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passive title of vitious intromission against the said Elizabeth Wallace ; and found it proved, That the defenders John and Mary Kings did receive from the said Elizabeth Wallace some of their mother's body clothes, a five guinea piece of gold, and four small pieces, in value 23 shillings, and some household furniture, that had been in the possession of their mother before her decease, for which they granted receipts in process to the said Elizabeth Wallace ; but in respect of the small value of these particulars, and that special receipts were granted for them, and of the uncertainty whether the articles of household-plenishing did truly belong to Mary Wallace the mother, or to Mr John King her husband, and had only remained in her custody after the husband's death without title ; and that by the proof it appeared, that the bulk of the effects of Mary Wallace had been roused by John Wallace her brother ; found, That John and Mary Kings their intromission with the small particulars contained in the receipts, could not, in law, be construed an intromission *per universitatem*, and therefore not relevant to infer the penal passive title of vitious intromission against them.

Fol. Dic. v. 2. p. 41.

1756. March 9.

No 156.

Creditors who consented to the relict's intromission with the goods of a defunct, after they had been sequestered by the Commissary court, and received payment of their debts from the relict, were found liable to the other creditors *in valorem* of their intromissions.

WILLIAM CUMMING, and Others, *against* ARCHIBALD HART, and Others.

ALEXANDER LAW died suddenly and insolvent. Hart, a creditor, immediately upon his death, preferred a petition to the Commissaries of Edinburgh, setting forth, ' That Law had died suddenly ; that he owed considerable sums to Hart the petitioner ; that there was reason to suspect that his effects might be embezzled, in defraud of him and the other creditors ; therefore praying warrant to sequestrate and seal up the defunct's effects for the behoof of all concerned.'

The Commissaries granted the desire of this petition. The goods were inspected, and the warehouse locked up by Smith, an officer of court. Next day Smith inventoried and valued the goods, and took custody of the key.

A few days after, the defunct's relict granted her obligation, with two cautioners, to Hart and the other defenders, that she should rouse the effects which had been sequestered, and apply the price towards their payment ; and this obligation, with an inventory, of the goods, was delivered to John Watson doer for the defenders. Watson informed Smith, that the creditors had come to an agreement with the relict, and thereupon got the keys of the warehouse from him and delivered them to the relict. She roused the goods, and with the price paid off the defenders.

Cumming and other creditors, not parties to this transaction, pursued Hart and others for payment of their debts, upon the passive title of vitious intromission.

Pleaded for the defenders; Vicious intromission is penal and odious; it may not be intended against those who acted *bona fide* and openly; and the defenders did not secretly take possession of their debtor's goods, but took payment from the relict of their just debt, being prevailed upon by her to save to her and her family the expense of confirmation, &c. as there would be a reversion. The whole transaction with her were openly and fairly carried on; neither she nor they imagining there was any other creditors, and the roup was public. Although Hart applied for sequestration; and obtained it for the behoof of all concerned, yet there was no obligation upon him to go further; he might honestly stop here, and take payment of his debt when offered; and the relict is the intromitter, not the defenders.

Answered for the pursuers; The whole was a fraudulent contrivance to hinder a confirmation, and prevent all the creditors from coming in *pari passu*. The defunct's bankruptcy was notorious, as is evident from the words of Hart's application to the Commissaries. If the effects had been fairly divided, there would have been a great deficiency. To prevent this, the name of the relict is used, as she had nothing to lose; but the defenders, and their doer Watson, were the conductors of the whole. They, by the transaction with her, authorised her intromission, and by false representations, obtained the possession of the goods from Smith, thereby taking the goods out of the custody of the Court; a step highly irregular, as done both in contempt of the Court, and to defraud the pursuers.

The Court seemed to be of opinion, that there was no place for a passive title in this case; at the same time that the intromitting with the goods *sine titulo*, after they were in the hands of the Commissaries, and thereby defeating the legal sequestration, was highly irregular; as was likewise the taking such obligation from the relict, and receiving payment from her, all within the six months; that they ought therefore to be subjected *in valorem*.

"THE LORDS found the defenders liable to the pursuers for the debts pursued for, being within the value of their intromissions."

Act. Lockhart. Alt. Advocatus, A. Pringle. Clerk, Kirkpatrick.
W. S. Fol. Dic. v. 4. p. 47. Fac. Col. No 200. p. 298.

1772. June 19.

JAMES WILSON against JANET SMITH, and ROBERT ARMOUR her Husband.

WILSON sued the defenders, as representing his debtor Patrick Smith, father of Janet, insisting chiefly on the ground of vicious intromission with the defunct's moveables. In defence, it was stated, that, upon the death of Patrick Smith, Armour, his son-in-law, having engaged for his funeral charges, he, in virtue of a warrant obtained from the Bailies of Kilmarnock to that effect, sold, by roup, as much of the household furniture as defrayed the expense of the fu-

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Intromission with a defunct's effects, where there was no fraud, and the articles inconsiderable, found not to subject farther than *in valorem*.