1749. *November* 7. SINCLAIR *against* JOHNSTON and FOTHERINGHAM.

No 318.
One pleading an interest in the subject arrested, allowed to support it by the oath of the common debtor against an arrester.

IN the competition between Johnston and Fotheringham of London, arresters of a parcel of spirits as belonging to Vallange their debtor, while aboard a ship in the road of Leith, and Katharine Sinclair of Leith, as having bought the spirits from Vallange, and given bill for the price prior to the arrestment; which came in by a process of reduction at her instance of the Judge Admiral's decree preferring Johnston and Fotheringham, but wherein the oath of Vallange, the common debtor, had not been insisted for; she having now insisted for the oath of Vallange for proving the sale to have been of a date prior to her competitor's arrestment, the Ordinary "appointed the oath of Vallange to be taken before answer," notwithstanding his being alleged to be bankrupt, at least insolvent; and, upon advising his oath, "reduced the Judge Admiral's decree, and preferred Katharine Sinclair."

And the LORDS "adhered."

That an arrestment should not deprive the arrestee of his alleged creditor the common debtor's oath, to prove payment to have been made by him prior to the arrestment, has been often found; and though the competency of his oath has been doubted, where he was insolvent, yet, by the later decisions, it has been found competent, even where he could not be alleged solvent; see July 9. 1745, Blair *contra* Balfour, No 317. p. 12473.

The question here was somewhat different, where the oath of the common debtor was not sought by the arrestee, but by one pleading an interest in the subject arrested preferable to the arrestment; yet the LORDS did, upon the same principle, admit his oath. For supposing the sale prior to the arrestment, the purchaser had the same *jus quæsitum* to the seller's oath, not to be lost by a supervening arrestment, as an arrestee has to prove payment to have been made before the arrestment. And it farther occurred, as a speciality in this case, that as the purchaser, Katharine Sinclair, had given her bill for the spirits, which Vallange, the common debtor and seller, had already indorsed away, if he was to swear to a falsehood, his interest rather led him to swear for the arresters, by which their debt would also be extinguished.

Fol. Dic. v. 4. *p.* 164. *Kilkerran,* (PROOF.) *No* 12. *p.* 446.

1751. *February* 26. A. *against* B.

No 319.

ON the verbal report of the Lord Woodhall from the Outer-house as a part of his trial, the LORDS, agreeable to the opinion by him given, found, that where resting owing is referred to a party's oath, who acknowleges that he was once debtor, it is not enough for him to swear, that he owes nothing; but he