

360. The power of dispensing with the terms of an oath is magis imperii quam jurisdictionis, at least falls not under the power of an inferior judge; and if such reports were allowed, all foreigners would plead exemption from taking the oaths.

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*Answered* for the chargers; It is not the question what way Quakers or Anabaptists must depone by our law; for the chargers live in Holland, and by the law there such declarations are sustained. And they who refer any thing to the oaths of Jews, Mahometans, Persians, Papists, Quakers, Anabaptists, Indians, and Heathens, must take it in the form their religion allows; otherwise there could be no trading or commerce maintained with them.

THE LORDS sustained the declaration upon faith and honesty as equivalent to an oath, and found the letters orderly proceeded.

*Fol. Dic. v. 2. p. 295. Forbes, p. 157.*

1707. November 20.

POOR BARBARA HODGE *against* BARTHOLOMEW GIBSON, and WILLIAM MILLER,  
Gardeners in the Abbey of Holyroodhouse.

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THE said Barbara being served heir in general to one Margaret Hunter, her aunt, whom she alleges to have been heritor of a tenement of land in the Westport, now belonging in property to the society of Quakers, and used by them for their meeting-house; she pursues a reduction against the said Bartholomew Gibson and William Miller of their right to these lands; and they having produced a sixty years progress in Horner and Kincaid, their authors' persons, to exclude her, she *replied*, That Horner was denuded in favour of Hunter, her predecessor, and offered to prove it by Miller's oath, that he had the writs instructing it in his hands; and he refusing to depone, in respect of his profession, the LORDS first allowed search to be made in the town's register of sasines, if there were any vestige of infinement in the said Hunter's person; and a testificate being returned that there was no such thing to be found in their books, it was *alleged* for Hodge, the pursuer, That the act of Parliament ordaining royal burghs to keep a register of sasines was late, only in 1681, and Hunter's right was long before that time, and therefore craved, that Miller might be holden as confessed for not deponing. For whom it was *alleged*, That this was nothing but a plain draught and contrivance to ruin them of that principle and persuasion, who had no freedom to swear in the common form now received, as being prohibited by our Saviour in the 5th of St Matthew; for, as it was evident she had no shadow of right to their house, her allegiance was only calumnious, purely taking advantage of their tender conscientiousness to oaths; and though she offers to give her oath of calumny, that what she alleges she believes to be true, yet small weight is to be laid thereon, in one of

A Quaker declaring solemnly, as in the presence of God, and as he should answer to God at the great day, without adding the words, 'By God himself,' sustained as equivalent to an oath in common form.

No 3. her circumstances, being in the poor's roll, and so can be no safeguard against dishonest covetous minds, who have no more ado but to refer a promise of 10,000 merks to their oaths, knowing their nice scrupulosity, and get them holden as confessed, and so become masters of their whole substance and estates; and which is so convictive to other nations, that in England, and Holland, their declaration is accepted in place of an oath; which he offers in these terms, " I solemnly declare, as in the presence of God, and as I shall answer to God in the great day, I shall declare the truth." And we are content, if what we say can be redargued of falsehood, to be liable to the punishment due by law to perjury; which form has all the essential materials of an oath, and was allowed to David Falconer, a Quaker, in the competition of Lord Halkerton's Creditors. *Answered*, This society of men are not to be indulged more favour than those who own the established religion of the kingdom; for this is to encourage enthusiasts to disobey the laws; and whatever dispensation they may have in England, there is no such act of Parliament here; neither is this *formula* equipollent to an oath, for it wants these essential words, " by God himself;" neither will they declare with their right hand lifted up, nor their head uncovered; and it has been frequently refused them, particularly to one Spark, a Quaker in Montrose, and others lately; and, if this were once indulged, Protestants not Quakers may pretend the same scruple, and escape. THE LORDS thought this pursuer's right very lame and defective, and that the *formula* offered was upon the matter an oath, and therefore allowed him to depone in terms thereof. There be sundry of that persuasion who will not go that length, but their greatest security were, by their numerous friends in England, to get the English act extended to North Britain.

*Fol. Dic. v. 2. p. 294. Fountainhall, v. 2. p. 394.*

\* \* \* Forbes reports this case :

IN the reduction and improbation at the instance of Barbara Hodge, as heir served and retoured to Margaret Hunter, against William Miller, for reducing a disposition of a tenement at the West-port of Edinburgh, granted to the defender by Agnes and Margaret Kincaids, upon this ground, that John Horner, the Kincaids' author, was denuded in favour of the said Margaret Hunter, before he disposed to them; the pursuer offered to prove by the defender's oath, that these writs and evidents, denuding Horner in favour of Hunter, were in his custody.

*Alleged* for the defender, 1<sup>mo</sup>, The pursuer can never get her right to the foresaid tenement declared, and attain possession, although the defender should be holden as confessed for not deponing upon his having the pursuer's evident; for feudal titles are not made up by holding havers as confessed, but by proving the tenor; and the only design of craving the defender's oath, is, because the pursuer knows that he being a Quaker will scruple to depone in the

common form. Yet, *2do*, The defender is content to declare solemnly as in the presence of God, and as he shall answer to God at the great day, that he shall declare the truth; which *formula* materially includes all that is intended by an oath; and the like was taken for an oath from David Falconer, a person of the defender's principles, in the competition of the Creditors of Halkerton. Again, Quakers in England, Holland, and elsewhere, being indulged for the preservation of their property to give a declaration in the terms aforesaid instead of an oath, it is hoped the LORDS will require no more from the defender, seeing to require oaths from persons of his persuasion, would expose their whole substance as a prey to unchristian people, who might calumniously refer things to their oaths, and take advantage of their refusing to depone.

*Replied* for the pursuer, *imo*, By the defender's being holden as confessed upon the foresaid allegiance, it would be presumed in law, that the pursuer hath undoubted right to the foresaid tenement in question, and that the defender hath no right, and consequently ought to cede possession. *2do*, The defender's offer to subscribe a declaration in terms of the foresaid *formula*, cannot be admitted in place of a solemn oath, without overturning the known principles of law and form; because a party deponing must with hand lifted up, and head uncovered, (in token of that adoration he pays to God) repeat these words, By God himself, and as I shall answer to God, I shall declare the truth. As to the pretence, that the defender and all his party might be ruined if holden as confessed for not deponing, by covetous persons commencing groundless actions against them, and referring a relevant point to their oath, being sure that they will not swear, this is abundantly confuted by the experience of many ages, no complaints having ever been heard of covetous persons so making a prey of Quakers, &c.; albeit it hath been the constant and inviolable practice of this nation to hold all persons, without exception, as confessed, who refuse to depone in common form; and if any folks of that kidney sustain loss thereby, they have themselves to blame. On the other hand, if declarations, however solemn, be sustained in place of oaths, not only Quakers, Anabaptists, &c. but any person pretending tenderness of conscience, and that he thinks it unlawful to swear, may plead the same exemption; And it is loudly talked, that these great pretenders to strictness are not always just in their dealings. Again, nothing seems more unreasonable than to deprive innocent persons of their means of probation through the fault of Quakers, &c. And since even an oath proves often a slender bond upon the conscience, what can be expected from bare declarations? Whatever may be the custom of other nations, we have no law or custom exempting any person from deponing upon a relevant allegiance referred to oath; nor can such an extravagant indulgence be granted without an act of Parliament. *Testibus enim, non testimoniis credendum est*, is so far true, that a witness's extrajudicial oath, though subscribed by him, is not regarded; and one would think that a person's declaration should far less be received in lieu of his oath. Is it not unequal to allow a Quaker to refer a point to the

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pursuer's oath, and to oblige the pursuer to take the other's word of honour or declaration, though amounting to no more, in the opinion of the Quaker himself, than to an asseveration, which some, inclining to defraud their neighbour, may be tempted to make, who would scruple to perjure themselves. In fine, the barons and officers of the army may more reasonably plead to have their word of honour taken for an oath, which they may be supposed to regard as much as Quakers do their declarations.

THE LORDS remitted to the Ordinary upon the witnesses to take the Quaker's oath in the terms of the foresaid *formula* offered by him.

*Forbes, p. 197.*

1710. February 26.

ROBERT ANDERSON, Writer in Edinburgh, *against* ALEXANDER FORBES of Blackford.

No 4.

The affirmation of a Quaker accepted instead of an oath.

IN the action at the instance of Robert Anderson, against Alexander Forbes, who is by profession a Quaker, for payment of 300 merks Scots, promised by him to the pursuer, the libel being referred to the defender's oath, the LORDS allowed him, instead of an oath in the usual form, to make his solemn affirmation or declaration in these words, "I *A. F.* Do declare in the presence of Almighty God, the witness of the truth of what I say, &c." conform to the statutes of England, 7th and 8th Will. III. cap. 34. 13th and 14th Will. III. cap. 4.

*Fol. Dic. v. 2. p. 294. Forbes, p. 405.*

1713. January 29.

A. against B.

No 5.

UPON report of the Lord Minto, the LORDS allowed a Quaker to give a declaration in the terms of the statute of England, upon the truth of his debt in a ranking of creditors, as equivalent to an oath.

*Fol. Dic. v. 2. p. 295. Forbes, p. 653.*

SEC APPENDIX.