

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 decret, 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