

No 55.

would have been an intrinsic quality; and possibly the same would have been the case, if he had expressly sworn, that, at any subsequent period it had been agreed, that the board was to impute in payment of the bill; but as he has only deposed, that at the distance of three years, an agreement was made for board, without adding that the board was to be imputed in payment of the bill; this has no immediate relation to the original loan; and therefore the claim for board stands entirely upon the footing of a ground of compensation unconnected with the bill, and of consequence must be otherwise proved than by the supposed creditor's oath, where no reference is made to it. The same observation holds with respect to the other furnishings said to have been made to the defunct; and the alleged promise made by Maclure, not to demand payment of the bill, is equally extrinsic. The whole decisions appealed to by the defender, differ from the present case in this, that in every one of them, the quality was immediately connected with the ground of debt; whereas here the quality adjected by the defender resolves clearly into a claim of compensation; and it is established by a variety of decisions observed under the present title in the Dictionary, that such claim is extrinsic.

'THE LORDS found the quality of the oath extrinsic; but found the defender entitled to retain the sum in the bill, until the charger or his cedent accounted to him for two seventh parts of Michael Maclure's executry; and found the defender entitled to plead compensation on such articles of furnishings as he had already instructed, or could instruct, that he had laid out on Michael Maclure's funerals.'

Act. *Montgomery.*Alt. *W. Stewart.*Clerk, *Kilpatrick.*

J. C.

Fol. Dic. v. 4. p. 206. Fac. Col. No 21. p. 38.

No 56.

A bill prescribed found due, the debtor acknowledged the debt, but adding that it was for wine which was useless, and which had been admitted by the creditor to be so.

1784. November 19. DUNCAN ROBERTSON against JOHN CLARKSON.

ROBERTSON pursued Clarkson for payment of a bill which had undergone the sexennial prescription; so that the debt contained in it could not be proved but by the oath or the writ of the debtor. What the latter alleged, and offered to depone, was, that the only value he got for the bill was a quantity of wine, which on trial he found to be totally unfit for use; That he recently intimated this discovery to the seller, who satisfied with the information, signified how unnecessary it was to return the wine, as the price of it would not be demanded; and that in a vain attempt to meliorate it, he had expended a considerable sum. Accordingly these allegations were understood as if made upon oath.

Pleaded for the pursuer; The defender has acknowledged the debt; and though he likewise alleges that he suffered loss from a defect he discovered in the quality of the wine, this exception, which is really a plea of compensation.

is extrinsic to his admission, and cannot be established but by a separate action.

No 56.

Answered; In a question which relates to the constitution of a debt, it cannot be an extrinsic exception, that the debt never existed. And this is truly the plea of the defender, who only says so in explicit terms when he describes the absolute uselessness of the subject, from the real value of which alone the debt could have arisen; and who affirms that he recently made an offer of returning the wine, which was refused.

THE LORD ORDINARY "sustained the defence of the sexennial prescription;" but the COURT altered that interlocutor, and

"Repelled the defence of prescription."

A reclaiming petition for the defender was afterwards refused, without answers.

Lord Ordinary, *Ankerville*. Act. *J. Grant*. Alt. *D. Armstrong*. Clerk, *Menzies*.
S. *Fol. Dic. v. 4. p. 206. Fac. Col. No 156. p. 279.*

1799. June 29. ADAM RANKINE against THOMAS ADAIR.

IN 1796, Adam Rankine brought an action against Thomas Adair, writer to the signet, for payment of a bill, for L. 100 payable one day after date, which the defender had granted to William Morrison in 1788, and to which the pursuer had right by indorsation.

No 57.

As the bill was prescribed, resting owing was referred to the oath of the defender.

Again found, that when resting owing is referred to the oath of the debtor in a prescribed bill, compensation is extrinsic.

His deposition bore, that the debt in the bill was originally constituted by a bill to the father of William Morrison; that old Morrison and his wife possessed a small farm belonging to the defender, on a lease to the longest liver of them, containing an obligation to support the houses and fences; that upon old Morrison's death, his widow acquired right to the bill; and that at the joint desire of her and of her son William Morrison, it was exchanged for the bill now claimed for, on the defender's receiving a positive assurance from Morrison, that the stipulations of the lease should be punctually performed; that the arrears of rent now amounted to L. 21*, and the defender supposed it would require at least L. 30 to put the subjects in the state of repair required by the lease; that these claims had been allowed to lie over, on assurances from Morrison that they should be deducted from the bill when it came to be settled; that trusting to the bill for his payment, the defender had done some business for Morrison, for which L. 13 : 19 : 1½ were due to him, and that with these deductions he was willing to pay the bill.

* The Rent was L. 3 a-year.