1679. *November* 21. ALLAN *against* YOUNG.

No 31.
A debtor in furthcoming, to whose oath resting owing was referred, acknowledged he owed a sum by bond, but had paid a part in meal. Not intrinsic.

JAMES ALLAN as assignee by James Turnbull, to a bond of 400 merks, granted by George Young, charges him thereupon. He suspends on this reason, That John Loch being creditor to Turnbull, arrested all sums due by George Young to Turnbull, and pursued him to make forthcoming, and referred the debt to his oath; whereupon he deponed that he had been debtor to Turnbull in 400 merks by bond, and that he had paid a part thereof by certain bolls of meal, oats, and a horse delivered to Turnbull, and that he was only resting him 100 merks, for which he was decerned, and of which he made payment and produced a discharge; so that the debt having been referred to his oath, and the same given, it is the end of all controversy, he having deponed both upon the debt and payment, as is ordinary; and in that process Turnbull himself was called, personally apprehended, though he appeared not, so that if Turnbull had referred the debt to his oath, he could not thereafter insist against him upon writ, and it is equivalent when Loch referred the same to his oath, Turnbull being called. It was *answered*, That if the debt referred to his oath had not been constituted by writ, the debtor's oath might both have been taken upon the debt and the payment; but seeing Young, in his oath, acknowledged he was debtor by bond, it was an incompetent quality to depone that he had paid it, which was an exception only proveable by Turnbull's oath or writ; and if this were sustained, it were easy for a debtor, by collusion with a creditor, to evacuate his bond by his own oath; it being rare, that the debtor whose sum is arrested compears in process to make forthcoming. It was *replied*, That whatever might be pretended *de recenti*, yet here Turnbull having acquiesced, and being now dead, whereby Young has lost the manner of probation by his oath, the decreet must stand effectual; and produced a practick of Haddington's, the 26th day of February 1623, Rule *contra* Hamilton in the like case, *infra*, *h. t.*

THE LORDS found that the oath acknowledging the debt due by writ, yet payment might be rejected by way of quality, but, seeing Turnbull the creditor was dead, they allowed Young to instruct by witnesses or other evidences the payment he had made to Turnbull.

Fol. Dic. v. 2. *p.* 297. *Stair, v.* 2. *p.* 708.

*** Fountainhall reports this case:

IN the charge James Allan against George Young portioner of Winchburgh, whose reason of suspension was, that in a pursuit to make furthcoming by a creditor of Mr James Turnbull's, who was James Allan's cedent, he had compeared, and deponed upon oath that it was all paid by him except L. 109, and that oath behoved to stand, since the said Mr James was called in that ac-

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*, *h. 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. 1. 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