

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

No 317.

Balfour of Dunboig, who acknowledged he was resting a certain sum to the common debtor, but insisted upon several articles of compensation, which he offered to prove by the common debtor's oath. The pursuer admitted, that in ordinary cases the common debtor's oath acknowledging a ground of compensation, is relevant against the arrester. But he observed, that the common debtor in this case was bankrupt, and that a bankrupt's oath is not good against his creditors. The Ordinary having admitted the common debtor's oath before answer, the pursuer reclaimed, insisting upon the following topic, that, when the common debtor diminishes the subject arrested, by acknowledging upon oath a payment to him, or a ground of compensation against him, it is in effect deponing against himself, which makes such an oath the strongest of all evidence; for, if the arrester be not paid by the process of forthcoming, he must be paid *aliunde*. This is not the case of a bankrupt; he may be justly considered as an indifferent spectator not at all interested whether the arrester obtained payment or not; no compulsion lies upon him to speak truth, more than upon any indifferent witness. In support of the pleading, the decision Nairn *contra* Drummond, 23d November 1725, No 314. p. 12468. was urged, which is as follows. In a process of forthcoming of a debt constituted by bond, it was objected by the arrestee, that the bond was granted by him *spe numerandæ pecuniæ*, which he offered to prove by the common debtor's oath. "Found, that such an exception might be proved by the common debtor's oath after an arrestment; but in regard that in this case the arrestee had allowed the bonds to lie in the common debtor's hands for a long time, and that the common debtor was bankrupt, therefore found the exception could not be proved by the common debtor's oath."

When this petition was advised, Elchies observed, That the cedent's oath is not good against an onerous assignee, because he is *funditus* denuded, and his oath is but that of a single witness; that, in the present case, the common debtor remains creditor after the arrestment as well as before, and that his oath is therefore an oath of party, not of a single witness. He said, that though the oath of a bankrupt ought to be less relied on, in a case of this nature, than that of a solvent person, yet *qua* party, his oath is still a relevant proof, unless other circumstances concur to render his oath suspicious. He added, that the decision cited, Nairn *contra* Drummond, was a confirmation of this doctrine, where the Court did not sustain bankruptcy alone to bar the common debtor's oath, but conjoined it with a very suspicious circumstance which discredited the allegation; and it was for this reason that they refused to admit the allegation to be proved by the common debtor's oath.

In this case it was admitted, that the bankruptcy of the common debtor was not occasioned by any fault of his, and that he was a man of entire fame; and therefore the Lords were unanimous, that the articles of compensation might be proved by his oath; and so refused the bill without answers.

Rem. Dec. v. 2. No 70. p. 108.