolvent, his oath is no better than that of a single witness. Where the common debtor is solvent, he must in all events satisfy the arresting creditor, and when he diminishes the subject arrested, he swears against himself; for which reason his oath is the strongest of all evidence; but where he is insolvent, it is of no consequence to him, whether the sum due to him by the arrestee be great or small; there is nothing to move him to speak truth, more than there is to move any single indifferent witness; for which the decision, Feb. 10. 1680, Morton *against* Gilchrist, No 307. p. 12463. was referred to, where the oath of a bankrupt was found not to be good evidence among his creditors.

*Kilkerran, (PROOF.) No 8. p. 444.*

\* \* \* Lord Kames reports his case :

ROBERT BLAIR in Errol, being creditor to George Paterson of Dunmuir by bond, for the sum of L. 3000 Scots, executed an arrestment in the hands of