

QUALIFIED OATH.

SECT. I.

Where the Qualified Oath imports a Denial of the Libel.

1664. December 9. ROBERT LEARMONTH *against* LAWRENCE RUSSELL.

ROBERT LEARMONTH being pursued by Lawrence Russell, for the price of wines, and the matter referred to his oath, gave in a qualified oath, bearing, that the wines in question were sent to him, not to be sold till further order, and that therefore he kept them unsold till the end of the year; and when they were in hazard of spoiling, sold them for L. 12 Sterling the ton; and that he that sent them was debtor to him by bonds and decreets in a greater sum. It was *alleged*, Neither member of the quality was competent; not the first, because it was offered to be proved that the wines at that time gave L. 20 Sterling; and not the second, because it was an exception of compensation, and relative to writ.

THE LORDS sustained the first member of the quality, but rejected the second, and found it relevant to be proved, by way of exception.

Fol. Dic. v. 2. p. 296. Stair, v. 1. p. 238.

* * * Newbyth reports this case :

LAWRENCE RUSSELL being creditor to Harry Moffat, and having arrested in Robert Learmonth's hands all sums due by him to the said Harry, which he referred to his oath, who deponed *qualificate*, viz. That the said Harry having brought some wines from France, he had put them in the deponent's cellars at

No 1.

Oath qualified was not sustained, importing compensation, but was admitted to be given by way of exception.

- No 1. Leith till he should come home, where they continued so long that they did spoil, whereupon he sold them at such rates and to such persons as could be got; and that he was not debtor in the money that was got for them, because the said Harry was debtor to him in greater sums. THE LORDS found they would receive Robert Learmonth's oath with the quality given in, that the wines by lying in his hands, by the debtor's order, were spoiled, and the price was such as he deponed upon; but would not receive that part of his oath, bearing that Moffat was debtor to him, unless he would instruct the same by writ.

Newbyth, MS. p. 10.

1669. February 6. BROWN against MITCHELL.

- No 2. BROWN pursuing Mitchell as debtor, by an account whereof one article being L. 450 borrowed money, and the rest for merchant-ware delivered, the whole being referred to his oath, he did depone, That as to the borrowed money, he was debtor by a ticket, but that it was delivered up to him upon compensation, due for merchant-ware, received by Brown's wife before her marriage, to whom Mitchell had granted the ticket. THE LORDS sustained this qualified oath to exoner the defender, notwithstanding that it was alleged, that he ought to prove the delivery of the merchant-ware; because the debt being once constituted by writ, which was delivered back and destroyed, so that they had no other way to prove the same but by his oath, the pursuer could not refuse to take it with the foresaid quality; neither was it respected, that the pursuer alleged, that the qualified oath did bear, that the ticket was given back by Brown's wife for a debt resting by her first husband, which they alleged ought to be proved: Notwithstanding whereof the quality was sustained without necessity to prove her first husband's debt.

Fol. Dic. v. 2. p. 296. Gosford, MS. p. 37.

1670. January 6. REID, Englishman, against BINNING.

- No 3. BINNING being charged upon his bond, for payment of L. 10 Sterling, did suspend upon payment of a part of the money, extending to 40s. Sterling, which he referred to the charger's oath; who having deponed *qualificate*, that as he confessed he received that sum, so it was in satisfaction of several particulars not relating to the bond; it was debated, if that quality should be received, unless it were otherwise instructed than by the charger's oath, seeing the suspender had no other way to prove the payment; and it was alleged that