is extrinsic to his admission, and cannot be established but by a separate action. No 56.

Answered; In a question which relates to the constitution of a debt, it cannot be an extrinsic exception, that the debt never existed. And this is truly the plea of the defender, who only says so in explicit terms when he describes the absolute uselessness of the subject, from the real value of which alone the debt could have arisen; and who affirms that he recently made an offer of returning the wine, which was refused.

THE LORD ORDINARY "sustained the defence of the sexennial prescription;" but the COURT altered that interlocutor, and

"Repelled the defence of prescription."

A reclaiming petition for the defender was afterwards refused, without answers.

Lord Ordinary, *Ankerville*. Act. *J. Grant*. Alt. *D. Armstrong*. Clerk, *Menzies*.

S. *Fol. Dic. v. 4. p. 206. Fac. Col. No 156. p. 279.*

1799. *June* 29. ADAM RANKINE *against* THOMAS ADAIR.

No 57.

Again found, that when resting owing is referred to the oath of the debtor in a prescribed bill, compensation is extrinsic.

IN 1796, Adam Rankine brought an action against Thomas Adair, writer to the signet, for payment of a bill, for L. 100 payable one day after date, which the defender had granted to William Morrison in 1788, and to which the pursuer had right by indorsation.

As the bill was prescribed, resting owing was referred to the oath of the defender.

His deposition bore, that the debt in the bill was originally constituted by a bill to the father of William Morrison; that old Morrison and his wife possessed a small farm belonging to the defender, on a lease to the longest liver of them, containing an obligation to support the houses and fences; that upon old Morrison's death, his widow acquired right to the bill; and that at the joint desire of her and of her son William Morrison, it was exchanged for the bill now claimed for, on the defender's receiving a positive assurance from Morrison, that the stipulations of the lease should be punctually performed; that the arrears of rent now amounted to L. 21*, and the defender supposed it would require at least L. 30 to put the subjects in the state of repair required by the lease; that these claims had been allowed to lie over, on assurances from Morrison that they should be deducted from the bill when it came to be settled; that trusting to the bill for his payment, the defender had done some business for Morrison, for which L. 13 : 19 : 1½ were due to him, and that with these deductions he was willing to pay the bill.

* The Rent was L. 3 a-year.

No 57.

In his pleadings, the defender stated, that the pursuer had not acquired right to the bill till it was prescribed, and that it had been transferred to him without value.

THE LORD ORDINARY found the defender entitled to plead compensation on the articles above mentioned; but as the sum required for repairing the houses and fences was not sufficiently ascertained, remitted to farmers to report on the subject.

In a reclaiming petition, the pursuer, besides an argument on the supposition of his being an onerous indorsee before the six years had elapsed, which did not weigh with the Court,

Pleaded; Compensation is always an extrinsic quality in an oath upon reference as to resting owing, because in adding that quality, the defender does not give a direct answer to the question put to him, which relates solely to the particular debt then in dispute. It is therefore quite different from the quality of payment, The counter claims which the defender may suppose himself to have against the pursuer, may not be inconsistent with an affirmative answer to the question put to the defender; and they are not in view at the reference, which implies no intention of allowing the defender to establish them by his own oath; Erskine, b. 4. tit. 2. § 11.; 11th February 1761, Mitchell against Macilnay, No 55. p. 13241.

The justice of the defender's claims is disputed in the present case; yet if they are to be at all regarded, the oath must be conclusive even as to their amount, which would be unreasonable.

Answered; When a reference is necessary only to establish the constitution of a debt not prescribed, the quality of compensation on a claim afterwards emerging, is indeed extrinsic, and the defender must prove his counter claim *aliunde*. But when, as here, it is incumbent on the pursuer to prove the present subsistence, as well as the original constitution of the debt, the quality of compensation being, like payment, a direct negative to the question put to the pefender, must be considered as intrinsic; 14th January 1737, Moffat against Moffat, No 22. p. 13214.; 6th July 1711, Clark against Dallas, No 21. p. 13213.; Erskine, b. 4. tit. 2. § 11.

Besides, the defender's right to deduction for rent and repairs is, in terms of the oath, *pars contractus* at the granting of the bill, an inherent condition even in the constitution of the debt, and to be considered in a different light from claims arising at a subsequent period; 5th June 1711, Forbes against Debtors of Craigy, No 20. p. 13212.; 8th February 1707, Maitland against Baillies, No 19. p. 13212.

Upon advising a petition, with answers, the LORDS "found the claim of compensation is an extrinsic quality in the defender's oath, and in so far altered the interlocutor of the Lord Ordinary reclaimed against, and remitted to the Lord Ordinary to proceed accordingly.'

A reclaiming petition was (12th November) refused without answers.

No 57.

THE LORD ORDINARY (20th December) found the defender liable for the bill libelled on, reserving to him to establish his claim of compensation by a separate action.

And a petition, craving a proof of the counter claims *hoc statu*, was (31st January 1800) refused without answers.

Lord Ordinary, *Craig*. Act. *Jeffrey*. Alt. *Hay*, *Gillies* Clerk, *Sinclair*.
D. D. *Fac. Col. No* 136. *p.* 308.

SECT. VII.

Where the adjected quality is not relevant.

1611. *June* 15. LAIRD of TORSONS *against* PRINGLE.

No 58.

A MATTER being referred to the party's oath, and he by his declaration affirming that which is offered to be proved, and therewithal adjecting conditions destructive of the allegeance, such as a clause irritant in case of failzie, and that the failzie is committed, the allegeance will be found proved, reserving to him his action for declarator of the failzie or contravening the conditions.

Fol. Dic. v. 2. *p.* 301. *Haddington, MS. No* 2217.

1714. *July* 16.
JOHN CARSE, Writer in Edinburgh, *against* Sir JOHN KENNEDY of Colzean.

No 59.
A father deponed in an exhibition, that he had cancelled a bond of provision to his child, because he had executed it in minority without consent of his curators. The minority and want of consent found extrinsic.

JOHN CARSE, as assignee by Dame Jean Kennedy, and Sir Gilbert Kennedy of Girvanmains, her husband, pursued an exhibition against the deceased Sir Archibald Kennedy of Colzean, for exhibiting and delivering a contract of marriage, past betwixt the said Sir Archibald, father of the said Dame Jean Kennedy, and Mrs Elizabeth Lesly, her mother, wherein, among other things, Sir Archibald bound him and his heirs to pay to the daughters of the marriage, at the term, and with annualrent and penalty, as was more fully contained in the libel, the sum of L. 2,000 Sterling equally among them; and subsumed, that the said Dame Jean Kennedy, being one of the four daughters, had right to a fourth part of the said sums; and concluded, that the contract being exhibited, the said Sir Archibald ought to be decerned to pay the said