

No 308.  
keeper,—the  
accounts hav-  
ing been set-  
tled with the  
servant her-  
self, the cau-  
tioner was  
found net-  
withstanding  
liable.

being proved, that the count was fitted betwixt Mrs Reidman and Janet Watt, the said Janet being present ;—the LORDS found the said Walter Turnbull liable for the balance of the account, albeit he was not present when the account was settled, notwithstanding the bond bore, that he should be only liable for what should be found due after just count and reckoning made betwixt Mrs Reidman and the said Walter.

*Fol. Dic. v. 2. p. 237. Sir P. Home, MS. No 454.*

No 309.

1686. December 17. MALVENIUS against BAILLIE.

A CAUTIONER for an apprentice being charged for an alleged fornication committed by the apprentice, the oath of the apprentice was found not probative against him.

*Fol. Dic. v. 2. p. 237. Fouut.*

\* \* \* This case is No 1. p. 583, *voce* APPRENTICE.

1711. February 20.

ANDREW HORN, Coalgrieve to the Dutchess of Argyle, against LORD EDWARD MURRAY and his Lady.

No 310.

In a process  
of furthcom-  
ing, payment  
found rele-  
vant to be  
proved by  
the debtor's  
oath, in pre-  
judice of the  
arrestor.

IN a process of forthcoming at the instance of Andrew Horn, who, as creditor to Mr David Seton brewer in the Canongate, had arrested, in the hands of Lord Edward Murray and his Lady, money due by them to Mr David for ale furnished to their family ; the pursuer offered to prove the furnishing of the ale and price thereof within the years of prescription by witnesses, and the defenders offered to prove payment by Mr David's oath.

THE LORDS found the payment relevant to be proved by the oath of Mr David the brewer and furnisher, in prejudice of the arrestor ; albeit it was alleged for the arrestor, that he being a legal assignee, Mr David Seton's oath could not make against him, more than a cedent's oath could prejudice an onerous assignee ; in respect an arrestment, being but an incomplete diligence, doth not denude the person whose debt is arrested, as an intimated assignation denudes the cedent ; seeing goods arrested may, notwithstanding the arrestment, be poinded at another creditor's instance.

*Fol. Dic. v. 2. p. 236. Forbes, p. 502.*

No 311.

Found in  
conformity  
with the  
above.

1711. June 5. FORBES against FORBES' CREDITORS.

FORBES of Craigie having broke suddenly, Forbes of Ballogie, as one of his creditors, arrests in his debtors' hands, and pursues a furthcoming, wherein they having deponed, their oaths came this day to be advised ; and Craigie's

count book being adduced to refresh their memories, Mr Souper merchant in Aberdeen, and sundry others, deponed, That they did truly receive the goods set down in the said ledger, but that they had paid the same to him before the arrestment, either in money or merchant-ware delivered to him. THE LORDS found that part of the quality of payment by money intrinsic; but that the delivery of merchant-ware is extrinsic, and behoved to be proved and astructed otherways than by their own oaths; and not having distinguished how much was paid in money, and what by ware, they ordained him to be re-examined, and to give in a special condescendence how much he had paid in money, which would be accordingly allowed him, and how much in goods and merchant-ware, and to adduce what probation he could of the quantity, qualities, and prices. And they offering to prove the delivery by the oath of Craigie, it was *objected*, That he being broke, his testimony can never militate against me, his creditor. *Answered*, Seeing you pursue in his right, you can never decline his oath; and in a late case betwixt a Brewer's assignee and Lord Edward Murray and his Lady, (*supra*), the furnishing of ale having been proved against them by witnesses, and they offering to prove by the brewer, the cedent's oath, that it was paid, the LORDS, by plurality, had sustained the same; and accordingly the LORDS, to keep an uniformity in their decisions, found the same here, though some dissented.

Some of Craigie's debtors deponed in this manner, That at the receiving his goods it was expressly pactioned and conditioned, that he should take goods to the value in payment and satisfaction *pro tanto*. THE LORDS found this quality intrinsic; as *pars contractus et pactum incontinenter adjectum*, as being given *in solutum* of his debt, and differing exceedingly from the first case, where he depones that he paid his account, partly in money and partly in goods.

Some of the debtors deponed in this sort, " I believe that I received most part of the articles charged upon me in the account, but I cannot be positive as to them all." THE LORDS thought, seeing he did not condescend what articles he doubted of; the oath was to be interpreted *contra proferentem qui potuit apertius dicere*, and therefore his not remembrance could extend no farther than to an article or two of the account, and these of the smallest moment, which they ordained to be deducted; but decterned for the rest; so his liberation and absolvitor from the smallest articles was all the advantage his bad memory gained him. See QUALIFIED OATH.

*Eol. Dic. v. 2. p. 236. Fountainhall, v. 2. p. 643.*