

funct, and abstracted by them, the libel being referred to the defenders oaths, they deponed, that Agnes Wilkie, some weeks before her death, gifted and delivered to them certain particulars in goods and money, partly, to see her honestly buried, partly, in requital of their attendance on her during her sickness.

THE LORDS found the quality of being gifted, intrinsic to the oath, and a sufficient ground to assoilzie the deponents. Albeit it was *alleged* for Patrick Mortimer, That qualities *super facto alieno* are never reckoned intrinsic, 6th November 1667, Fife *contra* Daw, No 46. p. 13233.; and that the things were gifted, is the fact of another person which should be proved, and *donatio nunquam præsunitur*. In respect it was *answered*. That intromission with moveables being referred to a party's oath, he might qualify the cause of his intromission, 3d February 1672, Scot *contra* Elliot, No 36. p. 13228.

*Fol. Dic. v. 2. p. 298. Forbes, p. 384.*

No 42.  
ables being referred to the parties' oaths, and they having deponed that they were gifted to them by the defunct, the quality of being gifted was found intrinsic.

---



---

SECT. V.

No exception will be sustained unless proponed at Litiscontestation.

1623. February 26. JOHN RULE *against* THOMAS HAMILTON.

THOMAS HAMILTON in Leith being obliged to pay to John Rule L. 100, and John Rule being addebted to others in greater sums, one of the creditors pursued Thomas Hamilton to make the sum of L. 100, owing by him to Rule, forthcoming, and likewise summoned Rule for his interest. The pursuer referred the verity of the debt to Hamilton's oath. He made faith, that he rested only L. 42, which he was decerned to pay, and paid. Thereafter, Rule charges Hamilton to pay L. 100, conform to his bond. He suspends upon the decret given upon his oath, and payment made conform thereto. Rule *answered*, That he had referred nothing to his oath, but proved the debt by the bond. THE LORDS found, that, because Rule had not in the first judgment used the bond to prove the debt against Hamilton, but suffered his oath of verity to be taken, he could not now be received to use any other probation whereby Hamilton might be proved mansworn. *Haddington, MS. No 2786.*

No 43.

1624. July 1. KINLOCHY *against* Lord CONSERVATOR.

THE Conservator being pursued by one Kinloch, for payment of money contained in his bond, against which pursuit, he *alleging* nullity of the bond, because it wanted witnesses; whereto it was *replied*, That it was holograph,

No 44.  
It was referred to oath, whether a.

## No 44.

bond wanting witnesses was holograph. The defender acknowledged, but added, the debt was paid. The quality found extrinsic.

which was referred to the party's oath; and he being sworn thereupon, deponed, that the bond was his hand writ, but that he took it on his conscience, that he had truly paid the sum therein contained, to the person to whom the bond was made many years since; which bond was given to him out of his own charity without any onerous or other necessary impulsive cause to the person to whom he was bound being his near kinsman for his help there being more than thirty years since the date thereof, and the person to whom it was given living many years after the bond who died but lately in a poor estate, and who, if it had been unpaid, would not have omitted or delayed so long to have sought it; and it being found by his executors since his decease, who had made Kinloch the pursuer assignee thereto, he had good reason to defend himself against that pursuit; which oath being considered by the LORDS, they found, that the oath confessing the hand-writ proved the reply, and had no respect to the second part of his declaration bearing the payment; seeing that was an exception which he could not swear himself, to import his liberation, not being referred to his oath; and so the LORDS divided the deponer's oath, which usually is respected ever conjunctly as the same is given.

Clerk, Hay.

Fol. Dic. v. 2. p. 299. Durie, p. 134.

## No 45.

Found in conformity with the above. The quality resolves into an exception, and ought to have been proponed before litiscontestation, and a qualified oath protested for. In this case, it was the verity of the subscription which was at issue; not whether the deed was holograph.

631. February 9. BARRENS, Dutchman, against HUTCHISON.

THE Dutchman pursuing for a debt, which he instructed by production of a ticket marked with two initial letters of the defender's name; the verity of the which subscription being referred to his oath, and he compearing, and by his qualified oath granting the subscription, but declaring that he had paid the debt, the ticket being dated sixteen years since, and he never being pursued therefore; the party's *contending*, That this part of the deposition should not be respected anent the payment, because it was not referred to his oath; and that he ought not swear an exception which he ought otherwise to prove; and the defender *alleging*, That seeing the writ being imperfect was supplied by his oath, he might declare *qualificate* upon the whole cause, and upon the verity of the debt, if it was yet owing unpaid;—the LORDS found, That that part of the oath bearing payment of the debt ought not to be respected, and that the defender was not freed thereby; but if he would propone an exception of payment, (which the LORDS found he might do, if he pleased, in the same state of the process) that they would suffer him to propone the same, and that he ought to prove it, as accords of the law, otherwise than by his own oath. Here the ticket libelled bore on the back payment of a part of the debt, and the presumption that the rest was owing was more considerable than any thing shown to the contrary.

Ac. Craig.

Alt. Russell.

Clerk, Gibson.

Fol. Dic. v. 2. p. 300. Durie, p. 566.