

During an action which depended on that point, between Samuel Swan and James Swan, Samuel died; and afterwards his heir, James Swan, having been made a party,

No 27.

THE LORD ORDINARY sustained the oath as a sufficient proof of onerosity. But

The COURT altered that judgment, and found, that Samuel Swan was not entitled to the privileges of an onerous indorsee.

Lord Ordinary, *Stonefield*.
Clerk, *Menzies*.

For the Heir of S. Swan, *Currie*.

Alt. *Honyman*.

S.

Fol. Dic. v. 4. p. 22. Fac. Col. No 286. p. 441.

1788. November 13. JOHN YULE against DAVID ROBERTSON.

ROBERTSON being debtor to Yule, attested an account of different articles composing the debt. In an action for payment of it, Robertson, by virtue of letters of incident diligence, was examined on oath, whether he himself had not the attested account in his possession. In the course of his examination, being interrogated for the pursuer, If both parties fairly settled the balance due by the deponent on the attested account? he deponed, That they did; and that he paid the balance. On this ground

No 28.

A party being examined as a haver, it is not competent to put to him questions relative to the existence of the debt.

The defender *pleaded*; The pursuer, by putting the above question, referred to the defender's oath the existence of the debt, which his negative answer has disproved.

Answered; Reference to oath of party being a judicial act, has effect no farther than the authority which is essential to it extends; Bankton, b. 4. tit. 32. § 9.; Falconer, 8th July 1749, Elliot *contra* Ainslie and Porteous, No 15. p. 9363. Here was no authority but for examining the party as a haver.

The LORD ORDINARY found, that "various questions had been put to the defender when examined as a haver, which were only competent to be put to him if he had been examined as a party, and which he therefore might have declined to answer; and that the answers he has made to such questions cannot have the force of an oath of party, there having been no previous judicial reference."

To that judgment, (it being observed, that artifices of this kind appeared to be multiplying in practice, and ought to be checked), the Court adhered.

Lord Ordinary, *Dreghorn*.

Act. *Elliot*.

Alt. *Ja. Clerk*.

Clerk, *Menzies*.

S.

Fol. Dic. v. 4. p. 22. Fac. Col. No 43. p. 73.