

No 31.

tion, and might have compeared and produced the bond, and not doing it, he seemed to consent to the taking his oath thereon; and the Lords had decided thus, as is observed by Haddington, on the 26th of February 1623, Rule *contra* Hamilton, *infra*, *b. t.* This point being reported, "the LORDS found his own oath could not exoner him, seeing his creditor was not compearing in that action, and referring the same to his oath how much he was owing, and seeing the bond was now produced by the assignee; yet seeing the debt was suspended against the cedent before his making an assignation thereof, they allowed George Young to prove his payments and grounds of compensation mentioned in his oath against the assignee, *tali quali probatione.*" Which I think did even extend to prove them by witnesses, though it was against a written bond, because by the cedent's death George Young had lost his mean of probation by his oath. Yet it may be argued, that in construction of law *contumax habetur pro præsenti*; see Craigie's Alphabetical Repertor. verb. Absentia. Now, he was cited, and did not appear; and supposing him to be once present, the law says, *præsentia ejus qui actum impedire potuit et non impedivit operatur consensum.* See Durie July 26. 1631, Bishop of the Isles, No 17. p. 5630. Yet it may be objected that this would induce an absurdity, for *duæ fictiones non debent concurrere circa eandem rem.* Vide Hottoman Quæst. Illustri 38.

Fountainhall, v. I. p. 65.

* * A similar case is reported by Stair, 24th December 1679, Home against Taylor, No 32. p. 8352; *voce* LITIGIOUS.

1707. December 23.

ALEXANDER BROWN, Merchant in Edinburgh, *against* HARY Dow, Writer there.

No 32.

Oath acknowledging the receipt of money pursued for, but that the same was expended by the deponent in payment of the owner's debt, found not to instruct the payment, as being an extrinsic quality.

ALEXANDER BROWN, as assignee by Thomas Wordie, merchant in Stirling, having pursued Hary Dow for an account of money received by him from the cedent, and referred the same to his oath; he deponed, acknowledging receipt of the money, but added, that as he received it, so he expended the same upon Wordie's law affairs before the session, and in payment of his creditors.

Alleged for the pursuer; The quality of the oath is extrinsic, and the defender ought to give a particular condescendence of his debursements on the pursuer's affairs, that it may be considered if they ought to be allowed; and as to what was paid to creditors, the bonds or bills satisfied must be given up to Wordie with their discharges, that he may be out of hazard of being distressed again for these debts; till all which be done, it cannot be known whether Mr Dow hath taken discharges or assignations to the debts.

Answered for the defender; No quality of an oath can be intrinsic, if payment is not; an agent's debursement's in law affairs requires no instruction but

his account; and the quality must also prove the payment to creditors, seeing where there is no other mean of probation against a person but his oath, he may thereby exoner himself of his acknowledgment by the circumstantiate quality of payment, 28th May 1629, Gall *contra* Eviot, *infra*, h. t.; 10th July 1632, Lord Fenton *contra* Drummond, No 36. p. 13228.

THE LORDS found the quality extrinsic, and that Hary Dow must instruct otherwise than by his own oath, what he paid to Wordie's Creditors.

Fol. Dic. v. 2. p. 297. Forbes, p. 211.

No 32.

1737. July 26.

JAMES MEIKLE *against* JOHN TENNENT.

THE pursuer, as having right from Richard Meikle's Executor, brought a process against the defender for payment of 300 merks, which he had borrowed from Richard; and, as no written document had been given for the money, the pursuer *insisted*, That Tennent should confess or deny whether or not he had borrowed that sum from Richard Meikle.

The defender *answered*; He denied he ever borrowed or received that money from the deceased Richard Meikle, but on the express condition of repaying the same, only in case he should ask it in his own lifetime, and not otherwise, which was the reason why he required neither bill nor bond for the same.

THE LORDS found the quality in the declaration intrinsic.

C. Home, No 71. p. 121.

No 33.

Quality in a declaration, whether intrinsic or extrinsic?

1745. February 22.

CHRYSTIES *against* CHRYSTIE.

Two brothers having agreed, by a written contract, to implement a deed of their father's, notwithstanding any nullities or informalities therein contained; the heirs of the one brother, who died, pursuing the other for implement, put it to his oath, whether he had not signed such contract? He deponed *affirmative*; but adjected, that it was under a condition not contained in the contract, that the brothers should make mutual tailzies in each other's favour; under which condition he offered to implement the agreement. THE LORDS found the quality adjected was extrinsic.

Fol. Dic. v. 4. p. 205. D. Falconer.

No 34.

*** This case is No 41. p. 8437., *voce* LOCUS POENITENTIAE.