

No 22.

Quality ad-
jected to an
oath, whether
extrinsic or
intrinsic?

1737. January 13.

JAMES MOFFAT *against* JOHN MOFFAT.

IN the process at the pursuer's instance, for payment of L. 65 Scots, as the agreed price of a score ewes and lambs sold by him to the defender about 16 years ago; the libel being referred to oath, the defender acknowledged, "that he bargained and agreed with the pursuer about the score ewes and lambs libelled; and John Moffat in Addington, the pursuer's good-brother, went along with the deponent to the hill, and shewed him the sheep; and the deponent agreed with the pursuer for the said soum of ewes and lambs at the price libelled. Depones, that some time after the bargain, the pursuer ordered the deponent to pay the price of the said ewes and lambs to the said John Moffat in Addington, which accordingly he did."

From this oath, the following question arose, Whether or not the quality adjected thereto was extrinsic or intrinsic? The pursuer *contended*, That the quality was extrinsic, and no otherwise proveable than by his own oath or writ, which was evident from the following considerations; *imo*, That payment taken in general was not an intrinsic quality, seeing it arose from the nature of the libel and reference, and that a pursuer was under no necessity to allege more in a libel than that the debt was contracted; that it is not paid is a negative which proves itself. Indeed, where the pursuer refers to oath, resting owing, either voluntarily, or being circumscribed by law to that kind of proof, there the debtor deponing he paid, or that nothing is resting owing, it is the very point referred to oath, and no quality at all, neither intrinsic nor extrinsic, properly speaking.

2do, Whatever may be the case of payment, the quality in question is not such; for payment to a third party is no payment to the creditor; the quality is payment by order of the pursuer, which is extrinsic; *imo*, Because it was no part of the transaction; if, indeed, it had been agreed, that the price paid to that third party should be good, the quality would have been intrinsic; but the oath bears, that the order was given some time after; *2do*, Because an order to pay a third party does not arise from the nature of the contract; payment to the party is specific implement of the contract; but, when made to a third person, as for the party, is extraneous to the matter of the contract; *3tio*, There is a distinction betwixt qualities *super facto proprio* of the deponent, and *super facto alieno*. In the first case, qualities may be admitted to be intrinsic, which would be extrinsic in the other; *e. g.* payment is *factum proprium* of the debtor, and so an intrinsic quality; but orders or commissions to a third person is *factum alienum*, with which the deponent will not be allowed to qualify his oath; as appears from the decision *Fyfe contra Daw, infra, h. t.* collected by Dirleton.

On the other hand, it was *contended* for the defender; That he had really paid the money as deponed upon; in evidence of which he produced a declara-

tion from the said John Moffat, wherein he acknowledged, that he had received the price of the ewes and lambs from the defender, by the pursuer's order, and that he had repaid the same at different times. And, as to the point in issue, it was observed, that the claim being prescribed by the quinquennial prescription, all that he was bound to depone on was the single point, "resting owing," which he has done by swearing, that it is not resting, payment being made to another by the pursuer's order; *2do*, Payment in all cases is reckoned intrinsic, and the constant course of decisions have run in that strain; nor can any good reason be given, why payment to a man's order should not be reckoned intrinsic, as well as when made to himself; surely the defender's oath is as much to be relied on in the one case as the other; *3tio*, As this claim was constituted without writ, it was natural to imagine, that it might be dissolved the same way; or, put the case, that the claim had been brought within the five years, if the pursuer had proved the bargain by witnesses, no doubt the defender would have been allowed to prove the order the same way; now, it appears very natural, where the pursuer proves the libel by the defender's oath, that he should be allowed to prove his defence in like manner; *4to*, It is a practice very usual to pay debts constituted without writ upon the creditor's verbal order; and the contrary doctrine would be too great a clog on commerce, especially in small matters; a consideration which ought to have great weight in determining the present question.

No 22.

THE LORDS found the quality intrinsic.

Fol. Dic. v. 2. p. 297. C. Home, No 47. p. 82.

1742. November 13. LADY FORRESTER *against* LORD ELPHINSTON.

LADY FORRESTER, as having right to a bill due by Lord Elphinston to the deceased Lord Forrester, dated *anno* 1716, brought a process for payment. The defence was the vicennial prescription. Whereupon the Lords ordained both parties to give in memorials touching the state of the law of foreign mercantile nations, anent the endurance of bills at the time of the act 1681.

No 23.
Qualities ad-
jected to a
defender's
oath, whether
intrinsic or
extrinsic?

The substance of the argument for the pursuer was, that, by the law of Scotland, great care is taken, in every case, to regulate the course of prescription; and, as there was no statute with respect to the endurance of bills, it ought to be the same as in other contracts and bonds, *i. e.* for 40 years; that it was observed by Sir George Mackenzie, in his observations on the act 1669, the parliament expressly refused to limit the endurance thereof, but left the same to the common law.

That what had given occasion to doubt, was the temporary prescription with respect to the negotiation of bills, in order for recourse, and the summary diligence allowed by act of parliament, when duly protested within six months.