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certainty at such distance of time, the law has required a proof of the verity of the deed by the defender's oath, and rejected all other manner of proof: That, where the law makes no distinction, neither ought the judges in the interpretation thereof. It mentions the defender, without limiting to the subscriber of the writ, consequently it must be applied accordingly without distinction; more especially, since it is apparent, that the presumed reason of the law militates in the one case well as the other; and so it was decided in the case betwixt the Earl of Dundonald and Graham of Kilmardinny.—(See APPENDIX.) With respect to the observation, that neither debtor nor creditor is designed in the note, there is nothing in it, as the pursuer got the note from his mother, who is general disponee from his father; and therefore, being found amongst his father's papers, who bore the name of the creditor in the note, he must be taken to be creditor. Neither is there any law that requires the designation of debtor or creditor in writs; but, when it is offered to be proven, that this is his father's subscription, this objection must be fully removed.

THE LORDS found, that the verity of the writ in question was probable by the defender's oath.

Fol. Dic. v. 4. p. 22. C. Home, No. 177. p. 295.

* * * Kilkerran reports this case:

In a process against the heir of the granter of a holograph writ, he was found to be obliged, upon the construction of the act of Parliament 1669, to depone upon the verity of his predecessor's subscription; the words of the act being, 'Except the pursuer offer to prove by the defender's oath,' &c.; by which it was not meant than an heir's acknowledging, that, in his opinion, it was his father's subscription, was relevant, for that would be no better than the opinion of any other witness who might know the defunct's subscription *comparatione*, and would render the act of Parliament useless; but only that, upon the construction of the act of Parliament, the heir is obliged to depone; and if he should acknowledge that he saw his father subscribe, or the like, it would be the same as if the subscriber himself on life had acknowledged his own subscription. See PROOF.

Kilkerran, (PROOF.) No 4. p. 441.

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Oath of party, respecting the onerosity of a bill must be special.

1786. June 30. JAMES SWAN against JAMES SWAN.

JAMES SWAN having made a reference to the oath of Samuel Swan, with respect to the onerosity of an indorsation of a bill, the latter deponed in general, 'That he paid value for the indorsation, and was an onerous indorsee.' But being requested to mention particularly what the value was, he refused to give any more special answer.

During an action which depended on that point, between Samuel Swan and James Swan, Samuel died; and afterwards his heir, James Swan, having been made a party,

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THE LORD ORDINARY sustained the oath as a sufficient proof of onerosity. But

The COURT altered that judgment, and found, that Samuel Swan was not entitled to the privileges of an onerous indorsee.

Lord Ordinary, *Stonefield*.
Clerk, *Menzies*.

For the Heir of S. Swan, *Currie*.

Alt. *Honyman*.

S.

Fol. Dic. v. 4. p. 22. Fac. Col. No 286. p. 441.

1788. November 13. JOHN YULE against DAVID ROBERTSON.

ROBERTSON being debtor to Yule, attested an account of different articles composing the debt. In an action for payment of it, Robertson, by virtue of letters of incident diligence, was examined on oath, whether he himself had not the attested account in his possession. In the course of his examination, being interrogated for the pursuer, If both parties fairly settled the balance due by the deponent on the attested account? he deponed, That they did; and that he paid the balance. On this ground

The defender *pleaded*; The pursuer, by putting the above question, referred to the defender's oath the existence of the debt, which his negative answer has disproved.

Answered; Reference to oath of party being a judicial act, has effect no farther than the authority which is essential to it extends; Bankton, b. 4. tit. 32. § 9.; Falconer, 8th July 1749, Elliot *contra* Ainslie and Porteous, No 15. p. 9363. Here was no authority but for examining the party as a haver.

The LORD ORDINARY found, that "various questions had been put to the defender when examined as a haver, which were only competent to be put to him if he had been examined as a party, and which he therefore might have declined to answer; and that the answers he has made to such questions cannot have the force of an oath of party, there having been no previous judicial reference."

To that judgment, (it being observed, that artifices of this kind appeared to be multiplying in practice, and ought to be checked), the Court adhered.

Lord Ordinary, *Dreghorn*.

Act. *Elliot*.

Alt. *Ja. Clerk*.

Clerk, *Menzies*.

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Fol. Dic. v. 4. p. 22. Fac. Col. No 43. p. 73.

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A party being examined as a haver, it is not competent to put to him questions relative to the existence of the debt.