

APPENDIX.

PART. I.

O A T H.

1805. February 28. MACNIELL *against* MACKISSOCK.

AN action was brought before the Sheriff of Ayr, by Alexander Macniell, writer in Stranraer, against David Mackissock, for payment of the balance due on a bill dated the 29th August 1787, on which no payment had been made since 1788. Mackissock pleaded prescription. Reference was made to his oath, and he deponed, That he accepted the bill for smuggled goods: That he paid no more than what had been allowed, but, as he was a great loser by the bargain, that he did not look-upon himself as owing the balance.

The Sheriff found, That the qualities adjected to the oath were extrinsic, and therefore repelled the defences. The cause was advocated; and the Lord Ordinary pronounced an interlocutor, finding the quality adjected to the defender's oath to be extrinsic, but without prejudice to his instructing *aliunde*, that the bill was granted for smuggled goods. Mackissock presented a petition to the Court against this interlocutor, and

Pleaded: The act 12th Geo. III. cap. 12. which introduces the sexennial prescription of bills of exchange, makes a distinction between the document of debt, and the debt itself. The debt may be substantiated by the oath of the debtor, though the bill is cut off by the lapse of six years; Armstrong against Johnston, May 16, 1804, No. 338. p. 11140. As the pursuer, therefore, derives no advantage from the bill, the debt is liable to be restricted or extinguished like any other debt, by a plea of payment, compensation, or any other qualification negative to the averment of resting-owing; and there can be no doubt, that the qualification adjected to the defender's oath, that the bill was granted for smuggled goods, is such as to preclude any action for recovery of the contents; Cockburn against Grants, November 2, 1741, No. 78. p. 9539; Duncan against

No. 1.
Intrinsic or
extrinsic
quality

No. 1. Thomson, February 8, 1776, APPENDIX, PART I. *voce* PACTUM ILLICITUM, No. 1. Cantley against Robertson, February 11, 1790, No. 87. p. 9550. Young against Imlack, July 7, 1790, No. 88. p. 9552; Reid against Macdonald, May 15, 1793, No. 91. p. 9555.

But the petition was refused, without answers; the Court being of opinion, that the quality resolved into a ground of challenge, which required to be supported by a proof.

Lord Ordinary, *Meadowbank*.
Clerk, *Pringle*.

For Petitioner, *Maconochie*.

Agent, *Ro. Young*.

J.

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