No 15.

The Judge found it proved, " That the defender engaged the pursuer as chief mate, and that he acted as such, and was to have Daniel Blair's wages; but found that quality in the defender's deposition, that the pursuer refused to act in any other station than as second mate, to be extrinsic, and ordained him to prove it;" and, on failure thereof, pronounced decreet, which being suspended, the LORD ORDINARY, 8th November 1750, " found the letters orderly proceeded."

Pleaded, in a reclaiming bill, The agreement to serve during the voyage as second mate is proved by writ. It is only proved by oath that he served any time as first mate, or that the defender agreed to pay him as such; and the oath limits the time for which only he can have any claim.

Answered, It is proved by oath the bargain was passed from, and a new bargain concluded; the passing again from which is an extrinsic quality.

THE LORDS found the quality intrinsic.

Fol. Dic. v. 4. *p.* 203. *D. Falconer, v.* 2. *No* 202. *p.* 244.

1765. *July.*

JOHN and WILLIAM HOWIES, Nephews and Executors of the Deceased ROBERT POLLOCK, *against* MARGARET WYLIE, his Relict.

No 16.
A relict sued for intromission with the effects of her deceased husband, deponed, that, some days before his death, he had made a donation to her of a sum of money. The quality found intrinsic.

JOHN and William Howies, the nephews and executors of the deceased Robert Pollock, brought a process against his relict, before the Commissary of Glasgow, libelling, *inter alia*, that she had, " before and since her said husband's death, intromitted with, or uplifted and received cash and other moveables, which pertained and was owing to him, or in his chest, or other repositories, at his death, to the value and extent of 2000 merks Scots."

The defender having denied the libel, as laid, the pursuers referred the same to her oath; and she deponed, That " the defunct, two or three days before his death, delivered to the deponent 24 guineas, and a piece of gold, whereof she knew not the value, and two crown pieces, and two or three half crowns, all which he gave her in compliment for her own use."

Upon this, the Commissary found the libel not proved, in so far as respected the 24 guineas and the gold and silver pieces; but, upon an advocation, Lord Alemoor, Ordinary, found, " that it would be of dangerous consequence to admit intromitters with the monies and effects of deceased or dying persons, to prove their title of intromissions by their own oaths; therefore, finds the defender, in this case, liable to account to the pursuers for the 24 guineas, piece of gold, crown pieces, and half crown pieces, mentioned in her oath."

Margaret Wylie reclaimed, and *pleaded*, That the interlocutor proceeded upon a *petitio principii*; for the point *de quo quaeritur*, and referred to her oath, was, whether she had any intromission or not? Had the fact been established, that there was a sum belonging to her husband, and that it had come into her possession when he was dying, or after his death, the *ratio decidendi* might have

applied; but the pursuer had no other way of proving that there was an intromission, but her oath; and they accordingly did refer *simpliciter* to her oath, whether she had intromitted with any money belonging to her husband at or about the time of his death. Her deposition resolves into a flat denial of the fact. She does not admit, that she had any intromission with the money in question, as belonging to her husband. She owns indeed, that this money was once in his possession; but she says, that he delivered it out of his own hand to her in a compliment, which is an express denial of the fact alleged by the pursuers, viz. that, at or about the time of her husband's death, she intromitted with money of his, lying in his repositories. Had the pursuers proved *aliunde*, that the defender was in possession of 24 guineas, which had belonged to her husband some days before he died, there might have been room for insisting, that the defence of donation was not proveable by her oath, or dangerous to admit it to be so; for, even in such case, by the principles of law, the *onus probandi* ought to have been laid upon the pursuers; as it is an established maxim, that moveables, or money in the possession of any person, are presumed to be his property, unless the contrary be proved. But, whatever might have been the determination in such a case, where the only question was as to the title of the defender's intromission, it is plain, that the present case is totally different; for the pursuers pretend not to have any evidence, that the defender was possessed of money which had formerly belonged to her husband. They referred the whole matter to her oath, and it resolves into an express denial of the libel; and the quality of donation is clearly intrinsic, being inconsistent with the fact alleged against her. If the quality of the oath be rejected, the whole must be rejected, and it must still lie on the pursuers to prove, that she is in possession of 24 guineas, which once belonged to her husband. The decisions proceed upon the principles maintained by the petitioner; and there was a late judgment very much in point, 21st November 1759, James Mitchell *against* Thomas Wright, No 32. p. 8082. No 16.

Answered for the Howies, The defender's oath would have been final and decisive, had the point referred been, whether or not the monies in question were gifted to her by her husband? but that was not the case; she did not allege such gifts in her defences, nor was it the subject of reference. It was the intromitting with, and having monies in her possession, that had belonged to her husband, that was referred to oath. Intromission is in effect acknowledged, but a quality adjected. And the present case is evidently a question concerning the title of her intromission, and whether she can be allowed to prove the title of donation, in order to screen her undue intromission.

The principles upon which adjected qualities, in cases *inter vivos*, are construed to be intrinsic, do not apply to cases of intromission with the effects of a dying or dead person. In cases *inter vivos*, the strong presumption that possession presumes property, gives the greatest latitude to the oath of party, and credit to such adjected qualities. A variety of such cases occur in that part of the Dictionary referred to by the defender, (in this title.) In these, the very nature of the claim

No 16. proves a voluntary delivery by the proprietor of the effects of the party, which presumes an absolute transference of the property, unless the contrary be proved by oath. But this presumption ceases in cases of intromission with the effects of persons dead or a-dying. The law is justly jealous of such intromissions; and it is of great moment, that the Lord Ordinary's interlocutor be followed as a rule, the consequence of which will be no more than this, that none can have right to the effects of dead persons, unless those who have taken care to have a proper document, and practices against which the law has found it necessary to enact penal sanctions, will thereby receive a more effectual check.

There is a decision which strongly confirms the doctrine maintained by the pursuers, 29th November 1679, Irvine against Kirkpatrick, *infra*, *h. t.* and thus abridged by Lord Kames, as on the margin: "But, as intromission with a party's moveables, after his decease, will not be presumed to be upon a title, because possession, in that case, does not presume property, vitious intromission being referred to a defender's oath, and he acknowledging that he got the goods from a third party, who had a disposition from the defunct, the quality was not respected, seeing he did not produce the disposition." Case of Wright, No 32. p. 8082. referred to by the defender, does not apply; for his oath was not in his own favour, but emitted by him *qua* depositary, with respect to the purpose of the depositation.

"The Lords altered the Lord Ordinary's interlocutor, and found the quality intrinsic."

Act. *Wil. Wallace.* Alt. *Ilay Campbell.*

J. M. *Fol. Dic. v.* 4. *p.* 203. *Fac. Col. No* 26. *p.* 43.

SECT. II.

Where resting owing is referred, are payment, or satisfaction, or payment to a third party, at the pursuer's desire, intrinsic?

1675. *June* 26. Gilchrist *against* Murray.

No 17. In a process for payment of a sum by the defender, the libel being referred to his oath, and he having declared with a quality, viz. that as he was debtor so he had made payment, partly in money, and partly in commodities and ware;

The Lords, upon advising of the oath, found, that the same not being special, as to the quality of payment, viz. how much was paid in money, and how much in goods, nor being special, as to the quantity of the several goods, did not admit the same; but, if it were made special, as to money paid by him, it