

1698. *January 28.* EARL AIRLY *against* SHARP.

No 9.

AN apparent heir being pursued upon the passive title of intromission with his predecessor's writs, and having declared upon oath, That he meddled with no papers, save what were his own by assignation, which his predecessor had made to him of all his personal estate; thus making himself judge of what belonged to him; and having owned his entering the closet, where all the defunct's writs were, without either the presence or warrant of a Judge; yet the LORDS assoilzied the apparent heir, and refused to divide his oath.

Fol. Dic. v. 2. p. 296. Fountainhall.

. This case is No 31. p. 9673. *voce* PASSIVE TITLE.

1702. *November 10.* AITKEN *against* FINLAY.

No 10.

A PURSUER having referred to the defender's oath, that he had given him a certain sum, on his promise to repay it; and the defender deponing and confessing, that he had received the money, but adding, that it was in payment and satisfaction of as much due to him by the pursuer, and that he never promised to repay it; the LORDS found the quality intrinsic; for the quality here resolved into a denial of the libel,

Fol. Dic. v. 2. p. 295. Fountainhall.

. This case is No 35. p. 9422. *voce* OATH OF PARTY.

1703. *December 18.* SINCLAIR *against* SINCLAIR of Barrock.

No 11.

SINCLAIR of Southdun being debtor in several sums of money to Sinclair of Barrock, by bond and otherwise, pursues a declarator of extinction of these debts, and produces two receipts, and libels upon an article of 500 merks received by the defender, by and attour the sums contained in these receipts, which, with other articles, he refers to oath. Barrock depones, and acknowledges the receipt of the sum of 500 merks libelled by and attour the sums contained in the two receipts, and that he gave no receipt for the 500 merks, none being sought; and adds, that Southdun was debtor to the deponent in several other sums at that time, by and attour the sums contained in the bond and tack libelled upon.

Receipt of money being acknowledged upon oath, a quality that the same was imputable to other debts, than those libelled, not sustained.

At advising, the pursuer craved allowance of the said 500 merks. It was *alleged* for Barrock, That the receipt of the money was only proved by his oath; and the same oath bears, that other sums were due to him without writ, to which other sums he imputes the said 500 merks. It was *replied*, The quality that other sums were due to the deponent without writ is extrinsic, and must be otherwise proved than by his oath; for, if he deponed, that the payment was

No 11. made and received in satisfaction of other debts not proved by writ, then the quality might be reckoned intrinsic.

" THE LORDS allowed the article of 500 merks, and found, that the defender's deponing there were other debts not proved by writ, did not prove, seeing he did not also depone, that the payment was given and received, in satisfaction of these other debts."

Fol. Dic. v. 2. p. 295. Dalrymple, No 43. p. 55.

1705. November 27.

JAMES SINCLAIR of Southdun *against* GEORGE SINCLAIR of Barrock.

No 12.

A debtor in bonds having offered to prove payment, by the creditor's oath, and he having deponed that his wife received from the debtor a certain sum, owing to him by a third person, which the debtor promised to pay, the quality in the oath was found intrinsic, and the sum received by the wife not imputed in payment of the bonds.

In a declarator, at the instance of James Sinclair of Southdun, against George Sinclair of Barrock, for extinguishing two bonds granted to him by the pursuer's predecessor, the pursuer offered to prove payment by the defender's oath; and he having deponed, that William Bruce, brother to Stanstell, being debtor to him in L. 60, which the pursuer's father promised to pay, the deponent's wife received the same, by his order, from Southdun;

THE LORDS found the quality of the oath intrinsic, and refused to deduce the L. 60 off the sum in the bonds.

Albeit it was *alleged* for the pursuer, That the quality should be considered as extrinsic; because the defender's oath cannot prove that William Bruce was debtor to him, or fix a debt upon Bruce, nor yet can it prove that the pursuer's father promised to pay such a debt; as a creditor in a bond, by whose oath the debtor offered to prove payment, acknowledging he got payment but upon the account of merchant-ware, or other things furnished, would be obliged, notwithstanding such a quality, to instruct the furnishing and prices.

In respect it was *answered* for the defender, That the pursuer having offered to prove payment of the bonds by the defender's oath; and he having deponed that the L. 60 was received upon another account, the pursuer must take the oath as it stands; seeing, if the defender had deponed that the pursuer was owing him L. 60 per bond or ticket, which he gave up upon payment; this could not have obliged Barrock, the defender, to prove that the money was due by the said bond, or ticket; for the case is not, whether a promise could be proved by the deponent's own oath; but that, seeing he did not acknowledge to have received the money controverted, in payment of the bonds, the pursuer doth not prove his allegiance.

Fol. Dic. v. 2. p. 295. Forbes, p. 46.

1727. January. LAUDER *against* M'GIBBON and MEDINA.

No 13.

LAUDER insisted against M'Gibbon and Medina for payment of a certain sum, as the price of goods furnished to them, and referred all to their oaths. M'Gibbon acknowledged the receipt of some goods, but adjected this quality, that he