

S E C T. II.

Oath of the Debtor, if good against his Creditors ?

No 305. 1627. February 2. LORD BALMERINO against LD LOCHINVAR.

A CAUTIONER in loosing of arrestment being pursued for payment of the debt after it was constituted against the principal debtor, the oath of the person in whose hand the arrestment had been laid was found a good proof of what he was owing to the common debtor at the time of the arrestment, in order to make the defender liable for the same.

Fol. Dic. v. 2. p. 237. Durie.

. This case is No 126. p. 789, *voce* ARRESTMENT.

1674. December 11.

ELPHINSTON against HUME and the LAIRD of STENHOPE.

No 306.

The oath of an arrestee not good against an arrester.

THE LAIRD of Stenhope being debtor to Captain Johnston's son, as executor confirmed to Captain Johnston, assigns the same to Mr James Elphinston, who having shown the assignation to Stenhope, he promised payment; and upon the assignation and promise, he obtained decret against Stenhope before the Sheriff of the shire. George Hume having arrested the sum in Stenhope's hand to be made furthcoming for payment of a debt due to him by Johnston, obtained decret before the Lords for making furthcoming. Stenhope suspends on double pointing; in which competition it was *alleged* for the arrester, That he had arrested before any intimation of the assignation, and so is preferable. It was *answered* for the assignee, That Stenhope having accepted of the assignation, and by his promise become debtor before the arrestment, he was no more debtor to the cedent, nor could any arrestment for the cedent's debt, after he ceased to be debtor, become effectual; and if this were not sufficient, Stenhope's promise could not be loosed, seeing he had rested thereupon.

THE LORDS found that the acceptance of the assignation before the arrestment is relevant to prefer the assignee, but that is not probable by Stenhope's oath, but either by writ or oath of knowledge of the arrester; and if it be not so proved, they found that Stenhope was only liable in single payment, unless there had been transaction or undertaking of the hazard.

Fol. Dic. v. 2. p. 236. Stair, v. 2. p. 292.