

No 32.

1679. December 24. HOME against TAYLOR.

ONE makes a bargain with Seaforth for cows. A creditor of the Earl of Seaforth arrests the price in his hands, and pursues to make it forthcoming. He depones he hath paid him the half since the contract, and hath discharged the bargain for the rest, because he hath no hopes to get the cows. THE LORDS rejected both the qualities, since he did not instruct the payment, and that he ought not to have destroyed the contract, or dissolved the bargain to the arrester's prejudice; but allowed him to make up the tenor of the contract, and deliver it to the arrester, or else pay the debt.

*Fol. Dic. v. 1. p. 554. Fountainball, MS. p. 169.*

\*.\* Stair reports this case.

JEAN HUME having arrested all sums and goods belonging to the Earl of Seaforth, in the hands of Taylor, drover, pursues to make forthcoming; whereupon Taylor depones, that there was a contract betwixt him and the Earl, whereby the Earl was obliged to deliver him a great number of cows; and that he did advance 10,400 merks, in part of payment of the price thereof; and that a great part of the cows were never delivered, or any more than what he had advanced and paid; and that the Earl and he had cancelled the contract after the arrestment. At the advising of which oath, the pursuer *alleged*, That the oath proved her libel, in so far as the defender acknowledged, that, at the time of the arrestment, he was obliged to have paid to the Earl a considerable sum of money; and that he had received a great number of cows from him; and that this debt was constituted by a writ; and, therefore, the quality adjected by him, as to the advancement of the money, and payment of the price of the cows, cannot be proved by his own oath, as a quality, but must be instructed by writ; for, if this preparative shall be sustained, that, after arrestment, parties could liberate themselves from their contracts, and cancel them, and take all to their own oath, both charge and discharge, it would ruin creditors; and, therefore, the defender must prove the payment or advance by writ, seeing the Earl of Seaforth, with whom the bargain was made, is dead. The defender *answered*, That, though the contract were extant, it could operate nothing for the pursuer; for, unless it were proved that the cows had been delivered, the price could not be due, being *causa data non secuta*; and, if it were referred to the defender's oath, that the cows were received, as it is competent to him to depone how many were received, so to depone that the price was paid. It was *replied*, That the defender could not warrantably cancel the contract after the arrestment, and then depone upon both the tenor and implement of it. But seeing he ac-

knowledges a written obligation, he must prove the satisfaction of it by writ, seeing the party contractor is dead.

No 32.

THE LORDS refused to sustain the qualities of advance or payment by the oath; but allowed the defender to prove the tenor of the contract, that thereby it might appear, whether the advance was acknowledged in it; and assigned a term to prove and to adminiculate the advance or payment, if it did not appear by the contract; and that same term to the pursuer to prove that the cows were received.—See QUALIFIED OATH.

*Stair, v. 2. p. 729.*

1729. January 7.

THOMSON *against* SPENCE.

AN arrestment having lain over two years, without any diligence thereon, and the common debtor having thereafter assigned the subject arrested; in a forthcoming, at the arrester's instance, the LORDS, in respect of the *mora*, preferred the assignee.—See APPENDIX.

No 33.

*Fol. Dic. v. 1. p. 554.*

---



---

DIVISION III.

Litigious by Denunciation on a Horning.

---

S E C T. I.

Debt contracted after Denunciation.—Alienation after Denunciation.

1611. January 18.

ORD *against* KEITH.

THE King's donatar, pursuing for declarator of a rebel's liferent of lands, holden by him of the King, will not be impeded by any base infeftment granted by the rebel, after his being year and day at the horn, albeit it be granted before obtaining of declarator.

No 34.

The King's donatar, pursuing for declarator of a rebel's life.