

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.

No 315.  
by the com-  
mon debtor's  
oath, though  
bankrupt,  
that was li-  
quid before  
the laying on  
the arrest-  
ment.

were laid by his creditors in Broomfield's hands; and, in the forthcoming thereon, the debt being referred to his oath, he acknowledged that he owed to the common debtor money, by bond and bill, and likewise an open account to an uncertain extent; but added, that, before the arrestments, he had made payments and furnishings to Moonie, which, by an account stated betwixt them after the bankruptcy, reduced the balance to so much:

Whereupon the arresters *pleaded*; That the oath was probative against the defender, in so far as he has owned that he owed so much by bond and bill, &c.; but, with respect to the quality adjected thereto, of the payments and furnishing made to him by Moonie, it was extrinsic, and not competent for him to depone thereon; as it neither was, nor could be, referred to him, the reference being in common form, *scil.* what he was owing to the common debtor at the time of the arrestment; and, if his own oath, without some other instruction, were sufficient to extinguish the bond, it would be in the power of any person, to whose oath a debt was referred, to create another by a simple averment to balance it.

*Answered* for the defender; That having referred the extent of the debt to his oath, and he having accordingly sworn, that the balance was only so much at the time of the arrestment, there was an end of the question; so that he could not be liable for any more. But, *2do*, If needful, he offers to prove the verity of the furnishings, and money-payments by Moonie's oath.

*Replied* for the arresters; That, in effect, they are legal assignees; and, as voluntary ones cannot be hurt by the oath of the cedent, so neither ought they; *e, g.* If Moonie had assigned the defender's bond, it would not have been competent for him to object articles of compensation probable by Moonie's oath; he behoved to answer the assignee, and operate payment of his counter claim the best way he could.

*Duplied*; There is a great difference betwixt an onerous assignee or indorsee, and an arrester; for the first purchases the right, not so much on the faith of the cedent, as because he sees no part of the bond or bill marked received on the deed itself; but an arrester, who tries to affect subjects where he can find them, must take them just *tantum et tale* as they are, under all the burdens with which they belong to his debtor; therefore his oath must be as competent against the arresters as it would be if the question were with himself; neither does it make any difference that he is bankrupt, that not inferring an *infamia* of any kind.

THE LORDS found, That he could prove, by the common debtor's oath, any ground of compensation that was liquid before laying on the arrestment.

*C. Home, No 40. p. 73.*