

1702. November 13. DAVID WALKER *against* JAMES CLERK in Dury.

No 40.
In an exhibition of a bond against the debtor as haver, he was bound to qualify in his oath, how it came to be retired by him.

IN the exhibition pursued by David Walker against James Clerk in Dury, the defender deponed, and confessed, that he was owing by bond to the defunct 400 merks, but that, when she was on death-bed, she sent for him, and gave him back his bond, and took his promise to bury her honestly, for which cause she gifted the debt in this bond, and he carefully performed the condition, and was at the expense of her funerals. *Alleged*, She had assigned to the pursuer long before that, all sums of money, goods, and gear, under which generality this sum fell, and so she was denuded. *Answered*, That was only a general clause, and carried no more but what sum was due to her at her death, and this assignation was never intimated to him, and he was *in bona fide* to receive his own bond, which the LORDS found. But it was contended, that it was an extrinsic quality, and ought to be *aliunde* proved. THE LORDS found the calling for him, and giving him up his bond intrinsic, but what he further adjoined of his having expended all the charges of her funerals, and so had implemented the condition was extrinsic, and needed probation. Then it was urged, that he could have allowance of no more than what he had actually wared out on her burial, which was but L. 40 or 50 Scots, and the remanent of the bond belonged to the pursuer as assignee. THE LORDS found it was *legatum liberationis*, and that she had given him the whole.

Fol. Dic. v. 2. p. 298. Fountainhall, v. 2. p. 159.

1708. June 24.

JEAN PRINGLE Relict of George Rutherford, Bailie in Dunbar, *against* ISOBEL MANDERSTOUN.

No 41.

THE said Jean Pringle, as executrix to her husband, pursued Isobel Manderstoun for L. 98 contained in her bond granted to the defunct, who proponed a reason of compensation or payment, by two horses to the value of L. 90 given to the defunct, and offered to prove the same by the pursuer's oath. She having deponed, acknowledging the receipt of such horses, but adding, that they were received in payment of an account of furnishing to the defunct, and in fortification of the quality, produced the defunct's count-book containing the same inserted; the LORDS found the quality of the oath intrinsic, and decerned to pay the bond.

Fol. Dic. v. 2. p. 298. Forbes, p. 253.

1710. January 5.

PATRICK MORTIMER in Cowper, *against* JAMES ARCHIBALD, and Others.

No 42.
Intromission with a defunct's move-

IN the cause at the instance Patrick Mortimer, as executor confirmed to Agnes Wilkie, relict of Fotheringham in Kennoway, against James Archibald, and others, for repetition of goods and money belonging to the de-

funct, and abstracted by them, the libel being referred to the defenders oaths, they deponed, that Agnes Wilkie, some weeks before her death, gifted and delivered to them certain particulars in goods and money, partly, to see her honestly buried, partly, in requital of their attendance on her during her sickness.

THE LORDS found the quality of being gifted, intrinsic to the oath, and a sufficient ground to assoilzie the deponents. Albeit it was *alleged* for Patrick Mortimer, That qualities *super facto alieno* are never reckoned intrinsic, 6th November 1667, Fife *contra* Daw, No 46. p. 13233.; and that the things were gifted, is the fact of another person which should be proved, and *donatio nunquam præsunitur*. In respect it was *answered*. That intromission with moveables being referred to a party's oath, he might qualify the cause of his intromission, 3d February 1672, Scot *contra* Elliot, No 36. p. 13228.

Fol. Dic. v. 2. p. 298. Forbes, p. 384.

No 42.
ables being referred to the parties' oaths, and they having deponed that they were gifted to them by the defunct, the quality of being gifted was found intrinsic.

SECT. V.

No exception will be sustained unless proponed at Litiscontestation.

1623. February 26. JOHN RULE *against* THOMAS HAMILTON.

THOMAS HAMILTON in Leith being obliged to pay to John Rule L. 100, and John Rule being addebted to others in greater sums, one of the creditors pursued Thomas Hamilton to make the sum of L. 100, owing by him to Rule, forthcoming, and likewise summoned Rule for his interest. The pursuer referred the verity of the debt to Hamilton's oath. He made faith, that he rested only L. 42, which he was decerned to pay, and paid. Thereafter, Rule charges Hamilton to pay L. 100, conform to his bond. He suspends upon the decret given upon his oath, and payment made conform thereto. Rule *answered*, That he had referred nothing to his oath, but proved the debt by the bond. THE LORDS found, that, because Rule had not in the first judgment used the bond to prove the debt against Hamilton, but suffered his oath of verity to be taken, he could not now be received to use any other probation whereby Hamilton might be proved mansworn. *Haddington, MS. No 2786.*

No 43.

1624. July 1. KINLOCHY *against* Lord CONSERVATOR.

THE Conservator being pursued by one Kinloch, for payment of money contained in his bond, against which pursuit, he *alleging* nullity of the bond, because it wanted witnesses; whereto it was *replied*, That it was holograph,

No 44.
It was referred to oath, whether a.