

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

No 25.

writs, he deponed, " That he knows of no other bills belonging to the defunct, except a bill which was due by Pitcullo for L. 7, which the deponent uplifted, and gave to John Bett the pursuer's brother, at her desire ; and she desired him to do this in July or August last, (being before her marriage,) and thinks, that John Bett got the money since the pursuer's marriage."

The Sheriff found, " That the defender ought to prove otherwise than by his own oath, that the pursuer gave him orders to pay the contents of the bill to her brother." Hardie's procurator thereupon caused cite the pursuer to depone on that fact ; and she was accordingly examined in presence of Hardie, and deponed, " That she never in her life desired Hardie to get up the money in Pitcullo's bill, and gave it up to her brother John Bett."

Margaret Bett and her Husband then commenced a new process before the Sheriff against Hardie, for payment of the contents of the bill. The Sheriff, in respect of her oath in the exhibition, decerned against Hardie, who brought the cause into the Court of Session by suspension.

*Pleaded* for the suspender, The quality contained in his oath, viz. of uplifting the contents of the bill, and paying it away by the charger's orders, was intrinsic, and should have obtained his absolvitor before the Sheriff. Where a debt is constituted by oath, and the same oath declares, that the debt was paid to the creditor's order, such quality is intrinsic, as found 9th December 1664, Learmont *contra* Russel, No 1. p. 13201. ; January 1727, Lauder *contra* Macgibbon, No 13. p. 13207. ; and 13th January 1737, Moffat *contra* Moffat, No 22. p. 13214.

*Answered* for the charger ; *1mo*, The ground of debt was constituted by a writ lodged in the suspender's hands for the charger Margaret Bett's behoof, and the suspender could have no right to uplift or discharge the debt without a written order from her. The suspender's exception, therefore, was only proveable by the writ or oath of the charger, and his deponing upon it consequently extrinsic ; 21st December 1679, Allan *contra* Young, *infra, h. t.* ; 24th December 1679, Home *contra* Taylor, *infra, h. t.* ; and 23d December 1707, Brown *contra* Dow, *infra, h. t.* ; *2do*, The quality is extrinsic, seeing it was contained in the suspender's oath emitted in the process of exhibition, where the matter referred to him was not the constitution of the debt, or the existence of the bill as such, (as in the cases quoted for him,) but only, whether or not the bill or writ was in his custody ? 2d July 1712, Forbes *contra* Lady Culloden, *infra, h. t.* ; *3tio*, The suspender repudiated and lost the benefit of his own oath, by his citing the charger, and her deponing negatively to his allegation ; And, *4to*, The charger's marriage vested the right of the bill or contents in her husband ; and therefor the suspender was *in mala fide* thereafter to pay the same to John Bett.

*Replied* for the suspender, There was no need of a written order to enable the suspender to uplift the contents of the bill, and apply the money, as the bill was extinguished by delivery of it to the debtor ; and consequently the ex-

istence of the debt rests upon the suspender's oath alone. Were it otherwise, clerks or servants entrusted with getting payment of bills, and applying their contents, might be unjustly subjected at the pleasure of their masters. *2do*, The quality was properly adjected to the oath in the exhibition, as the suspender was called upon not only to tell whether he had the bill in his custody; but, if he had is not, to declare how he had put it away. *3tio*, The suspender never referred the matter to the charger's oath; his procurator acted, in that respect, without any mandate from him; and supposing both of them had erred through simplicity and ignorance, it would be hard to let him suffer by that means; especially as he was no gainer by paying the money to the charger's own brother, who was in want. And, *lastly*, Though he paid the money to him after the charger's marriage, yet he had received her orders, and uplifted the contents of the bill before the marriage, which therefore could not hinder the application.

The COURT seemed to consider the quality of Hardie's oath as intrinsic, and that the citing Margaret Bett to depone at Hardie's instance, proceeded from ignorance or simplicity; and therefore was not to be held binding as a judicial reference made by him to her oath.

"THE LORDS sustained the reasons of suspension."

Reporter, *Woodball*.

Act. *Dav. Rae*.

Alt *W. Stewart*.

*D. R.*

*Fol. Dic. v. 4. p. 205. Fac. Col. No 185. p. 327.*

1782. February 20.

AGNEW against MACRAE.

In a process for payment of sundry bills after the lapse of the sexennial prescription, the pursuer having referred *resting owing* to the defender's oath, he deponed, "That the bills had been accepted by him, and never paid; but that he had never received any value for them but had given them by mistake, instead of receipts, for money advanced to him, on account of a son of the drawer, to whom, upon the drawer's verbal engagement to repay, the deponent had remitted goods to America." On this oath the pursuer

*Pleaded*; Every quality in an oath importing payment of a written document of debt, without producing any evidence by writ of such payment is held to be extrinsic; *Erskine*, b. 4. tit. 2. § 13; 21st November 1671, *Allan contra Young, infra, h. t.*; 24th December 1679, *Home contra Taylor, infra, h. t.*; *Blair contra Balfour*, No 24. p. 13217.; 11th February 1761, *Mitchell contra Macilney, infra, h. t.*

*Answered*; The statute 12th Geo. III. c. 72. enacts, "That no bills shall be of force, or effectual to produce any action, unless such action be raised before the expiration of six years." It farther provides, "That it shall and may be lawful and competent, at any time after the expiration of the said six years, to

No 26.

What qualities are intrinsic, where a creditor by bills falling under the sexennial prescription, refers resting owing to the debtor's oath?