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bond wanting witnesses was holograph. The defender acknowledged, but added, the debt was paid. The quality found extrinsic.

which was referred to the party's oath; and he being sworn thereupon, deponed, that the bond was his hand writ, but that he took it on his conscience, that he had truly paid the sum therein contained, to the person to whom the bond was made many years since; which bond was given to him out of his own charity without any onerous or other necessary impulsive cause to the person to whom he was bound being his near kinsman for his help there being more than thirty years since the date thereof, and the person to whom it was given living many years after the bond who died but lately in a poor estate, and who, if it had been unpaid, would not have omitted or delayed so long to have sought it; and it being found by his executors since his decease, who had made Kinloch the pursuer assignee thereto, he had good reason to defend himself against that pursuit; which oath being considered by the LORDS, they found, that the oath confessing the hand-writ proved the reply, and had no respect to the second part of his declaration bearing the payment; seeing that was an exception which he could not swear himself, to import his liberation, not being referred to his oath; and so the LORDS divided the deponer's oath, which usually is respected ever conjunctly as the same is given.

Clerk, Hay.

Fol. Dic. v. 2. p. 299. Durie, p. 134.

No 45.

Found in conformity with the above. The quality resolves into an exception, and ought to have been proponed before litiscontestation, and a qualified oath protested for. In this case, it was the verity of the subscription which was at issue; not whether the deed was holograph.

631. February 9. BARRENS, Dutchman, against HUTCHISON.

THE Dutchman pursuing for a debt, which he instructed by production of a ticket marked with two initial letters of the defender's name; the verity of the which subscription being referred to his oath, and he compearing, and by his qualified oath granting the subscription, but declaring that he had paid the debt, the ticket being dated sixteen years since, and he never being pursued therefore; the party's *contending*, That this part of the deposition should not be respected anent the payment, because it was not referred to his oath; and that he ought not swear an exception which he ought otherwise to prove; and the defender *alleging*, That seeing the writ being imperfect was supplied by his oath, he might declare *qualificate* upon the whole cause, and upon the verity of the debt, if it was yet owing unpaid;—the LORDS found, That that part of the oath bearing payment of the debt ought not to be respected, and that the defender was not freed thereby; but if he would propone an exception of payment, (which the LORDS found he might do, if he pleased, in the same state of the process) that they would suffer him to propone the same, and that he ought to prove it, as accords of the law, otherwise than by his own oath. Here the ticket libelled bore on the back payment of a part of the debt, and the presumption that the rest was owing was more considerable than any thing shown to the contrary.

Ac. Craig.

Alt. Russell.

Clerk, Gibson.

Fol. Dic. v. 2. p. 300. Durie, p. 566.