

received them in consequence of an agreement for teaching the pursuer the violin; Medina also acknowledged the receipt of some goods, with this quality, that he got them in consideration of pictures he was to draw of the pursuer and his lady, that he had made ready canvasses, and was still willing to perform. THE LORDS found these qualities intrinsic.

No 13.

*Fol. Dic. v. 2. p. 296.*

1730. February. CAMERON against DUNSKINE.

No 14.

In a pursuit upon a bill, an allegiance being made for the defender of a partial payment, which was referred to the pursuer's oath; and he deponing, that he received L. 5 Sterling, but that it was in payment of a separate open account; the LORDS found the quality extrinsic, and that the partial payment behoved to be applied to the bill, unless the pursuer would instruct the open account otherwise than by his own oath, notwithstanding that the allegiance of partial payment was not proved, the oath resolving into a denial thereof.—See APPENDIX.

*Fol. Dic. v. 2. p. 295.*

1751. February 20. THOMAS PADEN against ANDREW GOVAN.

No 15.

ANDREW GOVAN, Ship-master in Borrowstounness, hired Daniel Blair for his chief mate at L. 3: 10s. Sterling, and Thomas Paden, second mate, at L. 2: 12s: 6d. per month, for a voyage from Borrowstounness to Charlestown, in Carolina; thence to Borrowstounness, and thence to Rotterdam. Daniel Blair was discharged at Charlestown.

Paden pursued for wages as chief mate, before the Admiral-substitute at Borrowstounness, where the master deponed, "That the pursuer acted as chief mate from 6th or 7th September 1747, to 23d October thereafter, signed receipts, received on board the homeward-bound cargo. And being interrogated, if or not he was resolved to have gone to sea, and sailed homeward with the complainer as chief mate, till finding the ship leaky at Rebellion road, that the said ship was brought up again to Charlestown, where the complainer delivered the cargo, and hauled the ship down to a place to heave down, to make her fit for sea again? Deponed, that he was resolved to have sailed homeward with the pursuer as chief mate; and he acted as such till the ship was carried back to Charlestown to refit; and deponed, by his promise, that the pursuer was to have Daniel Blair's wages, as mentioned in the articles of agreement in process. Deponed, That after they returned to Charlestown, the pursuer refused to act in any other station aboard of the ship than what he first agreed for as second mate; and deponed, That he hired Alexander Crichton as chief mate; and that both he and the pursuer, Paden, kept journals, and navigated the ship homewards to Borrowstounness; that the pursuer acted as mate from Borrowstounness to Rotterdam, Crichton being discharged at Borrowstounness.

A ship-master being pursued by one he had engaged as second mate, and deponed, that, during the voyage, the first mate was dismissed, and the pursuer, for some time, served in his place; and that he intended to have brought him home as such, but the pursuer himself refused, whereon he hired another. The quality was found intrinsic.

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 decret, 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