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.

It is farther requisite to prove, by the receipt or discharge of him who is said to have received the money, that the mandate has been truly fulfilled; otherwise the mandant, instead of being released from his obligation, might afterwards be obliged to pay a second time. In that manner, too, though a defender is not allowed, on a reference to oath, to rear up claims of compensation in his own favour, he might do so in favour of another, and thereby, indirectly, deprive his creditor of what is owing to him. No 27.

THE LORD ORDINARY found, "That the defender has not brought sufficient evidence of his having paid the sum of L. 11 : 14 : 8 to Lymeburner, in consequence of the pursuer's order, so as to support the assertion of such payment set forth in his oath."

And, after advising a reclaiming petition for the defender, with answers for the pursuer,

THE LORDS adhered to the judgment of the Lord Ordinary.

Lord Ordinary, *Elliock.* Act. *Cullen.* Alt. *M'Cormick.* Clerk, *Sinclair.*
C. *Fol. Dic. v.* 4. *p.* 204. *Fac. Col. No* 274. *p.* 422.

1793. *June.* GRANT *against* CREDITORS of GRANT.

No 28.

A MAN being sued for payment of a bill which was prescribed, and resting being referred to his oath, he swore the bill was due, but that there was a sum at granting it owing to him equal to the sum in the bill, which had been overlooked by the parties; and that, upon discovering it, the granter had agreed to cancel the bill, which he had not then in his possession. It was questioned, whether this was an intrinsic or extrinsic quality? The Court found it intrinsic, as it in fact proved the debt not to be owing. See APPENDIX.

Fol. Dic. v. 4. *p.* 205.