

* * * Gosford reports this case :

June 5. 1675.—IN a pursuit at Murray of Abercairnie's instance against Nicol, as representing his father, at least vitious intromitter, in so far as he being a wright, he did make use of the work-looms, and employed the same for the space of a whole year after his father's decease, ought therefore to be liable for his father's debts;—it was *alleged* for the defender, That the making use of work-looms could infer no passive title, or make him vitious intromitter, seeing the defender having nothing left him, and being but a tradesman, did employ the same for his livelihood for some time; but his mother, who had intromitted with all the rest of his father's means, did thereafter sell and dispose upon the said work-looms, and so she could only be pursued as vitious intromitter.—THE LORDS did repel the defence, and decerned Nicol to make payment; which seems hard, he not being an apparent heir, nor having made profit by a vitious intromission; and passive titles being of so great import, ought to be qualified with great circumstances.

No 151.

Gosford, MS. No 755. p. 469.

1705. *June 29.*

PATRICK ARCHIBALD, Merchant in Leith, *against* GEORGE LAWSON, late Treasurer of Edinburgh.

IN the action at the instance of Patrick Archibald against George Lawson, the LORDS found the transporting of a person's chests or trunks after his death, from the place where he died to the defender's house, relevant to infer vitious intromission against him; and that the inventoring and rousing of the goods by virtue of a posterior warrant from a magistrate, (though before commencing of the pursuer's process) did not purge the vitiosity; albeit a subsequent confirmation, prior to the citation at the pursuer's instance, would have purged the former intromission.

No 152.

Fol. Dic. v. 2. p. 41. Forbes, p. 19.

* * * Fountainhall reports this case :

THE deceased Bailie Lawson, being debtor to the said Patrick Archibald in L. 250 Scots, he pursues George, his nephew, for payment, on the passive title of vitious intromitter, in so far as the defunct having lodged in one Jaffray's house, he left sundry trunks, household furniture, and goods in that chamber, which George caused transport after his death to his own house, without any disposition or other right thereto. *Alleged*, That the defunct was so poor, that he had no goods, at least they were of so mean a value, that they would not defray the expense of his funerals, and he neither sold nor disposed upon any of them, and so cannot be properly called an intromitter; and within two or three days after his death, he applied to a Bailie, and procured a warrant to inventory and roup them, which was accordingly done; and afterwards he confirmed himself executor-creditor, which was more than sufficient to purge and

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 intromitter 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 inventoring 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 inventoring 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.

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.

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.