

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

at pleasure; but a captain of a ship may be necessitated to retain even contumacious sailors, wanting hands to navigate his ship without them. It was further *alleged*, That the mariners going ashore without their master's consent, and sleeping a night there, inferred the forfeiture of their wages, and sundry other penalties. THE LORDS decerned for the wages confessed, and found the qualities extrinsic, reserving the Master's action for liquidating his damage against this pursuer, as accords, upon his malversations.

*Fol. Dic. v. 2. p. 299. Fountainhall; v. 2. p. 72.*

No 49.

1705. June 20.

Captain JOHN GRANT of Easter Elchies, as Assignee by ARCHIBALD INNES of Auchluncart, *against* Major ALEXANDER ANDERSON.

IN the action at the instance of Captain Grant against Major Alexander Anderson, for payment of L. 79 Scots contained in his ticket, whereby he stood obliged to hold count for that sum to Innes of Auchluncart the pursuer's cedent; the ticket being quarrelled as null for want of writer's name and witnesses, the pursuer offered to prove by the defender's oath, That he both written and subscribed the ticket. And he having in his deposition acknowledged the same to be holograph, but that he had in the terms thereof counted with Auchluncart for the money, the LORDS found the oath supplied the nullity of the ticket, and the quality to be extrinsic, and therefore decerned; albeit it was *alleged* for the defender, That the defects of the ticket being only supplied by his oath, the oath could not be divided. *2do*, The ticket is not of the nature of a clear and liquid obligation, where one obliges himself to pay a sum, but is allenarly to hold count, which of itself implies, that the person to whom it is granted is debtor on the other hand, and that there are mutual claims; upon which the defender having deponed, that seems to make a complete probation.

Then the defender offered to prove by the cedent's oath, that he did count with him in the precise terms of the note for the sum, and allowed the same in the first end of what he was resting at the time of the counting; which must prove against the pursuer, though an assignee for an onerous cause, seeing the obligation is only to count for the sum.

*Answered* for the pursuer; If the defender had counted with Auchluncart, he would either have got a writ under his hand acknowledging so much, or retired his own note, neither of which is done. *2do*, The cedent's oath is not to be taken to the prejudice of his assignee; nor even the assignee's oath after a cause is thus concluded, where the oaths may clash, and prove contradictory.

No 50.

That a assigned ticket, to hold count for a sum, was holograph, being referred to the granter's oath, and he having deponed acknowledging so much, but that in terms of the ticket he had accounted with the cedent; the quality was found extrinsic, and the cedent's oath upon the accounting allowed to be taken *cum onere expensarum*.