SECT. IV.

Where the libel as laid is irrelevant.

1632. *July* 10. Lord Fenton *against* Archibald Drummond.

No 36.

Intromission with corns, being referred to a parties oath, and he deponing that he had lawfully poinded them, the Lords admitted this exception.

Intromission with moveables being referred to oath, it was found an intrinsic quality, that they were freely gifted.

In an action of count and reckoning, of the said Archibald as chamberlain, for his intromission with the Earl of Kelly's rent, and others particularly libeled, there being an article of the said Archibald's intromission with the corns of one of the tenants of Kelly, which grew upon the room laboured by the said tenant, and therefore it was craved that the said Archibald should pay the farm of that room, the tenant's self being dead, and Archibald having intromitted with the whole crop that grew; and the said Archibald *alleging*, That his intromission was for satisfaction of certain rests of other years farms' addebted by that same tenant, for the whole which he poinded it, and intromitted with the corns controverted; the Lords found, seeing his intromission with the corns was referred to his oath, that he might swear, that he intromitted for satisfying the cause foresaid of the preceding debt; and found, that they would not divide his oath, and that he needed not to show any either writ or decreet, whereby the tenant was constituted his debtor of these preceding rests, nor any act of Court, nor other warrant to poind the corns therefore, but that his oath was sufficient for all; and sicklike, he being charged for intromitting with five puncheons of wine of the pursuer's, and which were sold by Archibald, and which was referred to his oath, who declared, that he intromitted with them, and sold them, but that they were freely gifted to him of before by the Earl of Kelly; and the pursuer *answering*, That that was not referred to his oath, if they were gifted, but only his intromission; the Lords *ut supra* would not divide his declaration, but found, that he might depone that they were gifted, and that he had no necessity to except and prove that they were gifted, either by the Earl of Kelly's oath, or otherways.

Act. *Burnet, Major.* Alt. *Minor.* Clerk, *Gibson.*

Fol. Dic. v. 2. p. 298. *Durie, p.* 641.

1672. *February* 3. Scot of Gorrinberry *against* Elliot.

No 37.

As possession presumes property in moveables, a libel concluding restitution upon intromission with moveables, cannot be relevant, unless the pursuer qualify *quomodo desiit possedere*; and therefore, when such a libel is referred to the

defender's oath, he may either object to the relevancy, or set forth the title of his intromission, and protest for a qualified oath, which will be sustained to him. No 37.

Fol. Dic. v. 2. p. 298. Stair.

*** This case is No 624. p. 12727. *voce* PROOF.

1677. *November* 14. EDGAR *against* EWING.

No 38.

In anno 1658, William Ewing, messenger, having apprehended John Edgar, merchant in Edinburgh, and for his expense, got a verbal order to lift some of John's money; he now convenes him before the Bailies of Edinburgh, to repay it, and refers the intromission to his oath. He depones he lifted it, but it was for his own behoof, Edgar being owing him as much. This is sought to be advocated on this reason, that the Bailies would divide the quality, and put him to prove it. THE LORDS refused to divide it, and so, with one breath, advocated and assoilzied, since, if the messenger would have perjured himself, he would simply have denied the meddling, their being nothing extant to prove it upon him.

Fol. Dic. v. 2. p. 298. Fountainhall, MS.

1679. *November* 29. IRVINGS *against* KILPATRICK.

No 39.
Vitious intromission sustained against a party who had deponed that he bought goods belonging to a defunct, within ten days of his death, from his son-in-law, who had a disposition thereof, in respect the disposition was not produced.

IRVINGS having pursued Kilpatrick for vitious intromission with the goods of Johnstoun of Clacharie, for payment of a debt due by Clacharie, this defence was found relevant, that Kilpatrick had bought certain goods from Craik of Stewartoun, who had disposition thereof from Johnstoun of Clacharie, and had paid the same accordingly. At the advising of the cause, the disposition of the moveables by Clacharie to Stewartoun was not produced, but Kilpatrick deponed, that he had bought several goods from Stewartoun, who had intromitted with Clacharie's goods, and that he had bought the same within ten days after Clacharie's death; whereupon it was *alleged*, That Kilpatrick ought to be decerned, because he produced not the disposition conform to the act, and by his oath acknowledged that he had intromitted with the defunct's goods, and he could not pretend that he had bought them *bona fide*, having deponed that he bought them within ten days of Clacharie's death, from Stewarton, who had intromitted with Clacharie's goods, and therefore it has been a mere collusion, Kilpatrick having married a daughter of Clacharie's; and though buying *bona fide* in a market, or otherways, may secure a stranger, yet that cannot secure this defender. It was *answered*, That the alleging upon the disposition was *ex superabundante*, and the oath is sufficient to clear against vitious intromission, at least to restrict it *quoad valorem*.

Yet the LORDS found the defender liable *simpliciter*, as vitious intromitter.

Fol. Dic. v. 2. p. 298. Stair, v. 2. p. 712.