

No 47.

litiscontestation, as said is, the LORDS did give a term to prove the said quality. See SUSPENSION.

*Fol. Dic. v. 2. p. 299. Dirleton, No 101. p. 39.*

1674. January 3.

GORDON against CUSIGNE.

No 48.

A person having deponed in an action against him, that he had bought a horse, and delivered the pursuer a cow, which was accepted as the price of the horse, the defender was found obliged to prove what he had deponed.

ANNA GORDON pursues William Cusigne for several sums and goods of her's intrusted to him, and wherewith he had intrusted, and, amongst others, for the price of a horse; he deponed, that he received and bought the horse at the price of L. 24 Scots, and deponed that he delivered to her a cow, which she accepted for the price of the horse; whereupon the question arose, whether this was a competent quality in the oath, or behoved to be proved as an exception; for if he had deponed that he bought the horse at L. 24, and that he paid the same, payment would have been made a competent quality, the libel being referred to the party's oath, but compensation would not have been a competent quality, but behoved to have been proved.

THE LORDS found, that if the acceptance of the cow for the price of the horse had been a part of the bargain at the same time with the sale of the horse, it had been an intrinsic quality, declaring a part of the bargain; or if it had been payment *ex post facto* in money, conform to the bargain; but being the acceptance *ex post facto* of the cow for the same price, which was in effect a new sale of the cow, they found that it was no competent quality, but behoved to be proved.

*Fol. Dic. v. 2. p. 299. Stair, v. 2. p. 246.*

No 49.

Where a sailor sued his master for wages, and the master, in his oath on reference, adjected an allegation of undutiful service. This was found extrinsic. Action for damages was reserved to him.

1699. December 12. WORKMAN against YOUNG.

ROBERT WORKMAN pursues John Young, skipper, on this ground, that he having hired him to be one of the sailors of his ship in a voyage to Bourdeaux, he now refused to pay him his wages; and both the service and *quota* of his fees being referred to the Master's oath, he acknowledged the same, but deponed he had served him most unfaithfully and undutifully, and condescended that he had embezzled the wines on board, and drawn some of them, and hid it in his bed, and had made sundry of the crew to mutiny and carry in the ship to Orkney. The question, at advising, arose, whether these qualities adjected were intrinsic, or behoved to be otherwise proved; for as to the wines, all the mariners did so, and it was the merchant's and not the skipper's loss; and as to his being rebellious and disobedient, he might have turned him off at the first port they came to: But others thought there was a difference betwixt a mariner and an apprentice, or a servant at land, who may be turned off