

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.

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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.*

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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,

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It was referred to oath, whether a.