

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.

No 23.

But these have nothing to do with a bill, when it is completed by acceptance; seeing, by the acceptance, there is an obligation completed *in suo genere* betwixt the holder and the acceptor, the endurance whereof ought to afford action and pursuit for recovery of the money, as long as other contracts. See 21st article of the edict Lewis XIV. 1681, and the *Sieur Savary*, lib. 3. cap. 6. p. 162. June 1728, *Hedderwick*, see APPENDIX.

For the defender it was *observed*; That it was solely owing to the privilege of commerce, that bills of exchange are sustained as probative, and because of the speedy dispatch the business of merchants requires, whereby bills use not to be kept up for any time; and if they were so kept up, they would not be probative (as Lord Stair observes); and because it is the general custom of merchants, which particular statutes cannot remeid: That holograph writs are the least capable of forgery of any, and yet these prescribe in 20 years; consequently there was much greater reason for limiting the endurance of bills, as these are seldom holograph of the debtor or acceptor: That people's manner of subscription varied often in the space of 20 years, and thereby may be apt to forget whether they subscribed such deeds or not, which might be dangerous to both debtor and creditor, if they were even allowed to lie as long over as holograph writs, when no diligence had been done upon them as the law directs.

As to the Parliament's refusing to limit the endurance of bills, it was observed, that, at that time, we had no act authorising summary diligence, so that it might be thought unreasonable to fix a prescription which might affect strangers: But now, when summary diligence is allowed, if that is neglected, and such writs lie over for 20 or 25 years, without any demand upon them, they surely ought to have less faith than holograph deeds; especially if it is considered, that these last are not looked upon as permanent securities, and therefore limited to 20 years; consequently, bills are far less to be considered as such. See *Scarlet* upon the law and custom of exchange, p. 337. *Forbes*, p. 176. *Savary's Universal Dict. of Commerce*, p. 338. Statute of Limitations, 21st James I. cap. 16.

The pursuer, suspecting the validity of the defence, referred resting owing to Lord Elphinston's oath,

Who deponed, "that the bill was truly accepted by him: That he has paid no part of it either to Lord Forrester, or any having his order; and that, in a conversation with my Lord Forrester when in Scotland, in the 1727, my Lord Forrester acknowledged he lay under many obligations to the defender; particularly, for money lent by the defender to him while in Flanders, from the year 1707 to 1711, and particularly for entertaining his sister in his family for many years: That he was conscious he was considerably in the defender's debt, and would give the deponent up the bill for L. 50, if Mr Cuninghame had been in Edinburgh: That he would do it as soon as he returned to Scotland, and would make a further acknowledgment to the defender for his favours to him and his sister: And lastly, that the defender had ground to think, that the Lord For-

rester was more in his debt than the L. 50, without regard to the Lady Herbertshire's aliment for four or five years."

No 23.

The Lords found, the oath did not prove resting owing.

*Fol. Dic. v. 4. p. 204. C. Home, No 208. p. 346.*

1748. June 18.

BLAIR against BALFOUR.

No 24.

BLAIR in Errol, as creditor to Paterson of Dunmuir, having arrested in the hands of Balfour of Dunbog, and in the furthcoming the pursuer having referred to Dunbog's oath what he was resting owing to Dunmuir at the time of the arrestment, he deposed, that he was resting to him by bond the sum of L. 2932 Scots, but added several qualities, partly resolving in payments, partly in compensations, and, *inter alia*, that he had paid to John Imrie, town-clerk of Cupar, at Whitsunday 1735, the sum of L. 833 : 6 : 8d. upon a decree of furthcoming at his instance against the deponent for a debt due by Dunmuir, but which decree he did not produce.

On advising this oath, a general topic was broached from the Bench, viz. That in all cases where resting owing is referred to oath, as a general denial of resting owing would be sufficient to exoner the defender, it were wrong, that because a man has but of tenderness condescended upon the manner in which he made the satisfaction, his oath should not be held probative of every thing deponed, whether a proper payment or not. But as this was to overturn what had been so long deemed the settled principles of our law, so it could at no rate apply to this case, where the payment was deponed to be made in consequence of a decree; for unless the decree be produced, the debtor is not exoner, but might be obliged to pay over again.

Accordingly, the Lords "refused to allow this payment till the decree should be produced."

*Fol. Dic. v. 4. p. 204. Kilkerran, (OATH.) No 2. p. 359.*

1759. March. MARGARET BETT and her HUSBAND against ROBERT HARDIE.

No 25.

MARGARET ANDERSON, in a testamentary settlement, conveyed, *inter alia*, to Margaret Bett, her daughter, a bill for L. 7 Sterling, drawn by Robert Hardie upon and accepted by Trent of Pitcullo, and indorsed by Hardie to Anderson.

Payment to a third party at the desire of the pursuer, whether intrinsic?

Hardie had been often entrusted by Margaret Anderson with the custody of her writs, and care of her affairs; and, upon her death, her daughter put the said bill, with several other writs, into his hands, and some time after married David Innes.

After the marriage, Margaret Bett, and her husband, pursued an exhibition before the Sheriff of Fife against Hardie; in which, after exhibiting certain