No 152. elide the odious passive title of vitious intromitter; seeing *quilibet titulus coloratus excusat a vitio*; and if he did transport them before he had a title, it was only *custodiæ causa*, and for preservation from embezzlements; so the most that can be inferred against him is only for single restitution, or to be liable in the price of the goods sold; but not to import an universal passive title. *Answered*, If the nearest of kin, or others be allowed to put their hands summarily, and be assoilzied on procuring warrants *ex post facto*, there shall never be an intrommitter overtaken; but the moveables of debtors shall be abstracted and concealed; and our law knows no way to secure this, but a legal confirmation, and till that was gone about, his method was to have got them sealed up and sequestrated, as is prescribed by the act of sederunt 23d February 1692, concerning the inventorying the writs and goods of defuncts; whereby it appears his meddling and transportation of the goods at his own hand was most unwarrantable; and his posterior inventorying by order of a Bailie, and then confirming, can never purge, because the Bailie's warrant was not the habile way, and the confirmation was posterior to the raising and executing of the pursuer's summons against him; and if these were once sustained, there would be variety of devices and contrivances invented, to defraud just creditors. The Lords found the subsequent warrant nor confirmation did not purge the antecedent intromission, nor liberate him from vitious intromission; but in regard it was alleged for the defender, that any goods he transported were in his uncle's lifetime, and not after his death, the Lords thought this, if true, altered the case; and allowed them a conjunct probation as to the time.

*Fountainhall, v. 2. p. 279.*

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1713. *January* 22.

Janet Stark and David Tam, her Husband, *against* George Jolly, Writer in Edinburgh.

No 153.

In a process at the instance of Janet Stark and her husband against George Jolly, the Lords found the defender's intromission with L. 7: 10s. Scots being so small a sum, and but one single act, not relevant to infer vitious intromission.

*Forbes, p. 649.*

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1724. *July* 9.

Mr Zacharias Gemmil, and Others, *against* Robert Barclay.

No 154.
A person granted a disposition of his moveables to his wife, in which two stacks of oats and one of hay were omitted. His son, upon his

Charles Barclay of Busbie, the defender's father, granted a disposition of his moveables to his wife, in which only two stacks of oats and one of hay were omitted. The defender, upon his father's death, sold one of the stacks, and granted his receipt for L. 28: 4s. Scots, as part of the price, and applied the same to the payment of the funeral charges; upon which Mr Gemmil, and others of the father's creditors, insisted against him as a vitious intromitter.

It was *pleaded* in defence, That for so small an intromission he could not be overtaken on this passive title, especially when it appeared from the application of the sum received, that he had no intention to defraud his father's creditors. In support of this defence, the decision, Reoch against Cowan, No 150. p. 9828, and Stark and Tam against Jolly, *supra*, were adduced.

No 154. father's death, sold one of the stacks for 28l. 4s. Scots, and and applied the same to the payment of the funeral charges. The Lords found the intromission not relevant to subject the defender to the passive title of vitious intromission.

It was *answered* for the creditors, That (as my Lord Stair observes) although intromission by strangers, who have not so easy access to embezzle defunct's moveables, must be *per quasi universitatem*, yet a very small intromission should be sustained against an apparent heir, who may huddle up his intromissions, and in time ascribe them to singular titles, &c. B. 3. T. 6. § 3. That there was no necessity of instructing fraud in such an intromission, but the bare contraction of moveables by the heir was sufficient; and if intromission to the value of L. 28 should not subject him as well as a thousand, then no rule could be fixed. As to the decisions it was *answered*, That they were with respect to the uplifting of small sums due to a defunct, where the danger was not near so great, because the debt would remain due if uplifted without a title, and likewise a legal evidence might be had against the intromitter, viz. his discharge to the debtor; whereas the *ipsa corpora* of moveables may be easily embezzled, and no vestige remain.

*Replied*, That as this passive title was not designed for a snare, the intention and *animus* of the party was to be observed, rather than the fact; and it could not be supposed, that in the present case the heir, by selling of a stack of corn, designed either to defraud the creditors or enrich himself; and as my Lord Stair says, B. 3. T. 9. § 7. 'Intromission with one thing, or a small thing, will 'not infer this passive title.'

"THE LORDS found the intromission being with one particular of small value, not relevant to subject the defender to the passive title of vitious intromission."

Reporter, *Lord Newhall.* Act. *And. Macdowl et H. Dalrymple jun.*
Alt. *Pat. Leith.* Clerk, *Dalrymple.*

*Fol. Dic. v.* 4. *p.* 46. *Edgar, p.* 75.

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1739. *January* 26. BLACK *against* WALLACE and KINGS.

No 155.

MARY WALLACE being due the sum of 1000 merks by bond, a process for payment was brought after her decease against Elizabeth Wallace her sister, and John and Mary Kings, her children, concluding upon the passive title vitious intromission. The LORDS found it only proved against Elizabeth Wallace, That she had some small moveables in her custody for the behoof of John and Mary Kings, which had been in the possession of Mary Wallace preceding her decease, and that she delivered these moveables to John and Mary Kings upon their receipt; and found such custody and delivery not relevant to infer the