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

would be sustained *pro tanto*; and, as to the delivery of goods, in satisfaction of the debt, it resolved in an exception, and ought to be proved. No 17.

Clerk, *Hamilton*.

Fol. Dic. v. 2. p. 297. Dirleton, No 280. p. 136.

1702. *December* 22. JAMES NICOLSON *against* JAMES MURRAY.

No 18.
Resting owing of a merchant's account, after the three years, was referred to oath. The defender acknowledged he had received the goods from the pursuer and his partner, and paid the same to the partner. The quality found intrinsic.

JAMES NICOLSON of Trabroun, late Dean of Guild of Edinburgh, pursues James Murray, taylor, for L. 11 Sterling of account, as the price of merchant-ware sold to him; and it being past three years since the furnishing, the debt is referred to his oath. He depones, that he received the goods from the pursuer and Provost Home, they being in copartnery, and that he had paid Provost Home, and recovered his discharge of the same. The Bailies having advised this oath, they found it proved the furnishing, and that the quality adjected of his being in company with Provost Home was extrinsic, and behoved to be *aliunde* proved. James Murray thinking himself lesed by this interlocutor, raises advocation on the head of iniquity, and insisted on this reason, that the account being prescribed *quoad modum probandi*, he had no other way of proving but by his oath, and he having deponed on the fact as it was, the Bailies ought not to have divided it, but should have taken it in the terms it stood, the quality being intrinsic; for what if he had deponed it is not owing, but paid? they could have required no more; and he cannot be burdened with proving they were in copartnery together, they having treated with him as such; and the Lords have been in use to sustain this quality as intrinsic; 11th February 1624, Cassinbrow *contra* Irving, *infra, h. t.*; and 10th July 1632, Fenton *contra* Drummond, *infra, h. t. Answered*, That his oath cannot prove that the pursuer and Provost Home were in copartnery together, such an adjection being quite extrinsic, and debtors might be encouraged to add this to their oaths, that they received the goods from him and another person, which might lay a dangerous foundation to evite their lawful debts. THE LORDS found the quality intrinsic, the pursuit being without the three years; and that paying any one of the copartners, and recovering his discharge, exoners the debtor; and therefore assoilzied the defender.

Fol. Dic. v. 2. p. 297. Fountainhall, v. 2. p. 168.