

## SECT. VI.

## Compensation Extrinsic.

No 51.

1628. July 29.

— against SIMPSON.

A HOUSE rent, which was the ground of pursuit, being referred to the party's oath, he acknowledged the debt, but added, that he had furnished wine to the pursuer to a certain extent. This resolving into an extrinsic exception of compensation, and which was consisting with his resting owing the debt pursued for, it was found, That the pursuer had proved his libel, viz. That the house rent was resting owing, and therefore the Lords decerned for the same, leaving the defender to follow out his ground of compensation as accords.

*Fol. Dic. v. 2. p. 300. Spottiswood.*

\* \* This case is No 283. p. 12450, *voce* PROOF.

\* \* A similar case is reported by Fountainhall, 5th June 1697, Borthwick against Ramsay, No 1. p. 4981, *voce* FUNERAL CHARGES.

No 52.

1629. March 28.

GALL against EVIOT.

ONE being pursued for a sum addebted by the defender, and which was referred to his oath, and the defender granting the debt, but in his oath declaring, that the debt was not owing, in so far as the pursuer had intromitted with the farms and duties of the lands of the defender diverse years, which were possessed by the pursuer, he retaining the duties unpaid, and which he compensated with the defender for satisfaction of his debt now acclaimed; the LORDS allowed of this compensation, and, in respect of the oath which reported the same, they assoilzied him from this pursuit, which was so found, albeit this was an exception proponed by the defender, not instructed, but sworn by himself, it being neither referred to his oath, nor yet otherwise qualified by the deponer, who granting the debt for which he was pursued, made himself free by affirming of another debt owing by the pursuer, which was neither instructed nor liquidated; neither was it shown, that the pursuer possessed these lands, nor what farms should have been paid therefor, nor what were the prices of the farms these years, nor that the deponer had right thereto, without which there could be no compensation; nevertheless, this being deponed by the party, it was found sufficient to liberate him of this liquid sum

confessed to be owing, and elided only by the said compensation; and it was found, That the deponer, by his qualified oath, might propone and swear his own exception.

No 52.

Act. Gibson.

Alt. Nicolson &amp; Cunningham.

Clerk, Hay.

*Fol. Dic. v. 2. p. 300. Durie, p. 444.*

1664. December 9. LEARMONT against RUSSEL.

In a pursuit for the price of wines, the libel being referred to the defender's oath, he acknowledged the libel, but added, that the pursuer was debtor to him in a greater sum by bonds and decreets. This quality was found extrinsic, and that it must be proved by way of exception.

No 53.

*Fol. Dic. v. 2. p. 293. Stair. Newbyth.*

\* \* This case is No 1. p. 13201.

1687. November. JOHNSTON'S ASSIGNEE against ———.

In an action for debt at the instance of John Johnston's assignee, referred to the defender's oaths, they having deponed acknowledging the debt, but with this quality, that the cedent had got goods from them to the value; the LORDS found, That this quality not being liquid, did not infer and instruct the compensation; and, seeing the oath did not bear that the defender gave the cedent goods in satisfaction of the debt due to him the cedent, it did not prove payment, as it might have done, had the quality been so conceived, although the cedent was then bankrupt, and in America.

No 54.

*Fol. Dic. v. 2. p. 301. Harcarse, (COMPENSATION.) No 266. p. 63.*

1761. February 11. WILLIAM MITCHELL against DAVID MACKILNAY.

WILLIAM MITCHELL, in right of Andrew Maclure executor confirmed to Michael Maclure, brought a process against David Macilnay before the Bailie of Carrick in 1748, for payment of a bill dated December 13th 1733, accepted by Mackilnay, and payable to Michael Maclure, but not subscribed by Maclure as drawer, his name being only in the body of it, and the writing not holograph of him.

No 55.

A quality in an oath inferring compensation is extrinsic.

The pursuer offered to prove the acceptance of the bill by the defender's oath, and that the contents thereof were resting owing; but the defender hav-