

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.