

1749. November 7. SINCLAIR against JOHNSTON and FOTHERINGHAM.

IN the competition between Johnston and Fotheringham of London, arresters of a parcel of spirits as belonging to Vallange their debtor, while aboard a ship in the road of Leith, and Katharine Sinclair of Leith, as having bought the spirits from Vallange, and given bill for the price prior to the arrestment; which came in by a process of reduction at her instance of the Judge Admiral's decree preferring Johnston and Fotheringham, but wherein the oath of Vallange, the common debtor, had not been insisted for; she having now insisted for the oath of Vallange for proving the sale to have been of a date prior to her competitor's arrestment, the Ordinary "appointed the oath of Vallange to be taken before answer," notwithstanding his being alleged to be bankrupt, at least insolvent; and, upon advising his oath, "reduced the Judge Admiral's decree, and preferred Katharine Sinclair."

And the LORDS "adhered."

That an arrestment should not deprive the arrestee of his alleged creditor the common debtor's oath, to prove payment to have been made by him prior to the arrestment, has been often found; and though the competency of his oath has been doubted, where he was insolvent, yet, by the later decisions, it has been found competent, even where he could not be alleged solvent; see July 9. 1745, Blair *contra* Balfour, No 317. p. 12473.

The question here was somewhat different, where the oath of the common debtor was not sought by the arrestee, but by one pleading an interest in the subject arrested preferable to the arrestment; yet the LORDS did, upon the same principle, admit his oath. For supposing the sale prior to the arrestment, the purchaser had the same *jus quæsitum* to the seller's oath, not to be lost by a supervening arrestment, as an arrestee has to prove payment to have been made before the arrestment. And it farther occurred, as a speciality in this case, that as the purchaser, Katharine Sinclair, had given her bill for the spirits, which Vallange, the common debtor and seller, had already indorsed away, if he was to swear to a falsehood, his interest rather led him to swear for the arresters, by which their debt would also be extinguished.

*Fol. Dic. v. 4. p. 164. Kilkerran, (PROOF.) No 12. p. 446.*

1751. February 26.

A. against B.

ON the verbal report of the Lord Woodhall from the Outer-house as a part of his trial, the LORDS, agreeable to the opinion by him given, found, that where resting owing is referred to a party's oath, who acknowledges that he was once debtor, it is not enough for him to swear, that he owes nothing; but he

VOL. XXIX.

69 C

1

No 318.

One pleading an interest in the subject arrested, allowed to support it by the oath of the common debtor against an ar-  
rester.

No 319.

No 319.

must condescend *quo modo* he paid, lest he should pay his debt by mistake in point of law.

*N. B.* The Lord Woodhall's letter not having come down, till, by the forms of the Court, there was no more Outer-house, the LORDS sent out an Ordinary *pro re nata*: They considered the forms of the Court to be subject to their own regulation, and that they could do no less in compliance with the King's letter.

*Fol. Dic. v. 4. p. 165. Kilkerran, (PROOF.) No 14. p. 448.*

No 320.

In what circumstances the oath of a bankrupt may be taken.

1783. February 26. HALKERSTON *against* LINDSAY.

HALKERSTON, as factor on the sequestrated estate of Mr Blackwood, having instituted an action against Lindsay for the balance of an attested account, the defender endeavoured, from a variety of circumstances, to shew that there was a mistake in the account, which he offered to ascertain by Mr Blackwood's oath.

The LORD ORDINARY refused this reference to oath, "in respect that the action was brought, not at the instance of the bankrupt, but at the instance of the factor for his creditors."

Against this judgment, the defender applied to the Court by reclaiming petition.

*Observed* on the Bench; A pursuer cannot established a debt by the oath of a defender who is a bankrupt. The case, however, is somewhat different where the bankrupt or his creditors are pursuers. Here, though the bankrupt's oath, which is no longer that of a party, will not establish a defence otherwise capable of proof in that manner, it may, together with other adminicles, afford sufficient grounds for a judge to assoilzie the defender.

THE LORDS remitted the cause to the Lord Ordinary, in order that the bankrupt might be examined.

Lord Ordinary, *Kennet.*

For the Petitioner, *Abercromby.*

*C.*

*Fol. Dic. v. 4. p. 164. Fac. Col. No 99. p. 158.*

1788. December. GRANT *against* CREDITORS of GRANT of Carron.

No 321.

THE oath of the bankrupt was found sufficient to support a decree of constitution. See APPENDIX.