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. 2*do*, 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. 3*tio*, 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. No 25.

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, *Woodhall.* 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.

No 26.

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

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.

prove the debts contained in the said bills, and that the same are resting owing, by the oaths or writs of the debtor." By this act the bills founded on are no longer documents of debt. Parties are in the same situation as if no bills had been granted. Now, were this pursuer insisting for money as advanced by him, it would be undoubtedly relevant for the defender to swear, that he was never debtor to him, all his advances to the deponent having been made in implement of a prior obligation. The authorities and decisions quoted apply to cases, either where the written obligation subsisted in full force, or where the allegation of payment was founded on circumstances entirely foreign to the obligation sued on, and so resolved into a plea of compensation, which cannot be established by the oath of the party using it.

The Lord Ordinary found, "That the oath in this case did not prove resting owing;" and to this judgment the Lords adhered, upon advising a reclaiming petition with answers.

Lord Ordinary, *Gardenston.* Act. *M'Cormick.* Alt. *Cullen.* Clerk, *Orme.*

C. *Fol. Dic. v.* 4. *p.* 204. *Fac. Col. No* 36. *p.* 57.

1786. *June* 21. Robert Hay *against* Robert Fulton.

No 27.

In what cases payment to a third party, at the desire of the creditor, is held to be an intrinsic quality?

Robert Fulton was examined, on a reference to oath, with regard to a debt of L. 11 : 14 : 8 sued for by Robert Hay.

He deponed, "That the debt was ~~not resting~~ owing by him: That the pursuer was owing to William Lymeburner the exact sum of L. 11 : 14 : 8; and, so far as he the deponent remembers, he gave the deponent a verbal order to pay the said sum to William Lymeburner; and which sum the deponent accordingly paid."

The question therefore being, Whether those circumstances of payment, which were all of them positively denied by the pursuer, could be considered as intrinsic, the defender

Pleaded; It cannot admit of doubt, that payment, which is the natural mode of dissolving a claim of debt, must be an intrinsic quality in an oath emitted with regard to it. Neither can it make any difference, whether such payment was made to the creditor himself, or by his order, to another. So accordingly it has been often decided, 6th July 1711, Clerk *contra* Dallas, No 21. p. 13213.; 14th January 1737, Moffat *contra* Moffat, No 22. p. 13214.; — March 1759, Bett *contra* Hardie, No 25. p. 13217.

Answered; The defender's argument might have been of some weight, if the person authorised to receive the money had been employed, as in the cases above alluded to, for the purpose merely of delivering it to the creditor. But where the object of the alleged mandate was to extinguish a debt due by the creditor to a third party, a general oath of payment is by no means sufficient.