

No 312. George M'Kenzie, in his Observations on the act against bankrupts 1621, says, such decreets may be reduced, if collusion appears, or competent defences be omitted; which is plainly Liddel's case; for he omitted to give in a renunciation as heir to his uncle, which would have saved the adjudging his own estate; and then Drumkilbo's adjudication would have been infallibly preferable, and Kilry could never have competed with him. And he cites a case for it betwixt Haliburton, Wat and Morison. THE LORDS considered, that this case had oft occurred, where debts were constituted against parties inhibited, by referring the same to their oaths, and yet they were never quarrelled *ex capite inhibitionis*, which silence and acquiescence seemed to be an evidence that our lawyers never thought such constitutions of debts fell under these inhibitions; and therefore, by plurality, found debts so constituted could not be quarrelled, though their debtor stood inhibited before. Which was looked upon as the first decision this case had met with.

Fountainball, v. 2. p. 658.

1713. December 2.

ALEXANDER NAIRN of Drumkilbo *against* JAMES OGILVIE, Bailie depute of the Regality of Cupar in Angus.

No 313.

JAMES OGILVIE having commenced a reduction and declarator of extinction against Mr John Ogilvie his brother, when out of the kingdom, of two bonds granted by the former to the latter, upon a ground of compensation referred to his oath; Alexander Nairn, Mr John Ogilvie's creditor, did thereafter, before any act was extracted, arrest in James Ogilvie's hand and pursued a furthcoming against him as debtor to Mr John by those bonds.

THE LORDS found it relevant for James Ogilvie to prove by Mr John's oath, that he was debtor to James to extinguish the debt due by him to Mr John, the matter being rendered litigious before the arrestment, with this quality, that James should report Mr John's oath; for Mr John not being within the kingdom, and he and his brother conjunct persons betwixt whom there might be collusion, the LORDS would not allow James to prove against his brother by holding him as confest to the prejudice of the arrester.

Fol. Dic. v. 2. p. 237. Forbes, MS. p. 7.

No 314.
In a process
of forthcom-
ing, the pur-
suer produced

1725. November 25.

Sir WILLIAM NAIRN of Dunsinnan *against* Captain LAURENCE DRUMMOND.

SIR WILLIAM NAIRN, as creditor to Mr Thomas Crichton of Tullifergus, then a bankrupt, used arrestment in the hands of Captain Laurence Drummond, and

pursued a forthcoming; wherein he offered to prove the debt *scripto*, and recovered two bonds, of date 10th January and 8th April 1709, granted by the said Laurence Drummond to Mr Crichton, for 500 merks each. The defence proponed was, "That these bonds were granted *spe numerandæ pecuniæ*, and that no money was actually advanced; which was offered to be instructed by Crichton the common debtor's oath."

It was *answered*, That an arrestment, whether it be a complete conveyance or not, entirely denuding the common debtor, makes at least a *nexus realis*, and establishes a separate interest in the subject in favours of the arrester; which can be taken away by no single oath, save his own: That an oath of party being binding in consequence of a tacit contract, can have no manner of effect except betwixt the contractors, and can have no influence upon the diligences or rights of third parties.

Replied, A debtor's case ought in equity to be made no worse by the transferring of his obligation from one creditor to another. If a creditor assign, the debtor ought not to suffer by the assignation; and if arrestment be laid on, which is a legal assignation, the reason is the same; according to the maxim, "Alteri per alterum iniqua conditio inferri non debet." And therefore, were the dispute betwixt Captain Drummond and Mr Crichton, as there is no question but the exception of non-numerate money would be competent by his oath, equity makes it competent against this arrester. It is true, positive law has introduced some exceptions in this matter, in order to prevent greater inconveniences; as in the case of onerous assignees and purchasers: There the favour of commerce, and security of purchasers, has made the onerous purchaser in a better condition than his author, with respect to his author's oath: But as these exceptions have been introduced by custom, no argument can be drawn from them to introduce new exceptions, or to make further encroachments upon the general rule, which is so strongly founded in common equity. The reason of these exceptions holds not in the case of an arrester; he did not contract upon the faith of the subject arrested, but took his hazard, when he lent his money, as well of his debtor's honesty, as his sufficiency; and this is the reason too, why the cedent's oath is good against gratuitous assignees, though they have a distinct interest in the subject, certainly more than an arrester. But *2do*, What if it be held that the common debtor's oath is good against the arrester, not only as an oath of party, but in another view, as a valid proof, and truly as strong a proof as can be in the nature of the thing? It is no novelty, if the Judges shall sustain the oath of one witness as a proof, where it is joined with such strong presumptions of truth, as perhaps to make a greater evidence than the oaths of any six indifferent witnesses. What is it that makes the oath of a party against himself so strong an evidence, but a violent presumption, that nothing could influence a man to swear to his own prejudice, but the force of truth? Is not the common debtor in this case virtually swearing to his own hurt, if he shall acknowledge, that notwithstanding

No 314.
bonds due by the arrestee to the common debtor. The defence was, That these bonds were granted *spe numerandæ pecuniæ*, and that no money was actually advanced; which was offered to be instructed by the common debtor's oath. The Lords found that an exception of not numerate money may be proved by the common debtor's oath, after arrestment; but in regard that in this case the arrestee allowed the bonds to lie in the common debtor's hands for a long space, and that the common debtor had become bankrupt; therefore found it could not be proved by his oath.

No 314. the bonds, he never gave the money to Captain Drummond? Is it not in every respect his interest, that Sir William Nairn prevail in the forthcoming? And if he do acknowledge that Captain Drummond is not truly his debtor, is not this effectually swearing against himself? Is not then the common debtor's oath an evidence much to be depended upon, an absolutely good proof in the nature of the thing, and consequently good against all mortals? Captain Drummond is sensible that this reasoning tends to make the cedent's oath even good against the onerous assignee; which upon this scheme it would certainly be, if it were not that by granting the assignation, he has already virtually declared that the debt assigned is a good debt, and truly resting owing; after which, to be sure he cannot be admitted to declare the contrary. And if notwithstanding this virtual declaration of the validity of the debt, the cedent's oath is sustained against a gratuitous assignee, that must be understood as a singular exception, because the case of gratuitous assignees is less favourable; besides that gratuitous assignations are presumed to be done with less notice, without any exact scrutiny into the circumstances of the debt, the right in such a case being understood as conveyed *talis qualis*, which is otherwise in onerous transferees.

Duplied for the arresters, to the *first*, It is allowed that all privileges and exceptions competent to the debtor from the nature of his debt, as they are competent against the cedent, are competent against every assignee; because such are founded, not in the circumstances of the creditor, but of the debt, and so must be good against the debt wherever lodged; so far the arrester contends not. But can it be pleaded with any show of reason, as to privileges and exceptions competent to the debtor merely upon personal respects, that are founded no way in the nature of the right, but in the circumstances of this or that creditor, that even these are competent against assignees? He presumes the bare proposal of the question is sufficient to show the absurdity. Mr Drummond indeed pleads the equity and favourableness of his case, but without reason; for whatever might be said against the arrester, were his a gratuitous debt, as it is onerous, his case is equally favourable with that of his antagonist; and so being *in pari casu*, their dispute falls to be determined by arguments drawn from the nature of the thing, and not from favour or equity. Neither can favour be the cause, why the cedent's oath is not good against the onerous assignee; it may be true, that onerous purchasers of land-rights are indulged in some privileges, so as to be free from latent exceptions and claims; but that never was extended to assignees in other rights. The assignee ought to know with whom he contracts, and is understood to rely principally upon his warrandice. Hence it is that all exceptions are competent against him, which are any way founded in the nature of the right, not merely personal against the cedent; and were favour the rule, there would be as good reason to deny compensation, and other real exceptions against the onerous assignee, as to deny the cedent's oath. To apply; since the oath of the cedent, being merely

personal, is denied against the voluntary assignee, not from favour, but the nature of the thing, the same must hold equally with respect to an arrester, who is a legal assignee. *Duplied* to the *second*, Whatever might be said were the common debtor entire, as he is bankrupt, his oath can militate no more against the arrester, than the oath of any indifferent witness; for, being secured against the arrester's recourse by his insolvency and a decret of *cessio bonorum*, it must be entirely indifferent to him, whether the arrester or the debtor in the forthcoming prevail; and so it becomes a supposeable case, that he may collude with the debtor in the forthcoming, perhaps for some share of the gain, to disappoint the effect of the arrester's diligence.

It was likewise noticed for the arrester, That here Mr Drummond suffered the bonds to continue in the common debtor's hands ever since the 1709, which he would not have done, if not truly debtor. To which it was *answered*, The presumption lies evidently on the other side, since Mr Crichton never once demanded payment during all that space, of either principal or interest, that there was truly nothing due; it is a more supposeable case, that Mr Drummond having a thorough confidence of his friend's honesty, might neglect to retire these bonds, than that Mr Crichton, had he been truly creditor, would have neglected to demand payment; neglecting to retire the bonds, was neglecting only to prevent an inconvenience, which there was no great prospect would have ever happen; neglecting to call for annualrents, is neglecting to do an action, by the not doing of which the creditor is actually suffering every minute. *Replied*, The small importance of the one neglect, and great importance of the other, makes the opposite presumption still prevail; by neglecting to call for annualrents, the creditor loses only the annualrents of these annualrents; by neglecting to retire the bond, one runs the hazard of being made liable for a principal sum he never received.

"THE LORDS found, That an exception of not numerate money may be proved by the common debtor's oath, after arrestment; but in regard that in this case Mr Drummond allowed the bonds to lie in the common debtor's hands for so long a space, and that the common debtor is bankrupt, therefore found it cannot be proved by Thomas Crichton's oath."

Fol. Dic. v. 2. p. 236. Rem. Dec. v. 1. No 62. p. 120.

1736. December 3.

The CREDITORS of JOHN MOONIE, Merchant in Calton, *against* HUGH BROOMFIELD.

THE said Broomfield being debtor to Moonie, both by bond and bill, and likewise in an open account, he, in payment of these debts, advanced money, and furnished goods to Moonie; who having turned bankrupt, arrestments

No 314.

No 315.
An arrestee
may prove
any ground of
compensation.