

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.

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.

No 38.

1679. November 29. IRVINGS against KILPATRICK.

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.

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.